Competition and Regulation: Charles River Bridge Recrossed

Donald I. Baker

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation

Donald I. Baker, Competition and Regulation: Charles River Bridge Recrossed, 60 Cornell L. Rev. 159 (1975)
Available at: http://scholarship.law.cornell.edu/clr/vol60/iss2/1

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
The American economy at large relies on competition, enforced by the antitrust laws, to serve as its regulator. The goal is to encourage efficiency and low prices and to hold economic power in check. Competition is thus accepted as "our fundamental national economic policy," and the Sherman Act as "the Magna Carta of free enterprise." Antitrust law rests on the premise, eloquently stated by Mr. Justice Black, that

the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Competition also has the additional virtue, not stressed here, of being able to adjust automatically and swiftly to changing public demands and business opportunities—an especially important value in an age of accelerating change.

At least two basic types of situations require resort to some form of direct government regulation. The first involves a "natural monopoly," where competition simply would not work in economic

† Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice; Visiting Professor of Law, Cornell Law School (Spring 1974). A.B. 1957, Princeton University; B.A. in Law 1959, University of Cambridge; LL.B. 1961, Harvard University. The views stated here are those of the author, and do not necessarily represent those of the Department of Justice.

The author gratefully acknowledges the research assistance and friendly advice of his Antitrust Division colleagues Kenneth G. Robinson and Edward Walton.

terms—in other words, where the economies of scale are so pervasive that direct competition becomes an idle gesture. The local distribution of gas, electricity, and telephone communication offers the principal case in point. Here regulation is intended to secure the classic marketplace goals of keeping costs and prices down.4

The second type of situation occurs where competition does not secure some specifically defined social goals, as in banking5 and securities regulation.6 The avoidance of widespread bank failure is accepted as an overriding social goal, because widespread failures are highly disruptive and losses traditionally fall on innocent depositors. Similarly, the issuance and trading of securities is regulated to ensure full disclosure and fairness to the investing public, and continued confidence in the capital markets. Regulatory supervision can be directed to these specific goals. Neither scheme implies a general elimination of competition. Indeed, the Supreme Court underscored the point in 1963, when it said that

[t]he fact that banking is a highly regulated industry critical to the Nation's welfare makes the play of competition not less important but more so. . . . [I]f the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected . . . . 7

In theory, "the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible."8 In fact, regulation has been used to thwart economic efficiency in many instances. The Council of Economic Advisers, among others, has made this point clear:

8 Northern Natural Gas Co. v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968). Here the court found that the FPC had ignored significant anticompetitive effects in permitting a joint venture among several American gas companies to construct and operate an entirely new gas pipeline across the Northern Great Lakes States.
Regulation has too often resulted in protection of the status quo. Change of any kind becomes hard to justify and even harder to allow when some affected group can claim immediate harm, whereas the potential beneficiaries are widely diffused and usually not represented. Yet innovation and adaptation are the dynamics of economic progress.

There is no clear safeguard against these dangers, but more reliance on economic incentives and market mechanisms in regulated industries would be a step forward. . . . Industries have been more progressive when the agencies have endeavored to confine regulation to a necessary minimum and have otherwise fostered competition.9

The thwarting of economic progress is due to a variety of factors, including the politics, psychology, and practicalities which surround the regulatory process. The problem is made worse by statutory mandates which allow—or encourage—anticompetitive regulatory measures. Clearly, the existing regulatory realities must be appraised. What direct government regulation can do well and what it cannot do well must be ascertained so that more realistic statutory rules can be formulated in response.

I

THE INSTITUTIONAL ENVIRONMENT

The regulatory commission is a unique American contribution to the history of public institutions. It reflects a faith in government by law, using open, orderly processes which can be reviewed by a court. It reflects a populist concern about robber barons and bigness, combined with an understandable public reluctance to have government assume broad business functions. It reflects the hope that a body of independent experts could solve problems which the legislature and general public found too difficult to solve themselves.

Regulators frequently are given very little statutory guidance about how to handle their jobs. This reflects a variety of political realities. Much economic regulation is the product of actual or imagined crises; it therefore reflects the understandable political desire to do something, even if no one is quite sure exactly what must be done. A clear example of this phenomenon is the key federal

regulatory schemes which arose out of the profound economic crisis of the 1930's, including the regulation of trucking, airlines, banking, broadcasting, common carrier communications, and securities markets. Crisis politics tends to produce generalized schemes in which the difficult accommodation of fundamental values is not defined and in which key questions are ignored or left for some future regulator to resolve under a very general mandate.\(^{10}\)

The traditional regulatory statute thus enjoins the agency to make a broad set of decisions on the basis of a very general injunction to serve the "public interest." Under this formula, regulators are frequently authorized to fix prices, exclude entry, and deal with any other competitive evil which may come up. Regulators tend to like it this way; open-ended authority gives them maximum flexibility to do what they think best. But, moreover, this situation is often not unpopular with the regulated firms, an important political fact because such firms generally prefer regulation to open competition.\(^{11}\) The pressure is ever present for broad, open-ended regulatory mandates, with full authority to suppress competition.

Fortunately, a series of recent appellate court decisions has made clear that an agency must consider antitrust questions even under the general "public interest" standard.\(^{12}\) Agencies have often resisted this approach, but lost. For example, in 1973, the Supreme Court, in *Gulf States Utilities Co. v. FPC*,\(^{13}\) criticized the Federal Power Commission for its failure to consider antitrust issues in connection with the financing of an electric utility. The Court emphasized that the regulatory agency's "[c]onsideration of anti-

---

\(^{10}\) The problem of excessively broad administrative discretion was recognized by legal scholars during the 1930's. In 1938 Professor Felix Frankfurter, as he then was, explained this central problem as follows:

The legislature will delegate power when it is so simple or so mechanical that it can leave it to somebody else; or, on the other extreme, when it is so complicated that the legislature cannot define it, where it takes care of a thousand variegated situations. In this situation you have the seed of the central problem of administrative law, namely, the conflict between rule and discretion. Out of that come most of our specific problems . . . .


\(^{13}\) 411 U.S. 747 (1973).
trust and anticompetitive issues . . . serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings.\textsuperscript{14} This line of cases does narrow the agency discretion somewhat: agencies can no longer ignore antitrust questions altogether. But they are not given affirmative guidance as to how they are to weigh competitive values against other interests; thus, they may still slough off competition in the balancing process.\textsuperscript{15}

Affirmative guidance is needed because competition is very much at odds with the traditional regulatory mentality. Competition is simply a tool for promoting economic efficiency. It recognizes that most commercial endeavors require skill and judgment, and that these are affirmative values which cannot be commanded by the state.\textsuperscript{16} Instead, it seeks to provide a framework which encourages private effort, with rewards for the innovator and the cost-cutter, and penalties for the laggards.

In contrast, regulation operates in an environment of government commands and bureaucratic negotiation. At best, it seeks to prohibit bad things, such as monopoly pricing, in the hope of thereby promoting good. The watchword of the process is caution: new ideas must be scrutinized carefully and all interests protected. Efficiency may be encouraged, but profits often turn on the regulator's judgment of a "just" rate of return; and rate-of-return regulation has sometimes penalized efficient firms with lower rate bases over less efficient firms with higher rate bases.\textsuperscript{17} The process tends to be shot through with subtle and elaborate cross-subsidies. For example, in transportation, high-valued cargoes subsidize low-valued cargoes.

\textsuperscript{14} \textit{Id.} at 760.

\textsuperscript{15} For example, in Northern Lines Merger Cases, 396 U.S. 491 (1970), the Court upheld an ICC approval of a large railroad merger almost identical to one which had been declared illegal over half a century earlier in a leading antitrust decision, \textit{Northern Sec. Co. v. United States}, 193 U.S. 197 (1904).

\textsuperscript{16} This point has of course been long recognized by courts of equity. See \textit{Lumley v. Wagner}, 42 Eng. Rep. 687 (Ch. 1852). In that case the Lord Chancellor declined to order specific performance by the defendant opera singer over a contract with the plaintiff, because "I have not the means of compelling her to sing." \textit{Id.} at 693 (emphasis added). Instead, he prohibited her from singing for others during the term of the contract. For an example of the failure of a regulatory agency to command success—and implicit recognition of that failure—see \textit{Investigation into Limitations of Carrier Service on C.O.D. and Freight-Collect Shipments, Ex parte 272}, 343 I.C.C. 692 (1973). See also \textit{Western Union: The Reluctant Messenger}, 120 CONG. REC. H9268 (daily ed. Sept. 16, 1974) (remarks of Rep. Rosenthal); \textit{A Cure for the Postal Problem}, 120 CONG. REC. E4555 (daily ed. July 9, 1974) (remarks of Rep. Crane).

valued cargoes, and in telephone and electricity regulation, commercial users, who do not vote, tend to subsidize residential users, who do.

The regulator tends to assume that by combining command and cajolery, he can achieve close to optimum results. Yet experience suggests important examples to the contrary: cases wherein regulators have been unable to prevent failure by management, as in the cases of the Penn Central Railroad and the Franklin National Bank. More important are the broader cases wherein regulators have been plainly unable to command success. This point is made clear by national experience in the field of passenger rail transportation. For years the government required reluctant railroads to run passenger trains that they wished to abandon. It could not require them, however, to run trains that the public wanted to ride on—trains that were prompt, clean, and pleasant. In the end, the government had to take this function over for itself in most of the country.\(^{18}\)

Competition is, of course, highly disruptive to the regulatory environment described above. It undermines subtle cross-subsidy schemes, and substitutes the consumers' judgment of what they want to buy for the regulator's judgment of what they ought to have. And, competition is particularly disruptive of the close working relationship between regulator and regulated—the environment of negotiation and trade-off\(^{19}\)—because it deprives the regulator of the customary "carrots" for inducing compliance with his particular desires.\(^{20}\)

Competition raises its awkward head in several types of regulatory situations. The first involves new entries and new ways of performing old functions. The second involves acquisitions and mergers of regulated firms. The third involves specific restrictive business arrangements which are arguably needed to comply with the basic regulatory mandate. Each of these situations requires the regulator to consider competition and generally to weigh it against other values.

The regulator's task is not easy. Monopolists rarely welcome intrusions from the marketplace, and regulated monopolists are no exception. They can usually be counted on to argue strongly

\(^{18}\) Rail Passenger Service Act of 1970, 45 U.S.C. §§ 501-644 (1970). This statute provided for, \textit{inter alia}, creation of Amtrak, a quasi-public corporation which was authorized to take over passenger service and equipment from the nation's railroads.


\(^{20}\) See A. Burns, \textit{The Decline of Competition} 520 (1936).
against competitive policies in any particular case. Their view of
the "regulatory" scheme becomes expansive in the face of competi-
tion; their arguments on both facts and policy can often be highly
technical; and their prediction of the future becomes ominous.
The regulator is asked to use his "expertise" to resolve all these
issues in favor of a noncompetitive solution. This presents an
important practical problem.

II
Charles River Bridge as a Case Study

The problem can be illustrated by taking a latter day look at a
famous piece of nineteenth century legal history. In 1837, the
United States Supreme Court decided the Charles River Bridge
case.\(^{21}\) This case involved a competitive challenge to a monopoly
toll bridge between Boston and Charlestown. The facts are quite
simple. The so-called "Charles River Bridge" had been built in
1786 by a private company which had a seventy-year charter
granted by the Massachusetts General Court. For over forty years,
this company enjoyed a monopoly. Then, in 1828, its position was
challenged by an upstart—the so-called "Warren Bridge"—whose
backing company had secured a second charter from a legislature
eager to see lower tolls. The Charles River Bridge Company was of
course outraged at this turn of events, so it went to court to
challenge the Warren Bridge charter. The issue was one of legal
interpretation and constitutional law. Did the Charles River Bridge
charter create an implied contractual right to a monopoly
position?\(^{22}\) No, said the Supreme Court in its celebrated decision;
the rights of private property are to be “sacredly guarded,” but the
public interest must control.\(^{23}\) Any other construction, said the
Court, would enable the holders of “old feudal grants” for turn-
pikes and ferries to prevent the growth of new methods of
transportation.\(^{24}\)

If this old controversy is replayed in contemporary terms, the

\(^{22}\) A modern echo of this argument can be seen in the Communications Satellite
Corporation’s assertions that the Communications Satellite Act of 1962 (47 U.S.C.
\$\$ 701-44 (1970)) gave it the exclusive right to offer domestic satellite services. See Comsat
Brief at 7-8, 12-13, Supplemental Brief at 17, 19, In re the Establishment of Domestic
Noncommon Carrier Communication Satellite Facilities by Nongovernmental Entities, 2
\(^{23}\) 36 U.S. (11 Pet.) at 547.
\(^{24}\) Id. at 533.
CORNELL LAW REVIEW

[Vol. 60:159

case is no longer simple and the legal issues are no longer so clearly focussed. The Warren Bridge Company is applying for a certificate of “public interest, convenience, and necessity” to build a new bridge, and the Charles River Bridge Company is still opposing. The forum is a hearing before the Federal Navigation Commission, an independent commission charged with broad statutory responsibility for regulating, inter alia, toll bridge entry and rates.

The Commission has a broad mandate. Under the Federal Rivers and Harbors Act, it must promote the safe and efficient use of the navigable waters of the United States, “to the end that safe and efficient transportation over water shall be fully available to the citizens of the United States at reasonable charges.” The original Act was designed to deal with certain local steamboat, ferry, and barge monopolies which Congress had found were gouging the public. Accordingly, the Commission was given statutory authority to control entry and pricing among carriers operating in these fields in such a way as to serve the “public interest, convenience, and necessity.” In due course, the regulated ferries were being hard-pressed on many river crossings by unregulated private toll bridges chartered by local governments. In response, Congress duly enacted the Toll Bridge Amendments, which expanded the Commission’s broad authority into this emerging field. The Charles River Bridge proceeding, of course, arises under the Toll Bridge Amendments.

---

25 See, e.g., 47 U.S.C. § 214 (1970). That statute requires FCC approval for adding to or subtracting from interstate communications plants and facilities. The basic traditional purpose of such a requirement is to allow the regulatory commission to veto what it regards as imprudent investment by a regulated monopolist. However, it has been used as a tool to keep down the level of competitive activity in noncompetitive situations.

26 This statute, and the agency created by it, are, of course, entirely imaginary. Any resemblance to any existing statute or agency may not necessarily be purely coincidental.

27 Cf. 47 U.S.C. § 151 (1970). The Federal Communications Commission was created “so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” Id.

28 This is a familiar phenomenon. The parallel to the history of the Interstate Commerce Act is obvious. What started as a railroad regulation scheme (Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified at 49 U.S.C. §§ 1-27 (1970)) was expanded, out of considerations of regulatory equity, to cover new modes of transportation, with very different economic characteristics. This is especially true of the Motor Carrier Act of 1935. Ch. 498, 49 Stat. 543 (codified as part II of the Interstate Commerce Act, 49 U.S.C. §§ 301-27 (1970)). The rationale for this expansion has been explained by the ICC in Coordination of Motor Transportation: since the railroads are regulated, it is unfair for the truckers not to be regulated also. 182 I.C.C. 263, 382-92 (1932).

Ultimately, almost every form of surface transportation was brought under the regulatory umbrella. Where particular groups, most notably farmers, have had the political clout to
The seven-member Commission is a typical administrative body, with various, diverse past connections to water transportation. The Chairman is a New Orleans admiralty lawyer who had been a regional organizer for the President’s last political campaign (he is also reported in the press to be a regular grouse shooting guest of several steamboat company presidents). The six other Commissioners are a conservative ex-Congressman who had served on the House Rivers and Harbors Committee before being defeated for re-election four years ago; a retired naval officer, with an overriding interest in maintaining sufficient inland shipping facilities to meet the needs of the national defense; a former law school professor, a self-proclaimed “consumerist” with clear ambitions to run for the Senate from his native state of Ohio; the retired Executive Secretary of the Northeastern Barge Owners Association; a former Staff Director for the Senate Rivers and Harbors Committee; and the Commission’s former General Counsel who was the author of the Toll Bridge Amendments.

The Commission is faced with a lively public controversy in the Charles River Bridge case. The high tolls on the Charles River Bridge have attracted great public criticism in Boston, and various politicians and consumer groups have been pressing for a competitive bridge.

Specifically at issue in the proceeding is the Warren Bridge Company’s application for a construction permit to construct a second span across the Charles River from Boston to Charlestown.

secure exemptions (see 49 U.S.C. § 303(b) (1970)), regulatory efforts have shifted toward defining the exemptions out of existence. The ICC, for example, long attempted to deny the agricultural exemption to farm products that had been subject to any processing at all, giving rise to curious proceedings involving the status of fresh versus iced or frozen poultry, fruit, and vegetables. See 2 A. Kahn, THE ECONOMICS OF REGULATION 187-91 (1971).

At times an agency charged with regulating one industry has been able, without a new statute, to extend its jurisdiction effectively to a new industry which has become a competitor. The usual rationale for such a step is that the agency has “ancillary” authority to protect its regulatory area from disruptive forces. The best example of this is the FCC’s assumption of direct regulatory authority over the new cable television industry in order to protect its existing regulatory arrangements for over-the-air television broadcasters. See United States v. Midwest Video Corp., 406 U.S. 649 (1972) (compulsory system design standards and program organization); United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (barring transmission of district television segments). The cable operators were even required to pay fees for their “regulation.” National Cable Television Ass’n v. United States, 415 U.S. 336 (1974).

These examples are but particular illustrations of the general point made some 20 years ago:

[R]egulation tends to beget further regulation. For if one industry is regulated then it may be urged that its competitors should, in fairness, also be regulated.

ATTORNEY GENERAL’S NATIONAL COMM. TO STUDY THE ANTITRUST LAWS, REPORT 269 (1955).
The Warren Bridge Company's application is supported with detailed traffic projections, as well as evidence of its own engineering and financial capability. Its policy argument is still the same as in the real case: a second span would promote competition, and hence lower tolls for travelers between Boston and Charlestown.

The Charles River Bridge Company is still outraged at this challenge to its long-standing monopoly. It is prepared to meet the challenge with a vast battalion of lawyers, engineers, accountants, and economists, armed with a battery of statistics, tables, regression analyses, and so forth. Its arguments are many and varied, but they are not original. They do suggest very broad and expansive factual inquiries into an extensive range of issues. Briefly, these arguments might be summarized under the following categories.

A. Economic Arguments

To begin with, there are what might be called the "economic" arguments:

1. "Adequacy of Service." There is no public need for a new service. Existing bridge facilities are not being fully utilized, and therefore creation of new capacity would lead to less economic and efficient use of existing resources. 29

2. "Destructive Pricing." Building a second bridge would create dangerous over-capacity; this would in turn lead to destructive pricing of bridge tolls and the eventual demise of all bridge service between Boston and Charlestown. 30

3. "Cream Skimming." Competition on the high-volume, low-cost, Boston-Charlestown route would undermine the Charles River Bridge Company's ability to maintain unprofitable, low-volume bridges upriver at Cambridge and Watertown. 31

29 See Motor Common Carriers of Property, Routes and Service (Petition for Elimination of Gateways by Rulemaking), 3 CCH 1974 Fed. Carr. Rep. ¶ 36,726. In that case, the ICC discussed the "virtues" of controlled entry, seeing its role as one which must "assure dependable motor transportation in a competitive system without the harmful and wasteful effects of unrestrained random operations." Id. at ¶ 36,726.03. Curiously, ICC restrictions on "back-haul" operations have sought to avoid wasteful activities by requiring a substantial number of trucks, essentially, to drive about the nation empty. See 2 A. Kahn, supra note 27, at 182-85.

Interestingly, in the original case, Charles River Bridge, counsel compared the bridge's average traffic with that of the London Bridge, in order to demonstrate that new entry and competition would necessarily deprive it of a "property" right. 36 U.S. (11 Pet.) at 447.


31 See In re Specialized Common Carriers, 29 F.C.C.2d 870, 876 (1971) (assertions of counsel for AT&T in case involving provision of specialized common carrier services to
4. "Economies of Scale." Even if adequate traffic to support two bridges could be projected in the future, such traffic could be far more economically provided for by expansion of the existing bridge system rather than the building of a separate duplicate span.32

5. "Full Public Service." If faced with full competition, the Charles River Bridge would no longer be able to afford to continue offering special discounts for school children and elderly persons using the bridge.33

B. Technical Arguments

There are also "technical" arguments—supported, of course, by copious engineering testimony:

I. "System Planning." Maintaining a single unified bridge system is necessary to plan and develop the bridges that will be required by the next generation of larger wagons.34

2. "Service Quality." The proposed Warren Bridge is a structure falling far short of the high technical standards of the Charles River Bridge.35 It would, at the very least, impose on the public a higher level of vibration than it was used to.36

32 "Bell's watchword has been 'one system, one policy, universal service' . . . ."

33 See NATIONAL ASS'N OF REGULATORY UTILITY COMM'RS, REPORT ON THE ECONOMIC AND QUALITY OF SERVICE IMPACT RESULTING FROM INTERCONNECTION 11 (1974). But see In re American Tel. & Tel. (Seven Way Cost Study), 2 F.C.C.2d 142 (1965).

34 See Letter from J. R. Billingsley, AT&T, to the Chairman, FCC, April 18, 1974. This letter outlined reasons for AT&T and General Telephone to enter the domestic satellite area jointly, rather than separately, as originally planned:

[T]echnical discussions have, over time, led each company to conclude that the public interest would be better served in AF&T and GSAT jointly utilized a single satellite system rather than two separate systems. This would achieve the Commission's objective in having GSAT increase its participation in the planning of the interstate network.

Id. (emphasis added).

35 See In re Microwave Communications, Inc., 18 F.C.C.2d 953, 962 (1969) (Commission rejected established carrier's argument that applicant's lower technical standards provided justification for rejecting this source of competition). Compare Brief and Proposed Findings and Conclusions of Bell System Parties, Carterfone, 13 F.C.C.2d 420 (1968). There the argument was advanced that

[interconnection] would inevitably result in degradation of service.

Id. at 20, 21.

36 In reviewing an FCC ruling upholding the lawfulness of an AT&T tariff barring use...
3. “Safety.” Reduced revenues would compromise the Charles River Bridge Company's ability to guarantee high maintenance standards and thereby endanger the public.37

C. Public Interest Arguments

Finally, there would be a variety of “public interest” or “convenience and needs” arguments which would be raised against the second bridge:

1. “Environmental Injury.” The new bridge would compromise the scenic beauty of the Charles River,38 while endangering the fish by reducing sunlight and impeding the flow of polluted waters to the sea.39

2. “Interference with Navigation.” A second bridge would complicate navigation for ships using the river, thereby raising risks of injury to seamen and travelers.40

3. “Balanced Transportation System.” Overdevelopment of the bridges across the Charles might be injurious, and perhaps even fatal, to the already precarious position of harbor ferrymen, who are also subject to the Board’s jurisdiction and whose services would be required in time of national emergency when the bridges were out of service.41

of a muffling device that could be attached to the mouthpiece on a phone, the Court of Appeals for the District of Columbia Circuit saw the question as follows:

The question, in the final analysis, is whether the Commission possesses enough control over the subscriber's use of his telephone to authorize the telephone company to prevent him from conversing in comparatively low and distorted tones. . . . Intervenors do not challenge the subscriber's right to seek privacy. They say only that he should achieve it by cupping his hand between the transmitter and his mouth and speaking in a low voice into this makeshift muffler. This substitute, we note, is not less likely to impair intelligibility than the Hush-a-Phone itself . . . . In both instances, the party at the other end of the line hears a comparatively muted and distorted tone because the subscriber has chosen to use his telephone in a way that minimizes the risk of being overheard. . . . The intervenors' tariffs, under the Commission's decision, are an unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental.

Hush-a-Phone Corp. v. United States, 238 F.2d 266, 268 (D.C. Cir. 1956) (emphasis added).

37 See In re Carterphone, 13 F.C.C.2d 430, 435-37 (1967) (hearing examiner's opinion detailing miscellaneous "dangers").

38 Cf. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966) (FPC required to weigh, inter alia, impact on scenic values).

39 Cf. Udall v. FPC, 387 U.S. 428 (1967). In this case, the FPC was required to weigh the impact of the construction of a dam on the spawning grounds of various anadromous fish:

The importance of salmon and steelheads in our outdoor life as well as in commerce is so great that there certainly comes a time when their destruction might necessitate a halt in so-called "improvement" or "development" of waterways.

Id. at 437.

40 The FCC's refusal to enjoin continued construction of Chicago's Sears Tower, on the ground it would cause "multiple ghost images" on area television sets was affirmed by the courts. See Illinois Citizens Comm. for Broadcasting v. FCC, 467 F.2d 1397 (7th Cir. 1972).

41 See In re American Tel. & Tel., 13 F.C.C.2d 235 (1968) (authorizing new
4. "Conflicts of Interest." The Warren Bridge Company's controlling shareholders have a substantial investment in a new form of transportation—a railway—which is to be built from Boston to Providence. This interest will cause them to divert capital and efforts from single-minded development of water-related transportation.\textsuperscript{42}

This revived \textit{Charles River Bridge} case sounds quaint. Yet the legal issues are basically the same as those involved in the original case. They have merely been revised in the context of the present, when larger, more modern stakes are involved. Of course, today's real proceeding would frequently involve more sophisticated technology, and therefore the "technical" arguments for protection would be much harder to grasp and resolve.

The revived \textit{Charles River Bridge} case is quite difficult enough for the regulatory process. How is even a diligent regulator to weigh this mixed bag of arguments, involving so many considerations which cannot be readily measured or quantified? Can he do this in a rational and consistent manner which gives reasonable guidance for the future? Can it be said, with any assurance, that the modern regulator would come out with the same result as the 1837 Supreme Court? Clearly, the same type of public interest in competition as a source of innovation, efficiency, and low toll rates exists; but today there is no method of objectively weighing these advantages against the contrary "regulatory" arguments. Thus, the decision could go either way.\textsuperscript{43}


\textsuperscript{43} Even a single regulatory agency sometimes handles basically similar competitive policy questions differently. For example, the FCC has encouraged competition with domestic communications common carriers. \textit{See, e.g., In re Specialized Common Carrier Services}, 29 F.C.C.2d 870, 902 (1971). Yet it has strongly discouraged competition in the international communications field. \textit{See In re Authorized Entities and Users}, 4 F.C.C.2d 421 (1966); \textit{In re American Tel. & Tel. (TAT-4)}, 37 F.C.C. 1151, 1160 (1964). Historically the SEC has encouraged competition between the New York Stock Exchange and regional exchanges in NYSE-listed securities. \textit{See NYSE Rules}, 10 S.E.C. 270 (1941). But it has discouraged such competition from over-the-counter dealers in the "third market." \textit{Cf. The
What the revived *Charles River Bridge* case indicates is a need for a much more structured regulatory inquiry. It shows that the broad "public interest" inquiry is likely to be more profitable for the lawyers and expert witnesses than it is for the public.

Moreover, that structure of inquiry must take account of the political realities which usually surround the regulatory process. It must assume the existence of a close and continuing community between the regulators and the regulated, and a great deal of influence on the part of the regulated firms in the appointment process. And finally, it must assume that the decision-making body is more often staffed by ordinary mortals than it is by disinterested experts or philosopher kings.

### III

**REGULATORY GOALS AND TOOLS**

A tighter statutory structure depends on tighter thinking about the goals of regulation in a particular industry context. Only if goals are defined precisely can there ever be legal rules and institutions which serve those goals. Fuzzy goals will produce fuzzy legal rules. Of course, goals will vary from sector to sector, but it is possible to state some general goals, and then discuss the means of achieving them in the context of the *Charles River Bridge* proceeding. The following seem to be the most important goals:

1. Economic efficiency is a fundamental goal for almost every regulatory scheme. With public utility regulation, this is more commonly stated as a goal of low prices to the public—but what is really meant is prices based on costs which are themselves prudent costs. Efficiency can be measured here, as elsewhere, in terms of the long-run costs of delivering a current offering. In a world of explosive technology—the age of "future shock"—efficiency can also be related to the development of cost-reducing methods and new offerings which the public wants and for which it is willing to pay.

2. An important goal of common carrier regulation is that the carrier serve all comers on equal and nondiscriminatory terms. A

---


Ferrymen, of course, have long been obligated to exercise "due diligence, and provide suitable means of transportation .... The public grants the exclusive privileges of ferrying for a consideration ... that the public ... shall be crossed at all reasonable hours without unnecessary delay." Jabine v. Midgett, 25 Ark. 474-76 (1869).
common carrier, unlike an ordinary businessman, has no general right to refuse to deal.

3. A related regulatory goal is minimum service reliability. This dictates that electric power be available when the switch is turned, that money be in the bank when the depositor stops to withdraw it. Although often related to common carriage obligations, it can apply to regulated firms which are not themselves common carriers.

4. Regulations frequently seek to assure a minimum degree of honesty and fair dealing among those holding positions of trust. This rationale supports the regulation of many activities of financial institutions and fiduciaries.45

5. Regulation frequently seeks to achieve informed public choices, by requiring that full disclosure of relevant information be made. Informed public choice is the basic cornerstone of securities regulation,46 and could be the basis of much consumer protection regulation.47

6. Regulation is frequently designed to protect health, safety, and the environment. Thus, regulations require air-worthiness certificates for aircraft,48 prior approval for drugs,49 and compliance with environmental standards.50 Of course, the reach of some environmental regulation may extend beyond considerations of health and safety.

Other goals may exist in particular industries and circumstances. For example, the whole premise of broadcast regulation is that the government must ration a limited resource and thereby prevent interfering use.51 But the range of goals given seems sufficient to illustrate the kind of specific inquiry needed.

Having set forth the goals as precisely as possible, one must then ask: what are the most efficient ways of achieving them? With respect to the first goal—namely economic efficiency—the market-

---


46 The securities laws have been described as regulation "married to an information service to produce compulsory publicity." H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 884 (tentative ed. 1958).


place generally offers the surest tool. Competition works better because it operates swiftly, because it rewards skill and innovation, and because it returns profits to those who produce what the public wants and considers worth paying for. As already noted, competition is not a spur in those relatively few "natural monopoly" situations where the economies of scale are so pervasive that the market itself dictates a single supplier. In these situations, it is necessary to rely on traditional public utility regulation as a "second-best" spur to efficient production of service. However, the types of situations covered by the natural monopoly rationale for economic regulation are surprisingly few—being limited essentially to local distribution of gas, water, electricity, and telephone communications. This means that there is still a very large part of even the regulated sector where competition can serve as an effective spur to efficiency and innovation.

The second goal—nondiscriminatory common carriage—is not necessarily inconsistent with the use of a marketplace approach, but in fact it has often been used to thwart competitive policies. The essence of the common carrier principle is that he who serves must serve everybody on nondiscriminatory terms. In practice, the key question is often not whether different users are going to be served at all, but how much they are going to be charged for service. Nondiscrimination strictly applied would dictate that two users, or classes, be charged the same price if the cost of serving them were the same, and that they be charged different prices if the cost of serving them were different. Regulatory bodies have frequently thwarted this goal by requiring one class of users to subsidize the service provided another class.

The remaining goals already outlined—minimum reliability, honesty, informed choices, and health and environmental protection—often involve some additional costs, but they generally do not require detailed, public utility-type regulatory intervention in commercial decisions. Therefore, they can generally be accomplished without fundamental interference with competitive incentives. What is required for them is a set of objective standards which any potential competitor can try to meet. In other words, the regulator ceases to be primarily a case-by-case adjudicator of who

52 Environmental issues present perhaps the closest thing to an exception. Some key environmental decisions, such as those concerning power plant construction, represent fundamental economic trade-offs among different interests. Some of them no doubt require case-by-case adjudication. See, e.g., Udall v. FPC, 387 U.S. 428, 443-44 (1967); Calvert Cliffs Coordinating Comm., Inc. v. Atomic Energy Comm’n, 449 F.2d 1109 (D.C. Cir. 1971).
can compete, and how much he must charge. Rather, he becomes
the promulgator of the terms on which competition is to be
permitted. Regulatory inspection may be necessary to assure com-
pliance, but this does not require detailed control over particular
commercial offerings.

The goal of reform should be to substitute objective standards
for the subjective regulatory judgments normally used in public
utility-type regulation. Thus, for example, a truck or airline
operator would have to have planes or trucks with safety
certificates, would have to treat all customers equally, and perhaps
would have to offer a minimum frequency of service on any route
that he chose to serve. But he would be able to choose his own
routes and prices. Similarly, the goals of honesty and reliability in
the financial sector could be served by having objective standards
for capital and managerial qualifications, combined with adequate
insurance against customer losses. Setting such standards may
eliminate those who cannot meet them—but this is of course
acceptable as long as the standards are necessary and are set by
independent decision-makers based upon an appropriate public
inquiry. And it is certainly a better entry than arbitrary exclusion
by regulators of qualified competitors.

An examination of the hypothetical Charles River Bridge pro-
ceeding in light of this approach demonstrates that more precisely
defined goals would simplify—and improve—the regulatory pro-
cess. First, this approach would suggest that there should be no
statutory rate and entry regulation at all on toll bridges. In other
words, nineteenth century bridge-building, like twentieth century
trucking, is not an activity characterized by such pervasive
economies of scale that it meets any “natural monopoly”
justification for rate and entry regulation. The Warren Bridge
would be allowed to enter if it could meet safety and other design
standards devised to protect the travelling public and navigator.

Even if Commission control over toll bridge entry were re-
tained, its decision-making process could be simplified by a statu-
tory scheme of carefully defined goals. If the statute specifically
provided that the purpose of toll bridge regulation were to assure
safe and efficient transportation at reasonable charges, then the
focus could properly be said to be on protecting the using public,
rather than on protecting competing modes. This would be espe-
cially clear if the statute expressly stated, as it should, that competi-
tion was a preferred way of assuring efficiency. In these circum-
cstances, the goal of efficiency would argue strongly for approval of
the Warren Bridge's application, on the ground that competition was the more likely source of innovation and lower rates. Efficiency would also militate in favor of rejecting the Charles River Bridge's cross-subsidy arguments of "cream skimming," "full public service," and "balanced transportation," because efficiency dictates that each mode pay its own way and that, for example, if bridges are truly more efficient than ferries, they should be entitled to realize the full extent of those efficiencies through the competitive process. If certain public interests are not met through the competitive process—i.e., the interests of school children, senior citizens, and upriver users—efficiency would argue that the Commission leave these matters to the legislature. Such interests can be more appropriately tested and more economically taken care of in the process of open public subsidies than through hidden cross-subsidies, and the Commission could so find under the statute. Finally, the "economies of scale" arguments should be rejected on the ground that if such economies really exist, the marketplace is bound to resolve the issue. True economies will enable one firm ultimately to drive the other out of business in an environment of full price and service competition, and, if they do not, the bridge users will benefit from continued competition.

The "convenience and needs" arguments, to the extent that they have merit, could be more appropriately dealt with by establishing appropriate technical standards for all bridges, rather than by excluding a new competitor. Thus the Commission could find under a statutory scheme of carefully defined goals that the "safety" issue could be disposed of by having minimum structural design standards for the bridge. The "interference with navigation" argument could be dealt with by setting appropriate height and lighting restrictions for bridges on the Charles. Finally, the "environmental injury" issues would have to be dealt with by the Commission to comply with the National Environmental Policy Act, but they seem slight in the context of this example: a second small wooden bridge is not likely to impair substantially the scenic value of Boston Harbor or to restrict unduly the tidal flows. The losses here seem relatively slight compared with the gains to the bridge-using public of having a competitor to a long-standing monopoly.

Thus, under a system of carefully defined goals, the Warren Bridge should be given its construction permit if the Commission

\footnote{42 U.S.C. §§ 4321-47 (1970).}
acts in an independent and responsible way. To say this is not to say that the Commission will so act. Rather, it expresses the need to look for ways to try to assure that it will.

IV

STRUCTURED PROCEEDINGS

The ultimate goal should be what one might call "workable regulation," to assure that the average regulator, with average regulatory biases, will in fact come out with a satisfactory result in the typical case. Any particular regulatory scheme may in fact be administered from time to time by extraordinary and independent individuals, but that is not the long-run condition of the process; therefore, regulatory schemes must be designed on the assumption that it will not be.

The political and psychological realities of regulation must be considered carefully in devising any scheme of structured regulation, for politics is, and will continue to be, important to the regulatory process. Particularly is this true for industries subject to rate or entry regulation, for here regulation becomes the "bread and butter" product of those in the industry. Firms in such industries are keenly interested in who is appointed to supervise them, and they are frequently able to influence such appointments. Beyond that, by continued hard advocacy and lobbying, these firms can often have a disproportionate influence on regulators once they have been appointed. The reason for this is obvious, and was precisely identified by a contemporary critic of the operation of the National Recovery Administration in the early 1930's:

Producers interested in a small range of commodities are more willing and better able than consumers interested in a wide range of products to form strong organizations to protect their interests. In particular, they can afford to hire better counsel.54

Thus, regulators are exposed to a constant stream of information and personal contact from those whom they regulate. In these circumstances, the regulator can come to equate the industry's interest with public interest.55

---

54 See A. Burns, supra note 20, at 464-65.
55 See generally A. Kahn, supra note 28, at 11-14. See also Wall Street Journal, August 13, 1974, at 34, col. 1. The article makes clear that the CAB's overriding goal is to assure a 12 percent rate of return on air carriers. Indeed, one staff member says that "to [Chairman] Timm it's the Holy Grail." Id. at col. 2. To this end, the CAB has authorized substantial fare increases and urged competing carriers to enter into service reduction agreements; it is, as
The Court of Appeals for the Seventh Circuit described the situation bluntly in a 1970 opinion implicitly criticizing the SEC's "passive supervision" of the New York Stock Exchange:

[T]he history of the United States regulatory agencies in general seems usually to record an ever growing absence of the spirit required for vigorous enforcement of the antitrust laws. Rather, it seems to demonstrate that shortly following the establishment of administrative procedures the regulatory agency usually becomes dominated by the industry which it was created to regulate. 56

Others have made the same point. For example, a 1968 Presidential Commission reported that "[i]n the regulated sector of the economy, the bias of policy and its enforcement is overwhelmingly against competition. . . . We believe that this bias is contrary to the public interest . . . ."57 This bias reflects the fact that regulated enterprises generally do not want to compete. Moreover, regulators generally do not want a "delicate regulatory scheme" exposed to the chance winds of competition and consumer choice.

This history suggests that regulatory agencies should be put on short statutory leashes when it comes to competition. They should not be given any unnecessary power to suppress competition. Any statutory grant should be based on a clearly defined need. Political compromise often results in agencies' being handed the power to suppress competition without sufficient consideration of the potential use of that power. 58 In fact, the presence of such power invites its use, if not by the present regulator, by some successor.

one Department of Transportation official put it, "allowing the airlines to quasi-monopolize themselves." Id. According to the CAB Vice-Chairman, "we have had too much emphasis on passenger convenience in the past," and the public "must be more tolerant" of fuller planes even if "somebody has to wait a day to get a flight." Id. at col. 1-2. 56 Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264, 273 (7th Cir. 1970), cert. denied, 401 U.S. 994 (1971). This reasoning supported the court's conclusion that the antitrust court had jurisdiction over exchange activities subject to the SEC's oversight, and that the court—not the SEC—should decide the question whether a particular exchange-imposed restraint was "necessary to make the Exchange Act work" and hence exempt from antitrust liability under Silver v. New York Stock Exch., 373 U.S. 341 (1963).


58 This can be illustrated by considering pending legislation aimed at changing current regulation of the securities industry. Careful factual study and months of hearings by subcommittees in both houses produced a bill originally introduced in 1973. H.R. 5050, 93d
Moreover, even when an agency is given some necessary power to suppress competition in order to meet other defined statutory goals, it should be required to choose less anticompetitive options and to support anticompetitive decisions by detailed findings which can be subjected to judicial scrutiny. In the context of an adversary proceeding, the burden of showing the need to limit competition should be placed on the party seeking the non-competitive solution. Sustaining this burden means showing that the solution is necessary to meet the precisely defined regulatory goals.

Meeting this burden is important, for the regulated enterprise generally has the incentive and resources necessary to raise competitive pressure 

---

5 See United States v. Third Nat'l Bank, 390 U.S. 171, 189 (1968). This important decision involved the action of a bank regulatory agency in approving an anticompetitive merger under the so-called "Convenience and Needs" defense to the Bank Merger Act of 1960 as amended (12 U.S.C. § 1828(c) (1970)). The regulator justified its approval on the grounds that the acquired bank had weak management and that the merger offered one way of eliminating this problem. The Supreme Court held that this was insufficient, since the same problem could have been resolved in some other less anticompetitive way—for instance by hiring independent, new management. The Court held under this statute that the regulator had to seek the less anticompetitive approach. "Otherwise," said the Court, "the benefits of competition, acknowledged by Congress, would be sacrificed needlessly." 390 U.S. at 189 (emphasis added). Although this is a construction of a particular statute, it could be applied more broadly, as it sometimes has been. See, e.g., Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264 (7th Cir. 1970).

noncompetitive values. It has detailed information concerning the operation of the particular system, be it the telephone network, the stock exchange, or a bank.

Thus, the first step is to structure much more precisely the agency's inquiry on competitive questions, and to require specific findings on these. This is a task for the legislature, and it is not an easy one. But it is necessary if some of the larger competitive blockages are to be shaken out of the regulatory process.

The second step is to insist on rigorous judicial review of agency action on such competitive questions. This is important because the courts are outside the traditional bilateral relationships that tend to grow up between regulatory agencies and the industries they regulate. But judicial review is possible only if the legislature sets down a specific standard for agency action, since the role of the court is not to substitute its judgment for that of the agency on open-ended "public interest" issues. The court's role is to insist that the command of Congress be obeyed—in this case, a command that full weight be given to competition as a more effective spur to affirmative action.

The process of effective judicial review can be illustrated by looking at the 1971 Supreme Court decision in *Citizens to Preserve Overton Park, Inc. v. Volpe.* Congress had given the Secretary of Transportation a very specific direction that he was not to permit a federally financed public highway to run through a public park "unless (1) there is no feasible and prudent alternative . . . and (2) such program includes all possible planning to minimize harm to such park." In this case, the Secretary had authorized the building of an interstate highway right through the middle of a Memphis park, and had made no factual findings to support this decision. The Secretary argued to the Supreme Court that he had broad discretion "to engage in a wide-ranging balancing of competing interests" in selecting a "prudent" route, and that he had done this in the present case.

The Supreme Court unanimously rejected this contention. It noted that park land was cheaper to acquire because it was already publicly owned and involved less displacement of existing residents, and therefore the historic "balancing" process had tended to result in highway construction through parks. The Court stressed

---

61 See note 19 supra.
64 401 U.S. at 411.
65 Id. at 412.
the clarity of the congressional mandate: "[T]he very existence of
the statute indicates that the protection of parkland was to be
given paramount importance" and therefore "the Secretary cannot
approve the destruction of park land unless he finds that alterna-
tive routes present unique problems." The Court remanded the
case to the district court with an order to make a "substantial
inquiry" into the whole basis of the Secretary's decision, "based on
the full administrative record that was before the Secretary at the
time he made his decision."68

This case represents probing, in-depth judicial review. This
type of review is also appropriate in dealing with competitive
questions. Indeed, competition seems much like park land: it is a
publicly acknowledged value which regulators have too often been
willing to dispense with as the easiest way out of any problem.
They should not be permitted to do this. The temptation can be
thwarted by a tough substantive standard plus detailed judicial
review under that standard.68

CONCLUSION

The practical implications of the type of statute suggested can
be seen by looking a last time at the hypothetical Charles River
Bridge proceeding. This case would now become relatively easy.
The competition-oriented statute would limit the Federal Naviga-
tion Commission's powers over competition to such steps as are
necessary to assure safe and efficient transit at reasonable charges,

66 Id. at 412-13.
67 Id. at 420.
68 A further check upon agency action can be provided by encouraging independent
antitrust suits challenging private conduct even though such conduct may have received
regulatory agency approval. In other words, when private firms submit an anticompetitive
merger or exclusionary agreement to a regulatory agency, they should not be granted
antitrust immunity simply because the agency then approves it. Under present law, such
immunity is generally available for agency approved restraints in transportation (see 49
(securities); California v. FPC, 369 U.S. 482 (1962) (natural gas pipelines). This different
treatment seems to be more the result of timing—indeed, some would say accident—than of
any well-thought-out overall scheme. The transportation industries were earliest subject to
antitrust suits, as in Northern Sec. Co. v. United States, 193 U.S. 197 (1904), and they were
able to persuade Congress, in each case over 30 years ago, that agency supervision was
adequate protection for the public interest. This is an assumption that has been questioned
in recent years. As a result, other regulated industries, such as broadcasting, banking,
electric power, and securities, brought under antitrust challenge in the last decade or so,
have been unable to obtain straight antitrust exemptions in the wake of Supreme Court
defeats.
and it would mandate the use of competitive solutions wherever possible to promote efficiency. The Commission would only have jurisdiction over maximum toll rates. It would be barred from rejecting new entry unless it found that (1) new entry involved significant risk of injury to travelers, shipping, or the environment, or (2) exclusion of a particular entrant represented the least anticompetitive way of assuring these statutorily protected interests.

Such a statute would narrow the inquiry greatly. The Warren Bridge Company would enter the proceeding supported by the statutory presumption in favor of competition, and the Charles River Bridge Company would have to show both that its objections were recognized by the statute and that excluding the Warren Bridge was the least anticompetitive way of meeting them. This would be a heavy burden. Most of the Charles River Bridge Company's economic arguments would be disposed of by the statute. The cross-subsidies inherent in the "full public service," "balanced transportation," and "cream skimming" arguments are simply inconsistent with the competitive mandate. The "safety" and "interference with navigation" arguments could be met, as already indicated, by design standards applicable to all bridges on the Charles—and the Charles River Bridge Company might not wish to press for too high a general standard! As previously noted, the "environmental" objections seem relatively slight compared with the competitive benefits of introducing competition to a long-standing monopoly.

In sum, the Charles River Bridge Company would be left with few arguments with which to prolong a Commission proceeding as to Warren Bridge and thereby delay its entry. And the Commission would be left with relatively little room to dodge the clear competition-oriented command of the statute. The result would be a shorter inquiry which would be cheaper for the applicant, more efficient for the Commission, and, in the long run, advantageous to the bridge-using public. The fact that it would not be so profitable to the lawyers and expert witnesses is hardly entitled to great weight in any net reckoning of the public interest.

At times, established firms have used the regulatory process primarily to impose delay and added costs on potential new entrants in order to deter them from trying to break into the market. See, e.g., California Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508 (1972) (alleging conspiracy to oppose and pursue, without regard to merit, all applications for trucking certificates by new entrants); L. Kohlmeier, The Regulators 95-97 (1969) ("Yack Fat" case lockstep response to whimsical tariff filing).