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Economic Regulation vs. Competition: Uncle Sam the Monopoly Man[†]

Mark Green* and Ralph Nader**

Despite contrary speeches on the corporate hustings, our free enterprise economy has yielded to a mixed economy of public regulation and private industry.¹ Yet because public policymakers have not confronted fundamental questions about its purpose, present economic regulation lacks both a comprehensive theory and a consistent goal. This brief comment argues that our unguided regulatory system undermines competition and entrenches monopoly at the public's expense;² it then suggests what can be done about it.³

† This article represents a synthesis of many of the findings and arguments of a number of critics of economic regulation in *THE MONOPOLY MAKERS* (M. Green ed. 1973) (forthcoming). Copyright © 1973, R. Nader.

* B.A., 1967, Cornell University; J.D., 1970, Harvard University; Director, Corporate Accountability Research Group, Washington, D.C.

** B.A., 1955, Princeton University; LL.B., 1958, Harvard University.

1. For the best discussion of this public-private economy, see W. ADAMS & H. GRAY, *MONOPOLY IN AMERICA: THE GOVERNMENT AS PROMOTER* (1956) [hereinafter cited as ADAMS & GRAY]; W. HAMILTON, *THE POLITICS OF INDUSTRY* (1937). Approximately twenty to twenty-five percent of our national income is directly or indirectly controlled by federal regulation and government enterprise. Caves, *Direct Regulation and Market Performance in the American Economy*, 54 AM. ECON. REV. 172 (Supp. May, 1964).

2. This assertion is not new. In 1956, Adams and Gray wrote, "Government today is, in many instances a promoter of monopoly. It frequently puts together the very power concentrates which the anti-trust authorities are later called upon to break asunder." ADAMS & GRAY vii.

3. Three preliminary caveats should be noted. First, this comment takes as its operating framework our traditional economic system of market and regulatory behavior. It does not prejudge alternate economic modes, existing or theoretical, for allocating economic resources and rights. Second, the focus is on federal economic regulation, such as our market determinations concerning price and entry, but not health or safety regulation. See p. 885 *infra*. Third, page constraints imposed on this article precluded elaboration of many points.

I. Defects of Design and Process

A. Design

While the historical origins⁴ and constitutional basis⁵ of economic regulation are relatively clear, its economic rationale is not. The most common justification for regulation is *natural monopoly*. This situation arises when efficiency requires very large economies of scale; when due to large, fixed costs, unit costs decline as the scale of production increases.⁶ The installation of telephone lines and water mains are classic examples.

There are problems, however, with this concept and its application.⁷ First, it is not clear what constitutes a natural monopoly. Most observers assume interstate telephoning is one, yet microwave technology and satellite communications have challenged that view.⁸ At one time fire-fighting, sanitation, police protection, and electric utilities were all privately and competitively operated.⁹ The Post Office, long considered a classic natural monopoly, is now facing competition in the delivery of mail.¹⁰ Thus, some care must be taken in defining natural monopoly, for what may appear to be an inevitable state of non-competition may be nothing more than a lack of imagination or an insensitivity to new technology.

4. A variety of questionable rate practices usually by local and then national railroads, led to the creation of regulatory commissions in the mid and late nineteenth century. Thomas, *An Answer to Regulation's Critics—Control of Administrative Agencies*, 1 TULSA L.J. 109, 114-17 (1964). The Interstate Commerce Commission was established in 1887 to prevent predatory competition and rate discrimination and to stabilize the railroads' revenues. See I.L. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION (1931-1937)*. But see G. KOLKO, *RAILROADS AND REGULATION, 1877-1916* (1965).

5. The constitutionality of economic regulation has been established since *Munn v. Illinois*, 94 U.S. 113, 126 (1887), where the Court stated, "When . . . one devotes his property to a use in which the public has an interest, he . . . must submit to be controlled by the public for the common good . . ." See also, *Nebbia v. New York*, 291 U.S. 502 (1934).

6. See, A. KAHN, *THE ECONOMICS OF REGULATION*, 113-126 (1971) [hereinafter cited as KAHN]; Nelson, *The Role of Competition in the Regulated Industries*, 77 ANTI-TRUST BULL. 1 (1966).

7. For criticism of the natural monopoly thesis, see Comanor, *Should Natural Monopolies Be Regulated?*, 22 STAN. L. REV. 510 (1970); Demsetz, *Why Regulate Utilities?* 11 J. LAW & ECON. 55 (1968); Nelson, *supra* note 6; Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969); Posner, *Natural Monopoly and Its Regulation: A Reply*, 22 STAN. L. REV. 540 (1970); Shepherd, *Regulation and Its Alternatives*, 22 STAN. L. REV. 529 (1970); Swidler, *Comments on the Case for Deregulation*, 22 STAN. L. REV. 519 (1970).

8. Waverman, *The "Natural" Monopoly, The Federal Communications Commission and the Regulation of Intercity Telecommunications* (paper presented at the Conference on Antitrust and Regulated Industries, Oct. 28 and 29, 1971, Brookings Institution, Washington, D.C.). Zimmerman, *Legal Overview of Antitrust Policies Toward Regulated Industries* (preliminary draft for Brookings Institution, 1971, on file with the authors).

9. B. BEHLING, *COMPETITION AND MONOPOLY IN PUBLIC UTILITY INDUSTRIES* 19-20 (1938).

10. United Parcel Service now has inter-city mail service in selected areas. See, e.g., Wall St. J., Dec., 19, 1971, at 1, col. 1.

Second, in its application, the grasp of natural monopoly can exceed its reach. Assuming *arguendo* that AT&T does have a natural monopoly in interstate telephone communications, the manufacture of telephone equipment is decidedly not part of it;¹¹ yet AT&T's telephones are provided by Western Electric, its wholly owned subsidiary. While there are large economies of scale in the *generation* and *transmission* of electric power, they do not exist in its *distribution*, but the large scales of the former are often used to justify unnecessarily large scale in the latter.¹² Finally, whatever the original reason for regulating the railroads, truck transportation is as close to the model of pure competition as exists in the economy;¹³ yet the regulation of railroads led Congress to approve the regulation of this competing mode.¹⁴ In sum, ill-defined natural monopoly situations are often used to justify the regulation of non-natural monopoly markets.

Besides natural monopoly, other controversial public interest rationales are offered for economic regulation. *Economic failure* may be judged too damaging to be tolerated. Here some would cite banking as a prime example. Others, however, believe more competition in banking could benefit the consumer by raising interest rates on deposits, creating more convenient locations, and encouraging the type of higher-risk loans which over-cautious loan officials avoid.¹⁵ *Limited space*, historically true for airlines as well as radio and television spectrums, supposedly requires government allocation among applicants.¹⁶ Yet both cable and satellite advances have antiquated the concept of spectrum scarcity. *Destructive competition*, which in a capital-intensive industry can lead to below-cost (predatory) pricing and deterioration of

11. Such manufacturing industries do not exhibit the characteristics of natural monopolies. The manufacture of telephone equipment does not require vast overhead investment, and therefore lacks the extreme economies of scale present in those industries reputed to be natural monopolies. See C. PHILLIPS, JR., *THE ECONOMICS OF REGULATION* 22 (1965); F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE*, 519-20 (1971).

12. KAHN, *supra* note 6, at 125. W.J. Primeux, Jr., *A Reexamination of the Monopoly Market Structure for Electric Utilities*, Conference Paper, *supra* note 8.

13. J. MEYER, M. PECK, J. STENASON & C. ZWICK, *THE ECONOMICS OF COMPETITION IN THE TRANSPORTATION INDUSTRIES* 211-15 (1959) [hereinafter cited as MEYER ET AL.]; J. BLAIR, *ECONOMIC CONCENTRATION* 396 (1972) [hereinafter cited as BLAIR]. See also Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1232-33 (1969).

14. 49 U.S.C. §§ 301-27 (1935).

15. Turner, *supra* note 13, at 1233-34; Tussing, *The Case for Bank Failure*, 10 J. LAW & ECON. 129 (1967). The prospect of bank failures should now be far less troubling, given the rise of the Federal Deposit Insurance Corporation, which can insure against losses up to \$20,000 per account.

16. "The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest." *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943).

quality,¹⁷ is another justification for economic regulation. While this phrase is sometimes used by industrialists today to mean stiff competition, and while this did occur to some extent in the early days of pre-regulation, contemporary commentators question its present day likelihood in many industries.¹⁸ More importantly, the antitrust laws already proscribe destructive and monopolistic competition. Finally, *guaranteeing service* to sparsely populated areas may require regulation. Thus, long-distance, well-traveled air routes are overcharged in order to subsidize shorter, less popular ones.¹⁹ Yet if a route is considered in the public interest, it would seem the burden should fall on all equally via a subsidy from general tax revenues rather than from an implicit tax on certain commuters hundreds of miles away. Moreover, as such subsidies are created by agency action without public hearing or comment, there is little guarantee that wise economic decisions result.²⁰

Thus these reasons for regulation are no longer convincing, if they ever were. They are often contradictory. Sometimes regulation seeks to avoid excessive monopoly, sometimes excessive competition. At times regulation is over price but not entry (insurance), at other times over entry but not price (television and radio). Some agencies have "primary jurisdiction" (CAB, ICC), while others do not (FPC, FCC). Moreover, these regulatory justifications fail, in the final analysis, to explain why certain industries are "clothed with a public interest" while others are not.²¹ Why, for one example, are motor carriers strictly regulated but not automobile production? The latter is far more oligopolistic and inflicts far more "externalities" than does trucking. In short, since little is known about how regulation affects the market performance of an industry,²² and since Congress has often failed to give any guidance to

17. KAHN, *supra* note 6, at 172-78.

18. See R. CAVES, AIR TRANSPORT AND ITS REGULATION 431 (1962); MEYER ET AL., *supra* note 13, at 249-50.

19. See Noll, *The Economics and Politics of Regulation*, 57 VA. L. REV. 1016, 1017-18 (1971) [hereinafter cited as Noll]. The CAB has occasionally justified this cross-subsidy by arguing that the "national interest" requires a complete airline network. *Id.* at 1018. Interestingly, this is not an official agency position but a justification in individual route awards and fare decisions. See G. EADS, THE LOCAL SERVICE AIRLINE EXPERIMENT AFTER TWENTY-FIVE YEARS (1972). But cf. Posner, *Taxation by Regulation*, 2 J. ECON. & MANAGE. SCI. 22 (1971).

20. In addition to this implicit subsidy is a direct subsidy from the federal government to air carriers which amounted to \$667 million in the proposed 1974 fiscal budget. OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES 284 (1973).

21. "... [T]he notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it." Tyson v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

22. See Caves, *supra* note 1.

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the courts or agencies other than admonitions to act in the public interest,²³ our government has little idea of when to regulate.²⁴ Consequently, like an architect without blueprints, economic regulation is unsure of itself and confused about its purpose.

B. Process

Aggravating this failure of design is a failure of process. The operational woes of regulation have been extensively discussed and need only be sketched briefly.²⁵ First there is delay, "the Achilles heel of the regulatory process."²⁶ Inflexibility very often results from bureaucratic aversion to new ideas and new ways.²⁷ There is often a lack of accurate and adequate information on which to make regulatory decisions,²⁸ a deficiency in part responsible for the lack of a presumed²⁹ expertness by

23. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 438 (1954).

Other scholars are even less charitable about defective designs of regulation. Economist Horace Gray states:

The public utility status was to be the haven and refuge for all aspiring monopolists who found it too difficult, too costly, or too precarious to secure and maintain monopoly by private action alone. Their future prosperity would be assured if only they could induce the government to grant them monopoly power and to protect them against interlopers.

Gray, *The Passing of the Public Utility Concept*, 16 J. LAND & P.U. ECON. 8, 9 (1940).

24. Loevinger, *Regulation and Competition as Alternatives*, 11 ANTITRUST BULL. 101, 115-16 (1966).

25. See generally L. KOHLMEIER, JR., *THE REGULATORS* (1969); R. Fellmeth, *The Regulatory-Industrial Complex*, in *WITH JUSTICE FOR SOME* (B. Wasserstein and M. Green eds. 1971) [hereinafter cited as Fellmeth]. Many well known studies have concerned themselves with the organization and inefficiency of government regulatory procedures. See, e.g., COMM. ON INDEPENDENT REGULATORY COMMISSIONS, REPORT (1949); J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960); THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE REORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971).

26. J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 5-6 (1960).

27. See p. 881 *infra*. See also P. MACAVOY, *THE CRISIS OF THE REGULATORY COMMISSIONS* vii-viii (1970).

28. For example, in mid-1970 the Federal Power Commission predicted that the country would suffer an oil and gas shortage that winter. How did it know? Oil and gas trade associations must have told it so, since the FPC lacks the independent capabilities to measure existing energy capacity. See, e.g., *Concentration by Competing Raw Fuel Industries in the Energy Market and Its Impact on Small Business*, Hearings before the Subcomm. on Special Small Business Problems of the House Select Comm. on Small Business, 92d Cong., 1st Sess., Vol. 1, at 13 (1971). Similarly, in December, 1971 the Federal Communications Commission, citing inadequate staff, announced it was canceling its investigation into AT&T's rate base and asked for "voluntary cooperation" from the telephone giant. N.Y. Times, December 24, 1971, at 1, col. 2. The agency, under heavy public criticism, later reinitiated its inquiry.

Another obstacle to the collection of needed data has been the 1942 Federal Reports Act, which requires that requests for information originating with any government agency (with certain exceptions) and going to nine or more respondents must be cleared by the Office of Management and Budget. Because the OMB defers to business advisory groups, such requests are often denied or delayed. See Green, *Business in Government*, NEW REPUBLIC, Nov. 14, 1970, at 14, col. 1-2.

29. See, e.g., *F.T.C. v. R.F. Keppel & Bros.* 291 U.S. 304, 314 (1934).

agencies.³⁰ Business pressure also exerts a continuous, one-sided regulatory presence, dominating agency decisions by the sheer quantity of argument; business lobbying can also include a range of activities from *ex parte* contacts to outright corruption.³¹ Political independence for agencies is often illusory due to the clearance of agency budgets by the Office of Management and Budget, the appointment of commissioners and chairmen by the President, and agency catering to congressional requests.³² Finally, a kind of regular personnel interchange between agency and industry blurs what should be a sharp line between regulator and regulatee, and can compromise independent regulatory judgment.³³ In short, the regulated industries are often in clear control of the regulatory process.³⁴

II. The Costs of Over-Regulation

These defects of design and process result in regulatory policies which often frustrate, rather than promote, economic competition.

30. Only three of eleven recent ICC Commissioners had any transportation experience prior to their official tenure, while the rest were mostly ex-FBI agents and politicians. R. FELLMETH, *THE INTERSTATE COMMERCE COMMISSION* 2-5 (1970). At his Senate confirmation hearing upon appointment to the FCC, one nominee was asked about his qualifications in the communications field. He replied, "Senator, I don't know anything about communications. I came to Washington expecting to be appointed to the Federal Power Commission." KOHLMEIER, *supra* note 25, at 48.

31. For an interesting case study of industry-agency corruption, see Rosenblum, *How to Get into TV: The Federal Communications Commission and Miami's Channel 10*, *THE USES OF POWER* 173 (A. Westin ed. 1956). When Dr. Herbert Ley resigned as FDA Commissioner in 1969, he lamented to the *New York Times* that he had been under "consistent, tremendous, sometimes unmerciful pressure" from the drug industry. "Some days I spent as many as six hours fending off representatives of the drug industry." *N.Y. Times*, December 31, 1969, at 1, col. 1.

32. If a regulator does his job too well, incurring the displeasure of the regulated industry, his reappointment can be jeopardized. The cases of Dean James Landis, formerly of the CAB, and Leland Olds, formerly of the FPC, may be two indications. See J.P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 178-194, 277 (1953). For descriptions of the political context of regulation, see M. MINTZ & J. COHEN, *AMERICA, INC.* (1972); J. TURNER, *THE CHEMICAL FEAST* (1970); FELLMETH, *supra* note 30.

33. All but two of the ICC Commissioners leaving that agency in the 1960's either went into transportation directly or became "ICC Practitioners" lawyering for the industry. FELLMETH, *supra* note 30, at 251. From the other end, one study found the following percentage of appointees coming from the regulated industry: SEC—thirty-four percent; ICC—twenty-one percent; CAB—nineteen percent; FCC—fourteen percent; FPC—twelve percent. D. STANLEY, D. MANN & J. DOIG, *MEN WHO GOVERN* 136 (1967).

34. M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 90 (1955). Some people may view the problem of economic regulation as giant bureaucracies steamrolling over helpless regulatees. This is far from the case. The total budget for the six major regulatory agencies (FCC, ICC, SEC, FPC, CAB, FMC) is \$132,315,000 for fiscal year 1973, which is about .05 percent of the federal budget. Their total manpower is 7246. *THE BUDGET OF THE UNITED STATES GOVERNMENT, 1973—APPENDIX* 884-929, 1050-55 (1972).

A. *Rate-Regulation*

Non-regulated pricing aims at distribution which maximizes the output of goods and services, thus optimizing consumer welfare. Regulated pricing seeks to produce enough revenue for all regulated firms, the efficient and the not-so-efficient, to cover their costs and generate profits. Such price paternalism in the name of industry stability often leads to industry collusion, waste, and hence higher-than-competitive prices.³⁵

Rate-regulation can take two forms. Rate-setting, done by state public utility commissions and the FCC's Common Carrier Bureau, involves the determination of a firm's permissible profits, and is tied by a "fair rate of return" to the value of a company's assets. This return must not be so high as to exploit consumers or induce inefficiency, nor so low as to discourage investors—a fine line extremely difficult to draw.³⁶

The problem is administrative as well as judgmental. The private firm makes initial managerial decisions, with the regulatory body reduced to a defensive posture after-the-fact. Furthermore, obtaining the necessary cost data from corporate managers can be a herculean chore.³⁷ Since state public utility commissioners and federal agencies lack adequate staffs to challenge effectively utilities seeking rate increases, there comes to be "regulation which does not regulate."³⁸ The self-interest in inflating asset values to yield higher returns can induce regulated firms to doctor their data by a variety of accounting devices.³⁹ Or they may engage in uneconomical activities such as overcapitalizing due to a reluctance to lease from others, resisting capital-saving technology, or being lax in procurement policies.⁴⁰ In addition, firms may try to emasculate profit ceilings by cutting costs or quality. The result can be unplanned profitability.⁴¹ In fact, although utilities never risk failure or zero profits as do non-regulated firms, their profits are comparable to the rest of American manufacturing, about ten percent after-

35. SCHERER, *supra* note 11, at 537; Noll, *supra* note 19.

36. SCHERER, *supra* note 11, at 523-537; Frankfurter & Hart, *Rate Regulation* reprinted in *THE CRISIS OF THE REGULATORY COMMISSIONS* 1 (P. MacAvoy ed. 1970).

37. See Coase, *The Federal Communications Commission*, 2 J. OF L. AND ECON. 1, 18 (1959) on the problem of insufficient data and price systems.

38. V. MUND & R. WOLF, *INDUSTRIAL ORGANIZATION AND PUBLIC POLICY* 379 (1971).

39. See J. NEWFIELD & J. GREENFIELD, *THE POPULIST MANIFESTO* 67-88 (1972).

40. KAHN, *supra* note 6, at 47-63. Averch & Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052 (1962).

41. While New York Telephone was permitted a 6.5 percent return from 1959-1968, it actually earned 7.3 percent, which is a \$50 million differential; similarly although the FPC in 1967 authorized AT&T to earn 7 percent to 7.5 percent, it actually earned 8.3 percent. NEWFIELD & GREENFIELD, *supra* note 39, at 77.

tax return on equity.⁴² Consequently, regulation does not significantly affect either utility rates or price discrimination.⁴³

The second and more common form of rate regulation is rate toleration. Agencies such as the ICC, CAB, and the FMC (Federal Maritime Commission) depend on industry collaboration in so-called "rate conferences" to set prices.⁴⁴ Here cartel "self-regulation" proposes and the government disposes. This process tends to pervert even the theoretical basis for regulation, *viz.*, that the government protects the public by assuring that private firms with undue market power not charge higher than competitive prices.

Although the ICC can independently investigate a rate proposal, it does so in less than one percent of the carriers' rate filings.⁴⁵ Similarly, the CAB did not *have* to acquiesce to the International Air Transport Association (IATA) when that world cartel began to set prices in 1946,⁴⁶ nor does it *have* to approve with regularity fare increases proposed by domestic air carriers.⁴⁷ The higher prices that result discourage many potential air travelers from utilizing air service.⁴⁸ Moreover,

42. Noll, *supra* note 19, at 1022-23.

43. See, e.g., Stigler & Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 J. LAW & ECON. 1 (1962).

44. These conferences have, if nothing else, tenacity and longevity. When an 1897 Supreme Court decision declared such railroad rate conferences illegal (*United States v. Trans-Missouri Freight Association*, 116 U.S. 290 (1897)), the ICC permitted them to continue. They were again declared illegal by the Court in 1945. *Georgia v. Pennsylvania Co.*, 324 U.S. 439 (1945). Instead of violating the law this time, the ICC made one. Passed over President Truman's veto in 1948, the Reed-Bulwinkle Act provided that the Commission could approve of agreements between carriers to establish rates if such an approval was in "furtherance of the national transportation policy." 49 U.S.C. § 5b (1959). The FMC has similar power. See 49 U.S.C. § 1378 (1946).

45. *Hearings before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess., pt. 1, at 258 (1972) (statement of G. Stafford, Chairman of the ICC).

46. See IATA Traffic Conference Resolution, 6 C.A.B. 639 (1946). The CAB explained that it felt pressured by foreign governments over the right of American planes to land abroad, despite the fact that we had already secured, through bilateral agreements, landing rights in most of the world. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 454 (1954).

47. W. JORDAN, AIRLINE REGULATION IN AMERICA 57-72 (1970).

48. Domestic and international airline rates may be fifty percent too high due to collusion by the airline trade association. See Pillai, *The CAB as Travel Regulator*, THE MONOPOLY-MAKERS (M. Green ed. 1973) (forthcoming). For one example, while the 340-mile, unregulated (intrastate) Los Angeles-San Francisco plane trip costs \$16.20, a trip of equivalent distance between Chicago and Minneapolis costs \$33 and the New York City-Washington shuttle (230 miles) costs \$26. William Jordan has concluded that agencies served producers, not consumers:

The available evidence regarding the effects of regulation on price level for former oligopolistic industries is consistent and unambiguous. Regulatory actions and procedures have allowed the carriers in each industry to reach agreements regarding prices and to enforce adherence to these agreements . . . Without regulation *prices [for interstate airlines, freight motor carriers, and railroads] would be from 9 to 50 percent lower than they are with regulation with many reductions in the long-run exceeding 30 percent.*

Jordan, *Producer Protection, Prior Market Structure and the Effects of Government Regu-*

the absence of any price competition among such firms leads to a frantic "service competition," which in turn can cause massive waste. Thus, while some industries, like public utilities, may require improved rate scrutiny, others, like some segments of transportation, may deserve no rate regulation at all.⁴⁹

B. *Entry Restrictions*

Most regulatory agencies restrict the entry of new competitors into their regulated industries. An entrant may, for example, have to obtain a certificate of public convenience or necessity by showing that there is a need for another firm and that he can satisfy it.⁵⁰ Instead of competitive market forces, an agency determines whether a new venture is publicly desirable. While this system enhances the value of existing lines by the imposition of artificial scarcity, it also encourages inefficiency and "the quiet life" of monopolists who lack the stimulus of potential competition.

Agencies appear to be far more restrictive toward entrants than they need be. The CAB has not certified a new trunk carrier since immediately after its creation in 1938.⁵¹ Yet within the confines of California, where CAB jurisdiction does not extend, sixteen intrastate carriers entered the market between 1946 and 1965.⁵² The Food and Drug Administration thwarts competition by the bureaucratic legerdemain of "New Drug Applications." Of course, the safety of newly marketed drugs must be shown by extensive clinical studies. But there is little need to require such tests, often costing \$50,000 to \$100,000, for each successive application of drugs *chemically identical to those already on the market*.⁵³ The rule does not contribute to drug safety, but it does bar smaller competitors and entrench the dominance of existing drug houses. For another example, the ICC not only restricts the entry of new truck firms into existing markets—an industry where entry would be relatively inexpensive—but also imposes a network of other controls to insure the immutability of the system.⁵⁴

lation, 15 J. LAW & ECON. 151, 167 (1972) (emphasis added). See also W. JORDAN, *supra* note 46; G. KOLKO, *supra* note 4, at 210-17; P. MACAVOY, THE ECONOMIC EFFECTS OF REGULATION: THE TRUNK-LINE RAILROAD CARTELS AND THE INTERSTATE COMMERCE COMMISSION BEFORE 1900, at 25-152 (1965).

49. See p. 884 *infra*.

50. See generally KOHLMEIER, *supra* note 25, at 105-09; BLAIR, *supra* note 13, at 396-98.

51. Pillai, *supra* note 48.

52. JORDAN, *supra* note 47, at 172.

53. BLAIR, *supra* note 13, at 399-400. See Till, *Drug Procurement High on Drugs*, in M. Green, *supra* note 48.

54. Various restrictions on motor carriers are imposed on routes and commodities. 49 U.S.C. § 308 (1966); 49 C.F.R. § 1040-1069 (1972).

In industries where the number of operators has been limited, entry can be restricted in other ways so as to stifle potential competition and favor established enterprises. For example, until 1969, the FCC had never refused to renew a broadcaster's license on comparative service grounds.⁵⁵ When it finally did refuse one renewal, the broadcast industry attempted to have the FCC Act revised.⁵⁶ Reacting to this pressure, the Commission issued a policy statement indicating that incumbent applicants would receive preferential consideration if past service was substantial,⁵⁷ though this policy was later found to be in violation of the Act.⁵⁸

C. Mergers

While new entrants must make an affirmative showing to earn their very existence, mergers by statute are usually only limited by a requirement that they be "consistent with the public interest."⁵⁹ Competition seldom survives the ad hoc arguments which can be deployed to justify nearly any merger: labor savings, complementary managements, overcapacity, and so on.

Examples of regulatory permissiveness are numerous. The ICC approved thirty of the thirty-four major railroad mergers it has considered.⁶⁰ Between 1960 and 1962, the Comptroller approved 232 of 239 bank merger applications; between 1966 and 1969, after the *Philadelphia Bank* decision held that the antitrust laws applied to banking, 402 of 406 were approved while only fifteen were voluntarily abandoned.⁶¹ The FCC approved the 1967 acquisition of ABC by ITT after considering the Justice Department's Antitrust Division's objections for all of one day,⁶² though ITT later voluntarily withdrew its proposal.

The Supreme Court has now said three times that the acquisition by El Paso Natural Gas of the Pacific Northwest Gas Company, approved

55. WHDH, Inc., 16 F.C.C. 2d 1 (1969), *aff'd sub nom.* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (1970) *cert. den.*, 403 U.S. 923 (1971).

56. See *Hearings on S. 2004 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. (1969).

57. *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C. 2d 424 (1970).

58. *Citizens' Communication Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

59. Interstate Commerce Commission Act, 49 U.S.C. § 5(2)(b) (1970); Civil Aeronautics Board Act, 49 U.S.C. § 1378 (1970); Federal Communications Act, 47 U.S.C. § 222(b)(1), § 222(c) (1970).

60. FELLMETH, *supra* note 30, at 94.

61. Interview with Daniel Friedman, Assistant Solicitor General, Sept. 17, 1970. This high rate of approval exists despite the fact that the antitrust laws apply to banking. See *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963).

62. Interview by the author with D. Turner, former assistant Attorney-General in charge of antitrust, Sept. 22, 1970.

by the FPC, violated the antitrust laws and should not have been permitted.⁶³ Recently the Antitrust Division has increasingly intervened in agency proceedings as an antitrust advocate. But with certain exceptions (like banking and communications), the doctrine of "primary jurisdiction" means that the regulatory agencies, and not the Antitrust Division or the courts, make the decisive policy decisions on proposed mergers.⁶⁴

D. *Technology*

Technological lethargy seems to inhere in the very process of regulation.⁶⁵ A firm with a stable rate base and rate of return lacks the competitive spur to be innovative. In fact, since a firm's return depends on the extent of its capital investment, it is encouraged even as it buys new capital to retain older and obsolete equipment in order to inflate its rate base.⁶⁶ Regulators and regulatees are both wary of technological breakthroughs which topple a well-nurtured, highly-valued regulatory system.⁶⁷ Agencies tend to approve important innovations only after years of delays and pressure: Consider, for example, container ships, "Big John" boxcars, "piggyback" operations in mail transport, "foreign attachments" to the AT&T telephone system, and (to a certain extent) cable television.⁶⁸

While few would deny that government regulation for public health and safety is essential, the verdict is nearly unanimous that economic regulation over rates, entry, mergers, and technology has been anti-competitive and wasteful. In recent years, the Johnson Antitrust Task Force, the Nixon Antitrust Group, and the Council of Economic Advisors have all concluded that regulated industries need, and the public interest demands, increased competition.⁶⁹ For the costs of economic

63. *Utah Public Service Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1968); *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1966); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

64. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964). See Schwartz, *supra* note 23, at 471.

65. There is a longstanding dispute whether giant firms, of the kind often under regulation, are a prerequisite or deterrent to innovation. For the argument that it is a prerequisite, see J.K. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967); for the argument that it is a deterrent, see Blair, *supra* note 13, esp. chs. 5, 9, 10.

66. C. EDWARDS, *MAINTAINING COMPETITION* ch. VII (1964).

67. "No matter how beneficial an innovation, it has little chance of timely adoption in a regulated industry if it will lead to a substantial redistribution of wealth among the regulated that cannot be compensated through some clever regulatory device." R. NOLL, *REFORMING REGULATION* 25 (1971).

68. See Noll, *supra* note 19, at 1022-23 (1971); *TECHNOLOGICAL CHANGES IN REGULATED INDUSTRIES* (W. CAPRON ed. 1971).

69. In 1968, the Johnson Antitrust Task Force stated:

In the regulated sector of the economy, the bias and its enforcement is overwhelmingly against competition. This bias manifests itself in more permissive policies to-

regulation are becoming intolerable. The list below, based on the best evidence available, estimates the economic losses due to the regulation of transportation and communication.

<i>Sector</i>	<i>Economic Waste From Regulation</i>
ICC: Increased costs and shifting of traffic from low cost to high cost modes, involving railroads, trucks, water carriers.	\$4-\$8.7 billion ⁷⁰
CAB: Trade associations and price-fixing.	\$2-\$4 billion ⁷¹
FMC: Merchant marine price-fixing.	\$2-\$3.5 billion ⁷²
FCC: "Additional value to consumers" if FCC reallocated TV channels so as to permit seven national networks rather than three.	\$8 billion ⁷³
TOTAL	\$16-\$24.2 billion⁷⁴

ward mergers and exemption of mergers from antitrust standards We believe this bias is contrary to the public interest.

Reprinted in *Hearings on Price Discrimination Legislation—1969, Before the Senate Antitrust and Monopoly Subcomm.*, 91st Cong., 1st Sess. 23 (1969).

The Nixon Antitrust Group, headed by George Stigler, criticized regulatory restrictions on entrants and rates:

[T]he commissions should have the merits of competition pressed upon them. Competition is not a matter of all or none, and the fact of regulation should not exclude competition as a force at each of a hundred points where it is relevant and feasible. *Id.* at 3. Finally, the Council of Economic Advisors also concluded:

Industries have been more progressive when the agencies have endeavored to confine regulation to a necessary minimum and have otherwise fostered competition. When regulation has stifled competition, performance has deteriorated. The clearest lesson of all, however, is that regulation should be narrowed or halted when it has outlived its original purpose.

COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 108 (1970).

70. Moore, The Feasibility of Deregulating Surface Freight Transportation (paper presented at the Conference on Antitrust and Regulated Industries, October 28 and 29, 1971, Brookings Institution, Washington, D.C.).

71. Passell & Ross, *Mr. Nixon's Economic Melodrama*, N.Y. Rev. of Books, Sept. 23, 1971, at 8, cols. 2-3, referring to Levine, *Is Air Regulation Necessary? California Air Transportation and National Regulatory Policy*, 74 YALE L.J. 1416 (1965).

72. MARITIME TRANSPORTATION RESEARCH BOARD, LEGAL IMPEDIMENTS TO INTERNATIONAL INTERMODAL TRANSPORTATION 42 (1971).

73. McGowen, Noll & Peck, *Subsidization through Regulation: The Case of Commercial Television Broadcasting*, paper prepared for Joint Economic Committee review of government subsidy programs and policies as part of the Brookings Institution Studies in the Regulation of Economic Activity, December 1971, at 35-40.

74. Many other serious economic losses inflicted by government activity are not included here. There is no reliable information on the precise competitive costs incurred by the internal inefficiency of AT&T's rate schedule, or the federal drug procurement program. The total consumer cost of tariff and quota restrictions may be between \$10 billion and \$15 billion annually. C. BERGSTEN, THE COST OF IMPORT RESTRICTIONS TO AMERICAN CONSUMERS 4 (1972). His tariff component is only \$2 billion, although he characterizes the \$10 billion estimate of tariff costs by Neuman Fieleke as a "plausible maximum." See Fieleke, *The Cost of Tariffs to Consumers*, NEW ENGLAND ECON. REV., Sept.-Oct., 1971, at 13. Other estimates range as high as \$20 billion. 118 CONG. REC. S 16623 (daily ed. Oct. 3, 1972).

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In sum, at least two conclusions emerge about our present system of economic regulation. First, the monopolistic practices and results of economic regulation exact their tribute from the American economy and consumer. Excessive rates mean higher consumer prices for both products and services—prices which may bar the lower-income citizen entirely. Second, because we have no clear understanding of who or when to regulate, we have regulated too much.

III. Proposals for Reform

This nation's industrial economy and system of antitrust enforcement was founded on the premise that,

the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress⁷⁵

Regulation, however, is a pallid substitute for true competition.⁷⁶ At best, regulation is a negative process, occasionally enjoining bad behavior but rarely compelling good. Hence, our general industrial policy should encourage competition in our economy by minimizing regulation, except when clearly necessary. With this theoretical framework in mind, we must both avoid over-regulation and limit the anticompetitiveness of "necessary" regulation.⁷⁷

A. Deregulation

If the problem is over-regulation based on irrational economics, then the most effective remedy is deregulation. Where there would be a viable, competitive market but for economic regulation, the industry should be freed from all such restraint. By this standard, trucking, air, and water transport, radio and television could return to the open

75. *Northern Pacific Ry. v. United States*, 356 U.S. 1, 4 (1958).

76. Economist Clair Wilcox argues:

[It] cannot prescribe quality, force efficiency, or require innovation, because such action would invade the sphere of management. But when it leaves these matters to the discretion of industry, it denies consumers the protection that competition would afford. Regulation cannot set prices below an industry's costs however excessive they may be. Competition does so, and the high-cost company is compelled to discover means whereby its costs can be reduced. Regulation does not enlarge consumption by setting prices at the lowest level consistent with a fair return. Competition has this effect. Regulation fails to encourage performance in the public interest by offering rewards and penalties. Competition offers both.

C. WILCOX, *PUBLIC POLICIES TOWARD BUSINESS* 476-77 (1966).

77. Procedural alternatives are not considered here. See pp. 875-76 *supra*.

market;⁷⁸ whether natural gas field prices should be similarly deregulated, when higher consumer prices would undoubtedly result, is presently under intense debate.⁷⁹ Where economic regulation substitutes for the kind of managerial decisions, such as pricing, which are usually within the domain of private competitive firms, deregulation should also occur. Thus, railroad, transoceanic shippers, and airlines should no longer be able to price-fix with (or without) agency approval, though in certain limited situations, maximum rates might still be necessary.⁸⁰ They could then compete on price, instead of on the color of their planes or the hemline of their stewardesses' skirts. The savings generated by such reform should be enormous.

But deregulation, if it is to occur, has a number of necessary preconditions and qualifications. First, a viable competitive market must be able to exist; if a well-defined "natural monopoly" or "natural oligopoly" characterizes the market, then the deregulation cure may prove no better than its regulatory disease. Second, antitrust policy and enforcement must be well-funded and vigorous to deter collusion or con-

78. See Turner, *supra* note 13; MEYER ET AL., *supra* note 13; KAHN, *supra* note 6, at 178-94; P. MACAVOY, PRICE FORMATION IN NATURAL GAS FIELDS (1962); Wall St. J., Feb. 3, 1971, at 10, col. 1. There is a comparative measure of how surface transportation would perform under deregulation. The Motor Carrier Act exempts regulation from ICC motor vehicles carrying agricultural products. According to a Senate Small Business Committee report: "Here is an unregulated segment of the trucking industry which, according to witnesses most intimately familiar with its operations, has admirably served the interest of farmers, consumer and the general public." SENATE SELECT COMMITTEE ON SMALL BUSINESS, COMPETITION, REGULATION AND THE PUBLIC INTEREST IN THE MOTOR CARRIER INDUSTRY, S. REP. NO. 1693, 84th Cong., 2nd Sess. 15 (1956).

79. The case for the continued regulation of natural gas field rates rests upon a series of arguments. First, regulation is required because the industry, in terms of firms bringing in new supplies, is quite concentrated. D. Schwartz, Supply-Technical Advisory Task Force-Regulation and Legislation (FPC Task Force Report, dissenting report, 1972). See South Louisiana Area Rate Proceedings, 40 F.P.C. 530 (1968). Pipelines, which require substantial backup reserves, supposedly are at a competitive disadvantage in dealing with gas producers and cannot effectively bargain to keep prices down; also, because pipeline costs are automatically passed on by the FPC, rate regulation has no incentive to keep prices low. Schwartz, *supra*. Critics disagree with the natural gas industry that low field prices discourage adequate exploration since producers are already earning fifteen percent per year profit on production. N.Y. Times, Dec. 13, 1972, at 34, col. 3 (letter of Charles F. Wheatly, Jr.). Investigator Robert Sherrill charges that there is a coordinated campaign by members of the national gas industry to convince the public that there is a gas shortage in order to push prices up. Sherrill, *Energy Crisis: The Industry's Freight Campaign*, NATION, June 26, 1972, at 816. Because he believes that deregulation would lead to unacceptably high consumer prices, Sen. Warren Magnuson has proposed to create a federal corporation, similar to the TVA, to explore and drill for natural gas on government land. Wall St. J., Dec. 15, 1972, at 4, col. 3.

The leading advocates for deregulation are Professors Stephen Breyer and Paul MacAvoy. In a forthcoming book, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION, they argue that rate regulation has led to uneconomical practices, and that there is very little evidence of a lack of competition in field pricing. *Accord*, Austral Oil Co. v. FPC, 428 F.2d 407 (5th Cir., 1970); McKie, *Market Structure and Uncertainty in Oil and Gas Exploration*, 74 QUART. J. OF ECON. 543 (1960). See also P. MACAVOY, *supra* note 75.

80. Because trucks and pipelines only marginally compete with railroad "piggyback" services and shipment of some bulk commodities, minimum rate regulation may be necessary to avoid rate gouging. MEYER ET AL., *supra* note 13, at 250.

centration and achieve effective competition. We have earlier argued that real competition rarely exists in industry:⁸¹ Not that it *could* not, but that in fact it *does* not. *Thus deregulation would have to be preceded by a serious antitrust commitment fostering deconcentration where necessary.* Third, since the introduction of competition will cause the closing of some inefficient facilities, a complementary program must underwrite the relocation and retraining of displaced employees. Fourth, there should be comparable insurance for customers damaged as a result of any firm restructuring. For example, since free entry into banking might increase the number of bank failures, federal insurance programs should cover any resulting losses. Finally, deregulation should be administered with a scalpel, not a scythe. It should not be applied to non-economic regulation which aims to complement, rather than replace, a market system incompetent or uninterested in fulfilling certain social needs. This type of necessary regulation recognizes that while competition may be our most efficient and equitable resource allocator, it is still rather imperfect. Several regulatory areas would be covered by this standard.

Safety regulation explicitly assumes that the market will not adequately protect consumers against certain product hazards. Such laws are based on the rationale that it is better to prevent consumer harm than to compensate it later. The harm inflicted may simply be unacceptable to its victims, as in deaths from dangerous drugs or crashing airplanes. Or it may be unrealistic to assume that a manufacturer will compensate victims: Not only may court costs pose a serious entry barrier to individually small (but collectively large) damage claims, but corporations can also employ a variety of litigative tactics to discourage meritorious claims.⁸² Examples of this type of regulation include food and drug safety, airline safety, auto crashworthiness, flammable fabrics, and radiation levels.⁸³

81. M. GREEN ET AL., *THE CLOSED ENTERPRISE SYSTEM* (1972).

82. When they work effectively, the courts can be an important adjunct of the market mechanism, a place where consumers and producers have recourse against fraudulent practices subversive of a free and fair market. Regulation can either frustrate citizen access to courts, as when the doctrine of primary jurisdiction operates to block the successful filing of individual lawsuits, or it can promote the use of this self-help mechanism by providing needed individual and agency information covered by (though not necessarily limited to) the Freedom of Information Act. Various procedural reforms—creative small claims courts, class actions, and improved legal services for the poor and middle income—can help restore the court as an effective forum for aggrieved consumers and competitors.

83. It is interesting to observe how a regulation-induced characteristic can educate and encourage consumers to desire the characteristic even if the regulations were lifted. At one time, for example, directional signals, bumpers, and headlamps all had to be required by law. Few auto purchasers today would buy cars without them, even if laws requiring them were suspended. There may be little consumer demand for code-dating

Regulation of non-market externalities would cover damage caused to third parties who neither bought nor sold the product inflicting the damage. For example, while dangerous cars may be sold through the market system, no one can be said to have "bought" auto pollution. The same is true for the risk of radiation poisoning from a nuclear reactor. In short, producers lack a market incentive to contain certain harms, including environmental and land use effects. Here government standards are necessary to protect the public.⁸⁴

Enabling regulation establishes the necessary preconditions for competitive enterprise to succeed. Antitrust law establishes the borders and rules for economic contest. Anti-discrimination laws, occupational health and safety requirements, and unemployment compensation establish minimal standards for the protection of the individual in the production process. Similarly, corporate and product disclosure requirements are *sine qua nons* for investor knowledge and consumer sovereignty. The corporate balance sheet should be made public so the capital market can reward and sanction firms accordingly. At the same time product information—e.g., nutritional labeling, code dating, truth in lending provisions—provide consumers with the intelligence necessary for rational purchasing.

Yardstick enterprise might also have to be provided by the government when industry withdraws from a market because it is perceived as unprofitable. Such public enterprise could fulfill a public need and, if properly circumscribed and wisely implemented, set an example for private enterprise. For instance, railroads wish to curtail passenger service; private insurance firms have shied away from flood and crime insurance; and because of oversupply, oil firms for years have not been interested in developing commercially viable processes for extracting oil from shale.

"Yardstick" enterprise should also include government research and development investment in areas shunned by private enterprise. Designs of many airplanes, some maritime ships, and nuclear power plants

at its legal inception, but one can imagine consumer complaints if in a decade food firms stopped telling buyers when their cheese and milk became perishable. Once consumers are alerted to the benefits of certain product protections and information, an appreciation develops and remains.

84. Such regulation is not only theoretically distinguishable from economic regulation, but is also far more practical. "Reducing the emission of noxious fumes or preventing the sale of a harmful drug is conceptually and perhaps administratively easier than deciding what allocation of television licenses will be 'in the public interest' or what price levels are 'reasonable.'" Wilson, *The Dead Hand of Regulations*, 25 PUBLIC INTEREST 29, 58 (1971).

were based on government technological breakthroughs. Modular housing, a non-addictive heroin substitute, and mass transit have similarly not yet been adequately developed and delivered by private industry. Since the competitive market can be a poor long range planner, especially where profits are not readily apparent, government may have to encourage innovation.

Such public enterprise may also generate beneficial secondary effects. The TVA, by producing cheap power in the Tennessee Valley, promoted industry and showed other utilities how costs and prices could be cut without cutting profits. Government can thereby open avenues for private enterprise by stimulating, rather than suppressing, competition.⁸⁵

B. *Intermediate Reforms*

Because deregulation will likely encounter serious corporate opposition,⁸⁶ and because some regulation will always be necessary, several intermediate reforms should be instituted to ensure that competition will be a prime consideration in the determination of regulatory standards. First, Congress should clarify the proper role and authority of many agencies, which now find themselves in the contradictory position of both regulating and promoting their industries. The 1887 Act creating the ICC emphasized regulation, to fight excessive monopoly;⁸⁷ the 1920 and 1940 National Transportation Acts emphasized promotion to combat excessive competition.⁸⁸ The 1938 CAB Act does a

85. For a general discussion of the role of public enterprise, see Shepard, *Public Enterprise*, CORPORATE POWER IN AMERICA (R. Nader & M. Green eds. 1973).

86. Whatever the economic merits, deregulation will be politically difficult to achieve. Industry and agency have often built up a benign interdependence, and more competition can only threaten both baronies. President Kennedy's 1962 transportation message did call for the abandonment of minimum rate regulation in the shipment of bulk commodities on trucks, trains and barges. The plan, however, was buried in Congress, opposed by the truckers, the barge operators, and the ICC. See Wilson, *supra* note 83, at 40.

A deregulation proposal entitled the "Regulatory Modernization Act of 1971" was recently submitted by the Department of Transportation to Congress. H.R. 11826, 91st Cong., 1st Sess. (1971). The measure had been cleared, but not endorsed, by the White House. The bill would give carrier management more freedom to price services, discourage collective rate-making, permit the abandonment of unprofitable operations, and allow greater freedom of entry. It was never reported out of its House Transportation and Aeronautics Subcommittee.

87. Interstate Commerce Act of Feb. 4, 1887, ch. 104, 24 Stat. 379.

88. 41 Stat. 456 (1920), 54 Stat. 898 (1940). Yet promotion of a "national transportation system" leads to an inefficient pricing system. Instead of traffic going to the lowest cost mode, prices are set around the highest cost mode to distribute the business among all carriers. Noll, *supra* note 19, at 1018; A. FRIEDLANDER, THE DILEMMA OF FREIGHT TRANSPORT REGULATION 65-99 (1969).

little of both.⁸⁹ Second, with a budget increase to augment its present staff, the Antitrust Division of the Justice Department should increase its interventions in agency proceedings in order to force commissioners to listen to, and perhaps better comprehend, the antitrust impact of their rulings. Third, the courts have mandated that agencies must consider antitrust implications as part of their "public interest" standard;⁹⁰ they should now go somewhat further and explicitly declare that, since antitrust is our dominant economic philosophy, the burden is on the agencies to show why they have departed from it when their statutes do not require it.⁹¹ Fourth, there should be at least one economist as a commissioner in every agency implementing *economic* regulation. Lawyers and former politicians⁹² have abilities, to be sure, but certainly no monopoly on wise economic regulation. Fifth, rate setting agencies must develop policies to prod utilities to be efficient and cut costs;⁹³ such "incentive" proposals have not even been considered, much less resolved, by utility commissions. Finally, aided by more liberal standing decisions⁹⁴ and increased access to agency data under the Freedom of Information Act, citizen suits could raise regulatory issues which the agencies shun. "Public interest" legal counsel, as suggested at the FCC, or a Consumer Protection Agency, as proposed by Sen. Abraham

89. 52 Stat. 973 (1938).

90. In 1963, in *United States v. Philadelphia National Bank*, the Court held that the antitrust laws applied to banks, the existence of the banking agencies notwithstanding, 374 U.S. 321 (1963). In *Silver v. New York Stock Exchange*, decided the same year, the Court said, "Repeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U.S. 341, 357 (1963).

Two 1968 cases continued this trend. In *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, the Court permitted the FMC to disapprove of two anticompetitive shipping conference agreements under the "contrary to the public interest" standard. 390 U.S. 238 (1968). And in the most lucid language to date, the D.C. Circuit Court emphasized in *Northern Natural Gas Co. v. Federal Power Commission* that "antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the [Federal Power] Commission is obliged to weigh antitrust policy." 399 F.2d 953, 958 (D.C. Cir. 1968). Because the FPC did not participate in this case, the issue was remanded to it for further consideration.

91. New legislation, like the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1970), which created this burden regarding pollution, could achieve the same result.

92. One study found that eleven percent of commissioners of independent regulatory bodies were ex-congressmen. STANLEY ET AL., *supra* note 33, at 141.

93. A sliding scale of return could be established, devised to permit a firm greater profits only if it could provide better service at the same or lower costs; or perhaps a public utility could be permitted any new profit level provided that it derived from lowered prices due to innovation or cost-cutting. For an elaboration of these points, see Moore, *supra* note 34.

94. Office of Communication of United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). But cf. Sierra Club v. Morton, Sec'y of Interior, 405 U.S. 727 (1972).

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Ribicoff and Rep. Benjamin Rosenthal⁹⁵ but narrowly blocked in the past two Congresses, could also represent previously ignored consumer interests. For years the regulatory agencies acceded to producer demands partly because that was the way of avoiding the embarrassment of public criticism or reversals on appeals brought by displeased producers. With citizen advocates now pressing their views on the agencies, they are less prone to defer to the judgment of their "client" industries. And so as the advocacy process becomes more competitive, so may agency policies.

95. H.R. 14, 92d Cong., 1st Sess. (1971); S. 1177, 92d Cong., 1st Sess. (1971).