An Administrative Law Perspective on Consensual Decisionmaking

Andrew Popper
AN ADMINISTRATIVE LAW PERSPECTIVE ON CONSENSUAL DECISIONMAKING

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INTRODUCTION

The purpose of this article is to explore the use of consensual decisionmaking as a substitute for conventional public sector decisionmaking systems. The basic presumption is that the process of negotiation will result in benefits which either do not exist under present regimes, or could be expanded in a consensual system. The potential benefits of negotiation can be recited without controversy: directly and indirectly affected entities have access to basic decisional process; there is a greater expectation of compliance with standards that are negotiated than standards that are imposed; the cost of acquiring information decreases and the reliability of information increases; in certain markets, negotiation can provide an ordering mechanism for resource allocation; finally, the cost of government regulatory activity declines as responsibility is shifted from agency decisionmakers to private sector groups.

Conversely, consensual decisionmaking systems provide an opportunity for price fixing and other forms of anticompetitive activity. The potential for price stabilization and market stagnation increases when horizontally aligned competitors meet and discuss aspects of profit making business on a regular basis. Standards evolved through the consensual process may represent a "lowest common denominator" suppressing further innovation and initiative in terms of technological efficiency.

This article is divided into two sections; the first examines problems with existing systems of administrative decisionmaking, and the second

focuses on present uses of consensual process. The thesis is that present conventional forms of decisionmaking are expensive, time-consuming and often fail to achieve desired public policy goals. Rule-making and administrative adjudication are necessary mechanisms, but well-recognized problems with these modes of decisionmaking suggest more frequent utilization of consensual process as an alternative. The politically appealing "open market" mode of decisionmaking is a second alternative, as evidenced by the deregulation of many major regulatory systems. However, the marketplace will not always provide the benefits and critical protections fundamental to various markets. This is particularly so in a period when major structural antitrust cases are held in disfavor by the executive branch, and when general federal antitrust enforcement is at a low ebb. Again, increased use of consensual process seems a logical and compelling alternative.

The term "consensual process" is used to cover a number of different types of collective or participatory decisionmaking. In the second half of this article, several general categories of consensual process are reviewed and thereafter specific uses of consensus are examined. At a base level, a consensual system involves decisionmaking by those most affected by the outcome or result of the matter at hand, be it a rate, product safety tolerance standard or a rule (in the context of "rulemaking"). The process can dilute or modify the role of an administrative law judge or administrator, who has operated in a "command and control" mode, substituting the decisionmaking of the consensual group for that of the historically disinterested decisionmaker.

Setting up a formal consensual system, determining uniform means of selecting parties, deciding on a process for oversight and review, isolating specific subject matter jurisdiction of a consensual body and analyzing the need for revision in existing statutory systems will be a monumental task, well beyond the scope of this article. One need not conclude each of these tasks to realize that there are many and varied problems with existing decisionmaking systems and that consensual process is one possible answer to those problems.

This piece is an endorsement of consideration of consensual decisionmaking. This endorsement is made based on the benefits inherent in consensual process and the disadvantages of conventional forms of decisionmaking. Support for consensual systems, however, is conditionally based on the following four points. First, consensual systems can be a breeding ground for the worst types of intercorporate conspiracy in direct contravention of our antitrust laws. Second, consensual systems can be abused and create serious distortions of power in the marketplace, if voting-party selection and review are not done
properly. Third, when consensual systems are set up by the Congress, great care must be taken to ensure that the systems will implement public policy, rather than be used to rubberstamp public imprimatur to one-sided and biased determinations. Finally, consensual process requires a rethinking of many basic notions of fairness. The implementation of a consensual system may require the elimination of an adversary system which had been the cornerstone of party access and procedural due process. Such gross editing of our basic systems must be done with extreme caution.

Before evaluating whether a system which centers on the evolution of consensus is a viable alternative to an adversary model which concentrates on clarifying the differences between parties and then selecting between the "positions" taken, some consideration must be given to existing systems. Naturally, if one is of the opinion that present rule-making and adjudicatory mechanisms are functioning effectively, change to a new and untested system makes little sense.¹

DYSFUNCTION IN PRESENT ADMINISTRATIVE DECISIONMAKING SYSTEMS AS A RATIONALE FOR CONSIDERATION OF CONSENSUAL DECISIONMAKING

A. Systemic Problems with Conventional Decisionmaking

One approach to supporting consensual decisionmaking is to argue that the negotiation and settlement processes are inherently effective, bonding decisionmakers with ultimate rules or standards, and thereby ensuring a likelihood of compliance. In the inherent benefit argument package, one would be likely to find discussions of increased access for directly and indirectly affected parties, improved information flow, and the potential for enriched competition, based on the presence of uniform and available market knowledge.²

A second approach which may be used to support the consensual decisionmaking argument is to assert that it is a reasonable alternative worthy of immediate consideration in light of the deficiencies of rule-

¹In American Soc'y of Mech. Eng'rs v. Hydrolevel, 456 U.S. 556, 102 S. Ct. 1935 (1982), the court found that not only would participants involved in consensual decision-making be personally liable if they used the format to restrain trade, but that an entire association would be liable on an agency theory. This case and related antitrust problems are discussed infra at I(D).

making and adjudication, the conventional forms of administrative decisionmaking.

A recent proposal of the Administrative Conference of the United States urges federal agencies to consider using negotiation and consensual decisionmaking as an alternative to conventional rulemaking. The action of the Administrative Conference is predicated on the belief that consensual decisionmaking and negotiation are inherently valid forms of decisionmaking; however, the recommendation is also the result of the Conference's belief that present forms of administrative decisionmaking are seriously flawed:

"Increased formalization of the rulemaking process has . . . had adverse consequences. The participants, tend to develop adversarial relationships with each other causing them to take extreme positions, to withhold information from one another, and to attack the legitimacy of opposing positions. Because of the adversarial relationships, participants often do not focus on creative solutions to problems, ranking of the issues involved in a rulemaking, or the important details involved in a rule. Extensive factual records are often developed beyond what is necessary. Long periods of delay and participation in rulemaking proceedings can become needlessly expensive. Moreover, many participants perceive their roles in the rulemaking procedure more as positioning themselves for the subsequent judicial review than as contributing to a solution on the merits at the administrative level. Finally, many participants remain dissatisfied with the policy judgments made at the outcome of rulemaking proceedings.

Participants in rulemaking rarely meet as a group with each other and with the Agency to communicate their respective views so that each can react directly to the concerns and positions of the others in an effort to resolve conflicts. Experience indicates that if parties in interest were to work together to negotiate the text of a proposed rule, they might be able in some circumstances to identify the major issues, gauge their importance to the perspective parties, identify the information and data necessary to resolve the issues, and develop a rule that is acceptable to the respective interests, all within the contours of the substantive statute."

This condemnation of rulemaking coupled with the election of negotiation as an alternative decisionmaking device has been suggested in the past. However, the action of the Administrative Confer-
ence is one of the few formal statements by an official body condemning rulemaking practices and opting for negotiation.6

In addition to arguing that consensual decisionmaking systems can be used to formulate rules, instead of using rulemaking, such systems can be used as a substitute for administrative adjudication. The criticisms leveled by the Administrative Conference are often applied to adjudicatory settings, although the language often differs.7 The characteristics of a trial-type hearing are compelling when such hearings are used to resolve disputes between private entities. However, the dynamics of adjudication seem particularly inappropriate when that system is used both for the formulation of policy and for the implementation of broad-based government programs.8 Tactics of delay and various types of litigation posturing plague such adjudicatory systems, frequently resulting in expensive and unmanageable proceedings.9

In an adjudicatory setting, directly affected parties play virtually no role in issuing decisions, but instead are cast in the role of adversaries.10 The adversary environment creates hostility and resentment, and inevitably leads to a rejection of standards which evolve, and a disrespect for such systems, with the end product being low compliance and difficult enforcement.11

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7The problems with administrative adjudication need little recitation. At the agency level, the problem is often referred to as "overjudicialization," a catch phrase suggesting that adjudication can be time consuming, expensive and have a "generally debilitating effect on the administrative mechanism." The President's Advisory Council on Executive Organization, A New Regulatory Framework: Report on Select Independent Regulatory Agencies, 49–50 (1971) cited in S. Breyer and R. Stewart, Administrative Law and Regulatory Policy (1979).

8See Cramton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 Va. L. Rev. 585, 590 (1972) where the author asserts: "issues must be severely compressed and put in bi-polar form... procedure is intricate and specialized, lawyers come to dominate the decisionmaking process even though many issues may be nonlegal... the adjudicator... may be less concerned with long-term consequences of the decision or a series of decisions. The focus on 'justice in the individual case' does not lend itself to intelligent forward planning... and to a concern for the aggregate effects of individual decisions."


11Although the scope of the problem is unknown, it is likely that in a very large number of cases regulatory toughness in its legalistic manifestation creates resentment and resistance, undermines attitude and information sharing practices that could otherwise be cooperative and constructive, and diverts energies of both sides into pointless and
There is little dispute that a negotiation format can be used as a decisionmaking device for matters now resolved through the adversary process. Whether negotiation will provide a smooth and swift system of dispute resolution is another question. Basic role perceptions will change, and redefinition of the function of administrative law judges will be a necessity. Such fundamental redefinition will require changes in the Administrative Procedure Act and in other basic substantive legislation affecting administrative action. Under the present system, agencies play a significant role in assisting parties in the negotiation and settlement process. Should negotiation and consensual decisionmaking become a part of the compulsory agency process, there is little reason to think that agencies would be incapable of performing the assistance roles necessary, though there is no existing agency model to support this proposition.

Notwithstanding the lack of empirical data studying consensual decisionmaking as a component of agency process, there is nonetheless dispiriting legal routines and conflicts. R. Kagan & E. Bardach, Going By The Book: The Problems of Regulatory Unreasonableness (1982).


See supra n. 10.


An excellent nonempirical analysis of consensus decisionmaking finds these values: . . . [W]hile the adversary system encourages "exaggerated, inflexible posturing," negotiation yields a pragmatic search for intermediate solutions. Because negotiators learn other parties' economic and political constraints, they may realize the impracticability of their own bargaining position and discover more common ground than they would as adversaries. Negotiation exposes genuine preferences by forcing parties to rank their goals and trade lesser items for desiderata. Finally, while lawyers and lobbyists—who by training and business interest thrive on disputes—run the adversary process, leaders of the affected groups—who are more interested in the outcome than the fight—would themselves be the principals in the negotiation process. Note, Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking, 94 Harv. L. Rev. 1871, 1876-77 (1981).
overwhelming support in the literature for the proposition that consensual decisionmaking and negotiation models are valuable and under-utilized means of decisionmaking.19 The very idea of collective action and negotiation, frequently expressed as sub-government decisionmaking, has been central to political science literature for some years.20 Should the proposal of the Administrative Conference pass through Congress, then some of the ideas on consensual decisionmaking and regulatory negotiation will be tested very quickly.21

Will consensual decisionmaking work more efficiently than existing systems? "Regulatory negotiation is a type of interest representation. . . . It relies not on the opinions of appointed administrators . . . developed through an adversary process but on the views of those directly affected. If negotiators effectively represent all interests, negotiation should make the administrative process more democratic while enhancing regulatory efficiency."22 The role a federal agency would play, however, is by no means clear. For example, if negotiation fails the benefits of consensual process become inconsequential, and the need for agency action returns.

Negotiation failures could be the triggering device for the conventional notice and comment rulemaking.23 A different approach would impose a highly expedited model of agency rulemaking, coupled with a piercing judicial review as the "second tier," should the negotiation model not come to resolution. A third alternative would involve the development of an arbitration system to be activated in the event that negotiation does not produce a useful result within a fixed time frame. Arbitration could be conducted by a small number of designated representatives and would be binding on all parties.

Whatever problems consensual systems might encounter, the risk seems well worth the undertaking. This is especially true when one considers the present state of administrative process.

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21P. Harter, supra note 6 concerning S. 1601, the Regulatory Mediation Act of 1981, 97th Cong., 1st Sess., September 9, 1981, which seeks to "establish an alternative rulemaking procedure which includes the establishment of regulatory negotiation committees," at 4 of the bill.


23Id. at 1876.
B. A Caselaw Perspective of Existing Systems

The system of administrative decisionmaking is currently undergoing thorough review. Judicial review of administrative action suggests disenchantment with the existing methodology of decisionmaking, substance of decisions, and the scope of decisions rendered by administrative agencies in the last few years. The problem with agency decisionmaking reflects a perceived national distrust, disinterest, or misunderstanding of federal regulatory procedures. An anti-regulatory sentiment is often coupled with demands for consideration of alternatives, although no broad based reform has occurred.

While there are a variety of reasons for the disenchantment, and while one might contest the intensity of the attack on agency decisionmaking, it is impossible to escape the conclusion that the last five years have witnessed a vigorous and comprehensive attack on major regulatory systems. This undifferentiated assault constitutes a dangerous development, particularly in the area of health and safety. The "marketplace" does not protect the environment, or enhance the public's health and safety. Furthermore, certain forms of economic regulation are critical to a stable, functioning, nondiscriminatory, organizationally diverse and competitive economy. This ideological perspective is far less important


\[\text{For the most recent efforts, see Regulatory Reform Act, Report of the Comm. on the Judiciary of the U.S. Senate to accompany S. 1080, S. REP. No. 97-284, 97th Cong., 1st Sess. (1981).}\]


\[\text{There is little question that health, safety, and environmental issues are "externalities which the market cannot fix." The Proposed Regulatory Reform Act: Hearings on S. 1080, Before the Subcomm. on Regulatory Reform of Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 2 (1981) (statement of Robert B. Lave). See also Ramo, The Regulation of Technological Activities: A New Approach, 1981 A.B.A. J. 1456, 1456 (stating "(n)o marketplace sets a price for an extra year of life or a month's supply of breathable air.")}\]
than an assessment of what has occurred; and what has occurred in a number of areas is substantial evisceration of the protection provided by governmental intervention.

While our regulatory system must change and respond to the demand for a more appropriate role for the federal government, the next generation of federal regulation is not predetermined. Now is the time for critical examination of alternatives to current regulatory process. If consensual decisionmaking, using a negotiation format, is effective, inexpensive, and unintrusive, it could become an important component of the American regulatory calculus. It has been underutilized in the past, leaving federal employees with the staggering responsibility of making tens of thousands of decisions in isolation. Carefully planned, such systems can avoid the disadvantages inherent in governmental "corporatism," and allow the government to play an efficient and compelling role. Consensual decisionmaking systems can be developed that include government participation as one component of a decisionmaking group, rather than as the singular decisionmaking entity. Simply stated, interaction between parties of varying interest (ultimately broken down through the voting process) coupled with direct participation and oversight by federal agencies, may be the regulatory model of the future.

The conclusion that major changes are needed in the manner in which administrative decisions are made stems in part from a review of several select and typical judicial decisions. These are cases where courts have remanded cases to agencies because the agency misinterpreted its congressional mandate, failed to follow basic procedural requirements, and where agencies appear to have abdicated their primary statutory responsibilities.

In American Trucking Associations, Inc. v. Interstate Commerce Commission, the Court was confronted with guidelines and restrictions issued by the Interstate Commerce Commission after the passage of the Motor Carrier Act of 1980. The Court acknowledged that while agencies were to be accorded considerable latitude in the issuance of "interpretive rules" and "general statements of policy" that latitude does not include the general authority to reinterpret a congressional mandate. In interpreting the act, the Commission decided that general commodities carriers could perform household goods transit with-

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29659 F.2d 452 (5th Cir. 1981).


out any additional demonstration of fitness, willingness or capacity to provide household goods service. In finding this interpretation to be outside the obvious meaning of the congressional mandate, the Court held:

"[I]t is illogical and unreasonable for the Commission to permit any general commodities carrier to perform household goods transportation without any further demonstration of its fitness, willingness, and ability to perform such service."

The strength of the Court's condemnation is noteworthy. In characterizing Commission action as "illogical and unreasonable," the Court's dissatisfaction with the Commission's activity is apparent. Similarly, on the question on the expansion of existing authority, the Court stated:

"We are unable to find support in the statutory language for the Commission's conclusion that it was required, or even authorized, to implement the policies of the Motor Carrier Act by granting to new applicants the very broad authorities it prescribes."

In condemning the Commission for its expansion of congressional mandate, the court acknowledged that the acts of the Commission were well-intended. The Commission's motivation for expansion of authority does not excuse the abuse of discretion.

These objectives may be laudable. They would be served even better by the complete removal of all licensing requirements. . . . Congress did not, however, see fit to deregulate motor carriage. Indeed, it explicitly forbade the Commission to go beyond the powers vested in it by statute and provided it in such detail, both for the removal of restrictions on existing certificates and for the alteration of the public convenience showing necessary for the approval of new certificates, that it would be anomalous to leave to inference a matter of such significance as the general broadening of new authority. . . .

The Motor Carrier Act continues to require the Commission to exact in the future, the showing of at least general fitness, willingness and ability to perform the services authorized by the certificates. . . .

In addition to the court's finding that the Commission had misinterpreted basic components of the certification system, the court found the Commission had created a genuine risk in the tank truck area by allowing the certification of carriers not properly suited for the transportation of hazardous bulk materials. The American Trucking Association case thus reflects an example of the desire of an administrative

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3659 F.2d at 467.
37659 F.2d at 470.
38659 F.2d at 452.
39659 F.2d at 454.
agency to reduce and eliminate regulatory provisions which Congress found necessary.

A different, but nonetheless serious problem in agency misinterpretation occurs where federal agencies seek to alter requirements in a direction different from that set out in congressional mandates. For example, in *Office of Consumer’s Council v. Federal Energy Regulatory Commission,* the court condemned the Federal Energy Regulatory Commission for exercising direct authority over the manufacture of unmixed synthetic fuels, when no such authority was intended by the Congress. The Court held:

> It is not for an administrative agency, however, to preempt Congressional action or to “fill in” where it believes some federal action is needed. It goes without saying that appropriate respect for legislative authority requires regulatory agencies to refrain from the temptation to stretch their jurisdiction to decide questions of competing public priorities whose resolution properly lies with the Congress.

> In sum, . . . the Commission acted without proper authority. . . . Congress has repeatedly declined to permit any extension of FERC authority into the synthetic gas area; on the other hand, it has specifically authorized a different governmental unit to undertake the tasks which FERC sought to perform through questionable use of its regulatory tools. In addition FERC improperly ignored contemporaneous congressional activity in its attempt to “fill in” where it believed some federal financial help was needed.9

Again the court acknowledged that the agency acted in a well-intended manner seeking to resolve the nation’s energy problems, but found no justification for an obvious expansion of congressional authority.8 Any administrative agency’s inherent power includes the prescription of rules and regulations; it is not the power to make new law, or by regulation to render existing laws a nullity.9 The appropriate role of a federal agency “remains basically to execute legislative policy; they are no more authorized than our courts to rewrite acts of Congress.”40

The cases involving an agency’s attempt to expand its mandate should be distinguished from decisions where courts disagree with an agency’s substantive factual findings, or matters of legal interpretation

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8655 F.2d 1132 (D.C. Cir. 1980).
57 655 F.2d at 1152–53.
38Kaiser Aluminum and Chemical Corp. v. FTC, 652 F.2d 1324 (7th Cir. 1981); E.I. duPont de Nemours and Co. v. Train, 541 F.2d 1018 (4th Cir. 1976); Aqua Slide ‘n’ Dive Corp. v. Consumer Product Safety Comm’n, 569 F.2d 831 (5th Cir. 1978).
where courts and agencies differ. These cases are the historical grist of judicial review, and courts continue to perform substantive oversight. Likewise, courts continue to defer to agency fact-finding, agency interpretation of substantive statutes, and to the choices agencies make in deciding whether to conduct a rulemaking or an adjudicatory proceeding.

The end product of dissatisfaction with administrative action has been the confinement of agency jurisdiction. Notwithstanding a strong argument to the contrary, the court held in *Greyhound Corporation v. ICC* that the ICC did not have jurisdiction over the Greyhound Corporation's securities activities. Similarly, in *Federal Trade Commission v. Turner* the court confined a section of the Federal Trade Commission Act which, the Commission argued, provided authority to determine the practical feasibility of various damage actions on behalf of the general public. "Absent a specific congressional mandate or a clearly discernable statutory implication, we will not find that the FTC has the claimed investigative authority in its new role."

Some further recent cases reflect judicial attacks on agency action, where the procedures followed by agencies appear to either obscure congressional intent, or frustrate basic rights and interests the agencies are required to protect. In *Illinois v. Gorsuch,* the court held that the delays by the Environmental Protection Agency in promulgating regulations for hazardous wastes bordered on an abdication of statutory responsibility. The court refused to permit the agency to delay the publication of rules, a power the agency believed it had. It ordered the agency to enforce explicit statutory deadlines challenging the tradi-

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41See infra n. 38.
4351 F.2d 414 (D.C. Cir. 1977).
44609 F.2d 743 (5th Cir. 1980).
45Compare Ford Motor Co. v. FTC, 654 F.2d 599 (9th Cir. 1981) which restricts basic adjudicatory power of the agency.
46609 F.2d at 745.
47Id.
tionally discretionary housekeeping powers of the agency. In a similar vein, the United States District Court for the District of Columbia condemned the Occupational Safety and Health Administration for a failure to promulgate statutorily mandated standards on drinking water for various types of seasonal agricultural functions.\textsuperscript{50}

A vigorous attack on agency action can be found in \textit{Ford Motor Company v. Federal Trade Commission}.\textsuperscript{51} The court held that the FTC would be prohibited from announcing a rule of broad and general applicability in an agency adjudication.\textsuperscript{52} Though the Federal Trade Commission could have promulgated its rule of general applicability in an ongoing rulemaking, the decision to announce the rule in an adjudication was deemed to be in excess of federal agency jurisdiction.\textsuperscript{53} This type of jurisdictional restriction seems as much a political statement of the court's dissatisfaction with agency decisionmaking as it does a judicial interpretation of prior opinions.\textsuperscript{54}

The power to articulate new standards in an adjudication is limited, requiring the agency to evaluate the destructive nature of a retroactive standard against the need for the agency action.\textsuperscript{55} The court's decision in \textit{Ford} seems to challenge the power of the agency to make such a balancing. A variation on this theme is \textit{McDonald v. Watt}\textsuperscript{56} where the Fifth Circuit found that the Federal Energy Regulatory Commission had, in all likelihood, failed to do the basic balancing required prior to the articulation of a retroactive standard.\textsuperscript{57} Similarly, in \textit{Sheperd v. Merit Systems Protection Board},\textsuperscript{58} a court found that the agency failed to consider the effect of the complexity of its regulations on those subject thereto, suggesting an insensitivity to basic procedural requirements on the part of the agency.\textsuperscript{59}

Justifiable dissatisfaction with agency decisionmaking exists. Agencies have been scolded for failing to follow their own rules,\textsuperscript{60} to provide

\textsuperscript{51}654 F.2d 599 (9th Cir. 1981).
\textsuperscript{52}Id at 601.
\textsuperscript{53}This portion of the opinion appears to directly conflict with SEC v. Chenery Corp., 332 U.S. 194 (1947) and with Nat'l Labor Relations Bd. v. Bell Aerospace Co., 416 U.S. 267 (1974).
\textsuperscript{54}654 F.2d 825 (D.C. Cir. 1981).
\textsuperscript{56}653 F.2d 1035 (5th Cir. 1981).
\textsuperscript{57}The Court did not address directly the misapplication of Chenery since it found an abuse of discretion in other components of the agency decision. 653 F.2d at 1045–46.
\textsuperscript{58}652 F.2d 1040 (D.C. Cir. 1981).
\textsuperscript{59}Id at 1045.
a needed forum, and for procedurally shortchanging parties by labeling interests affecting decisions as "interpretive rules policy guidelines."61 These shortcomings alone do not mandate a radical shift to alternate forms of decisionmaking. However they are sufficient to suggest serious consideration of other systems.

In proposing consideration of an alternative form of decisionmaking, in part predicated on the dysfunction displayed in the cases above, some thought must be given to the general question of agency competence. One interpretation of the above sampling of cases is that agencies can no longer be expected to perform efficiently.62 However, there is no meaningful empirical data to support that contention. "[R]egulatory commissions have performed their functions far better than currently credited and...their failings and shortcomings are specific, concrete and readily susceptible to remedy."63 Agencies have been overseeing systemic modifications and changes in regulatory functions have produced highly beneficial results.64 However, there has been only a limited response to criticisms of dysfunction and few examples of agencies undertaking affirmative steps to improve their decision-making process.65 Accordingly what is suggested is not just fine tuning of existing systems but consideration of an alternative means of decisionmaking.

It is impossible to predict what changes will occur in the next few years, though it is likely that there will be revisions of substantive law.66

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61Batterton v. Marshall 648 F.2d 694 (D.C. Cir. 1980); Gott v. Cleland, see note 48; Church of Scientology of Cal. v. Harris, 653 F.2d 584 (D.C. Cir. 1981).
62V. Rosenbloom, Competition as a Nostrum for Regulated Industries: Legal Factors of Precedent and Primacy (1975) (Conference paper, Northwestern Univ. Law School), states as follows:

If agency practices fail to expand public participation in government, to focus public spotlight on wasteful and inefficient practices, or to produce prices, supplies and quality or service within an equitable range for all of us, it is not because the inherent incapacities of the regulatory system are as nonexistent as the Emperor's new clothes in the children's fable. The fault lies rather with the inadequacies, mediocrities and occasional political perversities that have been allowed or encouraged at times to creep into its administration and implementation.


Steadily and quickly, the Reagan Administration is rolling back more than 15 years of
However, it may well be that these "reforms" are perceived as necessary because of the dissatisfaction with the process and results of standard administrative decisionmaking. A model which gives to those affected a role in the decisionmaking process, may engender a thoroughly different political response. Whatever that future response may be, the present perception of the validity of administrative systems is best measured by taking stock of the last few years. Congress has eliminated major components of agency responsibility, while agencies have followed suit by abdicating existing responsibilities. The variety of "cutbacks" of the federal system is well recognized. While there are isolated examples of agencies attempting to respond affirmatively to the onslaught, the general condition of the regulatory environment is unstable.

The changes in the nature and scope of federal agency activities, which have produced a vacuum in critical areas, might not be so disturbing, were an aggressive antitrust enforcement policy in place, creating additional market pressures. However, that antitrust vigor is not readily apparent. It is certainly not apparent in the regulated

Consumer Protection Regulation. From the FTC to the Food and Drug Administration to U.S.D.A., Reagan appointees are reversing, suspending and reviewing dozens of rules that had represented some of the biggest achievements of the consumer movement. The existence of some of the very agencies that were created by the consumer movement are in jeopardy. Earlier this year the administration proposed the abolition of the 9 year old Consumer Product Safety Commission. Although Congress failed to go along with this proposal, it did agree to the President's proposal to cut CPSC's budget by 30%.

67See supra n.27.
68See, e.g., In re Exxon Corp., No. 8934 (F.T.C., 1981), Federal Trade Commission dropped an eight year investigation into the Exxon Corporation explaining its action only by saying that the litigation had become unwieldy and impracticable. Id at 4.
69See Reagan Regulatory Era, Legal Times of Washington, Oct. 26, 1981, at 1; Computer and Communications Industry v. FCC, No. 80-1471 (pending D.D.C. 1981), in which the Justice Department has attacked the FCC in a brief filed in the first week of November 1981, on the grounds that the FCC has never explained how it can allow AT&T to set up corporate subsidiaries without using its monopoly power to gain advantages in various unregulated markets. Segments of the department's brief are reported in Legal Times of Washington, Nov. 9, 1981, at 14; see also, EPA Steps Back from Money Penalties, Legal Times of Washington, Nov. 30, 1981 at 1.
industries where there is a well-recognized congressional failure to provide direction for a uniform policy on competition.\footnote{8883 (F.T.C. filed Sept. 1, 1981); In re E.I. DuPont de Nemours & Co., No. 9108 (F.T.C. filed Oct. 20, 1980).} Alternatively, the fact that the "Congress has created bad regulatory legislation"\footnote{Shuman, \textit{The Application of the Antitrust Laws to Regulated Industries}, 44 TENN. L. REV. 1, 68–69 (1976). Regarding the reduction in the effect of the antitrust laws, it should be noted that "[t]he antitrust laws are most effective in their efforts to preserve competitive market structures through prohibitions on mergers." Breyer, \textit{Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform}, 92 HARV. L. REV. 549, 578 (1979).} is a possible explanation for the radical change in the influence and prestige of regulatory process. In this environment of changing regulation and modified antitrust enforcement, the appropriate role of the federal government in the next decade is at issue.

A projection of this article is that the government may become a participant in a variety of different forms of decisionmaking where affected parties become actual decisionmakers. This is suggested with the understanding that there are those who believe that no matter what the government does, it will be fatally flawed by the fact that the federal government is doing it. Justice Douglas articulated this sentiment in his dissent in \textit{Sierra Club v. Morton}.

The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relationships, or who have that natural affinity with the agency which in time develops between the regulator and the regulated. As early as 1894, Attorney General Olney predicted that regulatory agencies might become "industry-minded," as illustrated by his forecast concerning the Interstate Commerce Commission:

The Commission ... is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of the railroads, at the same time that the supervision is almost entirely nominal. ... M. Josephson, \textit{The Politicos}, 526 (1938).

Years later a court of appeals observed, "The recurring question which has plagued public regulation of industry [is] unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect."\footnote{Ramo, \textit{The Regulation of Technological Activities: A New Approach}, 67 A.B.A. J. 1456 (1981).}

Obviously, there are some who believe that federal agencies are inherently incapable of functioning effectively and for them arguments about consensual decisionmaking will be as suspect as were
discussions on rulemaking a decade ago. Some type of federal decisionmaking system will, however, be in operation. Resolving the problems experienced by federal agencies in promulgating effective standards, and similar regulatory dysfunction through existing procedures seems unlikely, however, where expediting devices are used which exclude effective public participation. In this regard, the comments of John F. Kemeny are instructive:

Our decisionmaking process is breaking down. The problem is whether our current political process can handle the complex issues of modern society—highly technical questions of science and technology that also involve value judgments... I am still a believer in democracy, but I think some changes will have to happen in the practice of it. We have to have a forum for effective discussion of highly technological issues, so that there is a clear consensus on what science and technology say about an issue. Then the political process can make the value judgement.

C. Changes in the Regulatory Process in Terms of Competition Policy

Political changes have given rise to shifts in regulatory emphasis creating new and perplexing questions. One would have thought that deregulation would have spurred an increase in antitrust activity. Instead federal antitrust efforts no longer appear to protect general market diversity interests, nor demonstrate concern over concentrated markets. Since the vigor of regulation has been historically balanced against the extent to which antitrust matters are pursued, a decline in antitrust enforcement should be accompanied by an increase in effective regulation. However, the Federal Trade Commission cases discussed below are illustrative of the lack of "regulatory antitrust" activity. When one considers the massive changes in standard regulatory systems, the disenchantment with the existing administrative agencies, and those phenomena are coupled with reduced antitrust vigor, the need to consider alternatives, such as consensual process, becomes most pronounced.

79Ramo, supra, note 77 at 1462.
80See supra n.27.
In October 1980, the Federal Trade Commission decided *In the Matter of E.I. DuPont DeNemours and Co.*

In that case, the Commission was confronted with an entity which enjoyed significant market power and had participated in a series of pricing practices, as well as market projections, which the staff alleged were a violation of section 5 of the Federal Trade Commission Act. The decision issued by the Commission absolved DuPont, using a slightly unusual interpretation of *United States v. Aluminum Co. of America.*

The opinion suggests that *Alcoa* is not a case which should be used to support the proposition that certain forms of market control are unlawful. Rather, the Commission perceives *Alcoa* as permitting monopolies created by natural phenomenon, force of accident, or survival by virtue of superior skill, foresight or industry.

This interpretation is at odds with basic antitrust theory which views *Alcoa* as the strongest structural monopoly case of the last four decades. The Commission suggests the case is an aberration. Contrary to the Commission's point of view, *Alcoa* is more often seen as a case that establishes a basis for structural monopolization prosecutions where certain forms of market projection, and long term planning to deliberately maintain market power may be sufficient to show a violation of the Sherman Act.

After analyzing *Alcoa*, the Federal Trade Commission found importance in cases such as *Berkey Photo Inc. v. Eastman Kodak* and *California Computer Products v. IBM Corporation.* These cases deal with expansion of the “business justification” defense, and are reasonably construed as “defendant’s cases.” By the end of the *DuPont* opinion, the *Alcoa* case is treated as an exception to established principle, rather than a seminal monopoly case. Having thus distinguished *Alcoa*, the Commission held that:

> [i]t may be that DuPont ultimately will achieve a monopoly share of the market. As its share increases, other firms may find it harder to capture the efficiencies enjoyed by DuPont due to the scale economies. . . . Antitrust policy wisely disfavors monopoly, but it also seeks to promote vigorous

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*See n.71.*


148 F.2d 416 (2d Cir. 1945) [hereinafter cited as *Alcoa*].

148 F.2d at 431.


603 F.2d 263 (2d Cir. 1979), cert. denied, 100 S. Ct. 1061 (1980).

613 F.2d 727 (9th Cir. 1979).
competitive behavior . . . that process would be ill-served by using antitrust to block hard, aggressive competition . . . even if monopoly is a possible result.\textsuperscript{89}

The Federal Trade Commission's trend away from structural cases was confirmed one year after the DuPont opinion. In In the Matter of Exxon Corporation, the Federal Trade Commission dismissed a proceeding against one of the nation's largest petroleum entities.\textsuperscript{90} The Commission characterized the eight-year investigation into the mammoth corporation as "impracticable," and then weakly suggested that an antitrust trial in the case could take an additional three years. On this rationale, the Commission decided to dismiss the proceeding, leaving an option to reopen at a later date.\textsuperscript{91} Fear of the extensive time required for antitrust litigation seems a wholly inadequate reason to dismiss a case against a company of this nature.\textsuperscript{92} In light of the serious nature of the charges this decision seems to border on an abdication of responsibility.\textsuperscript{93}

The Exxon case was in a very different posture on October 31, 1980, when the filing of the "Factual Contentions and Proof" by the staff reflected forty-six charges against the Exxon Corporation, any one of which, if proven, may well have been a violation of section 5 of the Federal Trade Commission Act. Price fixing, gross predatory practices, and erection of insurmountable entry barriers, pervaded the complaint.\textsuperscript{94} Quite clearly, the dismissal of this case reflects one of two things. Either, the Federal Trade Commission feared further budgetary cutbacks, and felt that it could appease certain political interests by the dismissal of this case; or senior staff at the Commission have, consistent with the apparent national political direction, shifted away from any form of vigorous government-based regulatory activity.\textsuperscript{95}

The final major Federal Trade Commission decision indicating a shift in regulatory policy regarding competitive markets is the Cereal

\textsuperscript{89}DuPont, No. 9108 at 750.

\textsuperscript{90}No. 8934 (F.T.C. 1980), See, n. 71.

\textsuperscript{91}Id. at 4.


\textsuperscript{94}Complainant's First Statement of Issues at 84-352, \textit{In re} Exxon Corp., No. 8934 (F.T.C. 1980).

\textsuperscript{95}To even a casual observer, it should be obvious that the antitrust laws are a vigorous form of regulation, notwithstanding the fact that they are usually mentioned in an open market context.
case, In the Matter of Kellogg Co., General Mills, Inc. and General Foods Corp. Some considered the Cereal case an experiment, and belittled its significance. Nevertheless, the subject of shared monopoly, which lies at the heart of this case, involves one of the most profoundly difficult problems in the antitrust field. Three years prior to the Federal Trade Commission decision, the Justice Department issued a memorandum on the shared monopoly problem, in which the department announced that it would make a "maximum effort in this area since the potential benefits to the economy are enormous." The Department believed certain markets would benefit from antitrust enforcement pursuant to a shared monopoly theory. The Department listed various information exchange mechanisms, price and product standardization systems, and other mechanisms that might prevent competition from functioning effectively. It was not until the Cereal case, however, that the administrative law side of antitrust enforcement had an opportunity to rule on shared monopoly. The Cereal case was to be the opportunity to inform the public of the evolving federal policy regarding the legitimacy of shared monopoly. The Federal Trade Commission responded to this with the following proposition: "it would serve no purpose to consider in a vacuum what factual showing, if any, of industry conduct and performance would constitute a 'shared monopoly' violation of section 5, and might justify an order restructuring an industry. Such a showing has not been made here."

While one might not dispute the findings of fact that led to the outcome, it is difficult to understand why the administrative law judge was so reluctant to even discuss legal theory. As with the Exxon case, there are several possible reasons for the judge's reticence to shed any light on the evolving shared monopoly theory. First, a fear of further congressional cutbacks in the authority or budget of the Federal Trade Commission would not be an unrealistic motivation. Second, the judge may have been justifiably frightened by cases such as Ford Motor Company v. Federal Trade Commission which reflect a desire to judicially circumscribe the authority of the Federal Trade Commission. Finally,
the judge may well have sensed that a change has taken place regarding the general role of federal competition regulation.\textsuperscript{103}

There can only be speculation regarding the motivation of the Federal Trade Commission's decisions in *DuPont*, *Exxon* or the *Cereal* case. What is not speculative is that three well-developed structural antitrust proceedings, each reflecting a massive investment in terms of government personnel, and each reflecting an individual regulatory ideology of market control, have either been dismissed on the merits or dropped by the federal agency responsible for the regulatory implementation of the competition system. Unlike much of the earlier material reflecting dissatisfaction in the procedural workings of federal agencies, these cases reflect a substantive disillusionment and suggest a need for consideration for different forms of federal intervention.

Ultimately, in trying to pin down what has happened in the last few years in the regulatory world, we are left with a series of confusing and disjointed decisions. Contrary to the hopes of some, the clock will not be turned back to a period of vigorous regulatory intervention with governmental entities being primary decisionmakers.\textsuperscript{104} Quite simply, major regulatory programs have changed\textsuperscript{105} and there is little reason to think that "regulatory analysis" will provide a substantial shift in the success or acceptability of governmental regulation.\textsuperscript{106} Likewise, implementation of Executive Order No. 12291,\textsuperscript{107} will not make regulatory

\textsuperscript{103}See Comment, Regulatory Reform: Will an Injection of Competition Cure the Patient, 52 Tul. L. Rev. 362 (1978).

\textsuperscript{104}See Note, NRA Antitrust Review of Nuclear Power, 1980 Law Forum 1011, in which the author posits that antitrust enforcement in the nuclear power field is "becoming an important forum in which to discuss economic regulation issues." Political reality has invaded this most sensitive function of the federal government, undertaken pursuant to 42 U.S.C. § 2135 (1976). In May 1981, the number of lawyers enforcing the antitrust laws at the Nuclear Regulatory Commission pursuant to 42 U.S.C. § 2135 (1976) was reduced from a staff of twelve to one section chief and two litigating attorneys, all of whom have responsibilities in other areas in the office of the executive legal director. Moving personnel away from critical regulatory functions has become commonplace. See, e.g., Internal RIFs, Huge Staff Cut Hint EPS Retreat on Programs, Washington Post, Sept. 30, 1981, § A at 1.

\textsuperscript{105}See n.27.


\textsuperscript{107}Exec. Order No. 12,291, 46 Fed. Reg. 13193 (1981), requires executive agencies to submit proposed administrative rules to the Office of Management and Budget for a cost-benefit analysis. The order requires a determination of the "net benefits" of the rule (§ 3(d)(4)) both in monetary and nonmonetary terms. The order applies to "major rules" (§ 1(b)) and is designed to allow the Office of Management and Budget to prohibit the implementation of any rule that appears incapable of paying its own way. See generally Rosenberg, Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking under Executive Order 12291, 80 Mich. L. Rev. 193 (1981).
operations more effective merely because the Office of Management and Budget becomes involved in the process. "The OMB staff alone is not a unique repository of balanced perspective of the national interest." In light of this change, consideration of alternatives is appropriate.

D. Potential Antitrust Liability for Consensual Decisionmaking

Before considering some examples of consensual process, a brief synopsis of potential antitrust liability seems appropriate. The discussion in section I(c) above suggesting a decline in the intensity of federal antitrust efforts should not be read to mean that those who participate in classical conspiracies, particularly those with price influencing features, will be saved from the rigors of antitrust scrutiny. Even if the government chooses to take no action, the availability of private treble damage actions will present a formidable deterrence to certain types of collective action. Indeed the very process of consensual decisionmaking creates a risk of antitrust liability of sufficient magnitude to call into question the advisability of the practice in many circumstances. At a minimum, the election of consensual decisionmaking as an administrative decisionmaking device ought to be accompanied by either express immunity, a strong and convincing implied immunity or, if immunity is unclear, an understanding that there is a presumption against implied immunity. If no immunity argument can be made, then the election of consensual decisionmaking must include an understanding of potential antitrust liability for organized collective action.

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109 See n. 71.
Liability would most likely be for a violation of section one of the Sherman Act, on the premise that meetings of competitors are presumptively held for the purpose of conspiring to restrain trade.

If express immunity is provided by legislation for identified participants, the only question is whether the activity undertaken is within the ambit of the immunity. If express immunity is not provided by statute, several points must be considered. First, if the rule, decision or agreement that is the end product of the negotiation is to be submitted to a government agency, that fact alone will not immunize the process. Further, unless the decisionmaking system and regulatory review clearly displace open market forces, or there is a patent repugnancy between the operation of the antitrust system and the regulatory system submittal to a governmental body of a collectively produced product is not immunized. Finally, if there is an extensive regulatory program and if the activity of the parties to the negotiation is compulsory, an argument can be made that the process should not be subjected to antitrust scrutiny. It would not be enough to argue that there is an extensive regulatory program and that compliance therewith is in the public interest.

A different approach to the immunity question is to assert that the right of petition and associational interests would be jeopardized were the antitrust laws to impinge on consensual systems where the outcome of consensual process would be used to effect a governmental decision. This doctrine has been held expressly inapplicable to intrastate collective ratemaking. Further, the Supreme Court has viewed

117Board of Trade of City of Chicago v. ICC, 646 F.2d 1187 (7th Cir. 1981).
the doctrine restrictively\textsuperscript{126} and general reliance on such assertions is probably unwise.

Assuming consensual activity is not immunized, collective activity that is price influencing is \textit{per se} unlawful\textsuperscript{127} even though there is another perceived beneficial effect of such interaction.\textsuperscript{128} Classical arguments regarding the need to coordinate or "order" a marketplace have usually failed\textsuperscript{129} unless it can be proved that there is no demonstrable economic effect\textsuperscript{130} or that the discussions involve nonprice data.\textsuperscript{131} While not every discussion between competitors which has a price influencing character will be found \textit{per se} unlawful,\textsuperscript{132} particularly if the market practice is being evaluated for the first time,\textsuperscript{133} escaping the \textit{per se} designation provides only the opportunity to demonstrate that a collective practice is not an unreasonable restraint of trade.

To demonstrate reasonability, it is often necessary to show that the interaction leaves a margin for subsequent noncollective price modification,\textsuperscript{134} was accomplished in a "fair and open" manner,\textsuperscript{135} or is otherwise needed to maintain more central competitive pressures.\textsuperscript{136}

\textsuperscript{126}See supra n.122.
\textsuperscript{128}Fashion Originators Guild of Am. v. FTC, 312 U.S. 457 (1951); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); U.S. McKesson and Robbins, 351 U.S. 305, 310 (1956).
\textsuperscript{129}United States v. Socony-Vacuum Oil, 310 U.S. 150 (1940); Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918); see Eilberger v. Sony Corp. of Am., 622 F.2d 1068, 1076 (2nd Cir. 1980) (adopting the standard of Chicago Board of Trade v. United States, 246 U.S. 231 (1918)).
\textsuperscript{132}Broadcast Music, Inc. v. Columbia Broadcasting Systems, 441 U.S. 1, 23 (1979); Central Iowa Power Coop. v. FERC, 606 F.2d 1156 (D.C. Cir. 1979).
Those defending the consensual process do not have a simple burden in a reasonable restraint case; they must show that an open discussion between horizontally aligned competitors is necessary to facilitate market competition and is the least restrictive way of accomplishing that goal. Each consensual decisionmaking process will have this burden, unless provided with express immunity. Naturally, the more the negotiation topics focus on nonprice data, on information dissemination and publication rather than price establishment or are perceived as critical to the provision of a public service the greater the likelihood that such practices will be construed as "reasonable restraints" and thus lawful.

Parties should not be advised to participate in such systems without an appreciation of the risk, unless prior case law suggests that the collective action will be found reasonable, or existing legislation expressly protects parties from antitrust scrutiny. Even in dialogue that is by any definition nonprice, the risk of market manipulation and potential antitrust consequences is present.

The discussion above relates to antitrust problems that result from the inherent nature or structure of consensual decisionmaking. A final antitrust concern is that parties involved in consensual processes are at risk, not just because of the collective structure of such systems, but also because such systems are capable of being abused by overly aggressive participants. In American Society of Mechanical Engineers v. Hydrolevel, the Supreme Court found that a standard setting group can be liable for the intentional and covert anticompetitive actions of a few of its members. Relying on basic agency principals, the Court imposed liability on the consensual group for activity which constituted a secret conspiracy between two persons to injure a competitor, on the premise that the conspiracy had been accomplished using the resources and forum provided by the standard setting body. The case does "not delineate . . . the outer boundaries of the antitrust liability of standard setting organizations for the actions of their agents committed with

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137 See Broadcast Music, n.132.  
138 See National Society of Professional Engineers, n.132.  
139 See Maple Flooring, n.132.  
141 Central Iowa Power Co-op v. FERC, 606 F.2d 1156 (D.C. Cir. 1979).  
apparent authority." It does, however, suggest extreme caution in terms of ensuring that consensual systems are well run and that the process of decisionmaking is conducted with a consciousness of potential antitrust risk.

CONSENSUAL DECISIONMAKING SYSTEMS

A. General Categories of Consensual Systems

There are a number of different existing forms of consensual decisionmaking. The listing below includes only those systems studied, and is by no means exhaustive. One of the goals of this research is to encourage expansion of these formats into a more public domain.

The first and most widely used consensual decisionmaking system is the private standard-setting consensual decisionmaking body. It has no government reporting obligations or direct government oversight, although the end product of such groups may be adopted by governmental units. Industry standard-setting groups, such as the American Society of Mechanical Engineers (ASME) and other similar trade associations have been involved in the formal and informal promulgation of codes, standards, and guidelines for many years. ASME is discussed in I(D) of this article and is typical of this class. A second example of a private standard-setting organization is the National Fire Protection Association (NFPA). The NFPA maintains a highly complex system for the promulgation of fire tolerance standards for building materials and related products.

NFPA is divided into numerous committees which evaluate the compliance of a particular product with the organization's safety codes. An intricate system of appeals, administrative review, public notice and comment, record keeping, and public access to files, each with time limitations, is used to reach decisions for new and existing products. Each decisionmaking group has three parts: one-third industry representatives, one-third fire marshals or other fire safety specialists and insurance personnel, and a final third drawn from

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145 Id. at 347.
146 Id. at 344.
147 Standards produced by the two groups used as an example of this form of consensual decisionmaking (The American Society of Mechanical Engineers and The National Fire Prevention Association) are often incorporated into municipal housing codes.
148 See supra n.143.
149 The National Fire Protection Association is headquartered in Batterymarch Park, Quincy, Massachusetts, with Washington, D.C. offices at 1800 M Street, N.W.
consumer groups, with interests in both product costs and product safety. In theory, groups comprised of such divergent interests should generate well-reasoned and rational decisions regarding product tolerance. This type of balancing increases the potential of interest groups or "lowest common denominator" standards.

There is periodic criticism of the objectivity and decisionmaking competence of private groups.\textsuperscript{150} Such decisions are not subject to any form of agency review or judicial review, with formal legal oversight limited to antitrust scrutiny regarding the process of decisionmaking\textsuperscript{151} or the anticompetitive effects of the decisionmaking.\textsuperscript{152}

A second category of consensual decisionmaking involves groups established, usually on an \textit{ad hoc} basis, with the hope of resolving a specific public problem affecting many different interests. Such organizations occasionally receive public funding and do not report to any particular agency. One successful example of a private advisory group was the New England Energy Congress, sponsored by the New England Congressional Caucus.\textsuperscript{153} The New England Congress was funded by the United States Department of Commerce and the United States Department of Energy and was designed to develop energy policy that would reconcile conflicting interests in the field. Efforts were made to ensure that the Energy Congress was comprised of membership that represented diverse and conflicting interests.\textsuperscript{154}

\textsuperscript{150}The Technical Committee Documentation of the National Fire Protection Association (Toronto, Ontario, Canada, Nov. 16–19, 1981) lists membership on various committees which have the responsibility to promulgate standards and evaluate products. In looking at the individual membership lists, it is hard to see the delineation of participant selection mandated by the organization's own rules. However, committee membership is highly diverse and reflective of all appropriate interests, although not always with the appropriate percentages.


\textsuperscript{154}The membership of the 1977–1978 New England Energy Congress advisory committee included: the Vice-president of Northeast Petroleum; the vice-president in charge of energy and transportation of the First Naional Bank of Boston; the president of Maine Hydroelectric, the director of the energy section of the Rhode Island office; the energy program director of the New England Regional Commission; the president of the Northeast Solar Energy Center; a representative of the Department of Energy; a representative from the New Hampshire State Labor Council; the executive director of Berkshire-Litchfield Environmental Council; the energy project director of the Law
Energy Congress produced a set of proposals in the energy field many of which have been implemented at various governmental levels. The formula for success in this context includes intelligent juxtaposition of conflicting interests, provision of a complete opportunity for study and deliberation and production of proposals within a limited time frame. Although the proposals represent negotiated compromise of various positions, this is inherent in any process of public decisionmaking, consensual or otherwise.\footnote{And the example of such an organization is the Economic Policy Council of the United Nations Association of the United States of America. The Council's purpose is to provide a forum for public and private sector interests to debate and decide upon policy direction for international bodies, to assemble resources to study complex international economic problems, and ultimately to make recommendations on these issues. The 1978 Economic Policy Council was comprised of the chairman of the board of Atlantic Richfield; the president of the International Union-United Auto Workers; a professor from Wellesly College; the president of the University of the District of Columbia; a director and senior vice-president from Exxon Corporation; consulting economists; government officials; representatives of various investment firms and banks; and United Nations personnel. See Economic Policy Council of the United Nations Association—United States of America, The Global Economic Challenge, Volume 1: Trade Commodities Flows (1978).}

The third type of consensual decisionmaking body is the public advisory board. These groups are created by statute or executive order, and possess formal recommendation power. Pursuant to the Federal Advisory Committee Act,\footnote{U.S.C.A. §§ 1 et seq. (West Supp. 1981); See also Walters, Use of FDA Advisory Committees: President and Future, 29 Food Drug Cosm. L.J. 348 (1974).} advisory committees can be created either by the Congress to report to congressional committees, or by the President, to report to the director of the Office of Management and Budget; or perhaps to designated individuals within the federal agency system.\footnote{51 U.S.C.A. § 3 (West Supp. 1981).} Advisory committees can be formed by congressional action, presidential mandate or by federal agencies with appropriate jurisdiction.\footnote{The Federal Advisory Committee Act, 5 U.S.C.A. § 3 (West Supp. 1981).} The Advisory Committee Act as modified in 1972, was designed to eliminate unnecessary advisory committees, prevent advisory groups from becoming self-serving, refine decisional tasks for particular advisory committees, and generally to improve the operation of such groups.\footnote{See Consumers Union of United States, Inc. v. Department of Health, Education and Welfare, 409 F. Supp. 473 (D.D.C. 1976), aff'd., 551 F.2d 466 (D.C. Cir. 1976).} There are advisory committees to assist on the development of aquaculture,\footnote{National Aquaculture Act of 1980, 16 U.S.C.A. § 2803 (West Supp. 1981).} to work on problems of juvenile
justice,\textsuperscript{161} to solve the problems of small business,\textsuperscript{162} guide the development of solar photovoltaic energy\textsuperscript{163} and many others.

In the area of nuclear safety, there are two organizations comprised of various experts who, on issues of nuclear safety, have different political postures. The Nuclear Safety Oversight Committee\textsuperscript{164} was established following the accident at Three Mile Island and consists exclusively of nongovernmental nuclear power experts. The Nuclear Safety Oversight Committee reports to the President, the Secretary of Energy, the Secretary of Health and Human Services, and provides an annual status report on its investigations and decisions made to address various presently unresolved safety issues.\textsuperscript{165}

The Nuclear Safety Oversight Committee is, however, a single incident group. By contrast, the Advisory Committee on Reactor Safeguards\textsuperscript{166} is a fifteen-member body, appointed by the Nuclear Regulatory Commission, which reports regularly to the Commission on public safety issues in the licensing process. A membership prerequisite is impartiality; members must be free of financial influence or conflicting employment obligations. They must, in addition, be free of all Nuclear Regulatory Commission staff involvement.\textsuperscript{167}

This particular consensual decisionmaking group exercises responsibility over issues of nuclear power safety involving water-cooled reactors, tolerance capacity of containment vessels, and performance criteria for the emergency core cooling systems. The Advisory Committee acts as a consensual decisionmaking body with recommendation powers to the Nuclear Regulatory Commission.

The fourth and very different type of consensual decisionmaking system operates by virtue of congressional delegation of responsibility to defined groups which may have exclusively private members, or be a mix of public and private members. Under carefully defined circumstances, the Congress may decide that a statutorily required aspect of decisionmaking can be best made by an entity other than a federal agency. For example, the securities exchanges function as collective

\begin{thebibliography}{9}
\item[{\textsuperscript{167}}] See United States Nuclear Regulatory Comm'n., Advisory Committee on Reactor Safeguards, A Review of NRA Regulatory Processes and Functions, NUREG 0642, Rev. 1 at 16 (1981).
\end{thebibliography}
associations, with substantial decisionmaking power exercised in a consensual format.\textsuperscript{168} Clearing and settlement agencies, as well as exchanges, must register with the Securities and Exchange Commission\textsuperscript{169} which has oversight responsibility for the exchanges' rules or rate related determinations. Antitrust problems in varying forms have surfaced because the exchanges and other self-regulatory organizations require continuous communication between horizontally aligned competitors.

There is no express immunity for the activities of entities in the securities industry. In \textit{United States v. National Association of Securities Dealers},\textsuperscript{170} and \textit{Gordon v. New York Stock Exchange},\textsuperscript{171} the Supreme Court decided that the antitrust laws were repealed by implication. This implied repeal was only functional to the minimum extent necessary for the operation exchanges allowing\textsuperscript{172} those who participate in the consensual decisionmaking process to discuss and vote upon matters germane to their industry.\textsuperscript{173} The self-regulatory organizations are, however, restricted to business appropriately before the organizations pursuant to federal statute and may only operate within the confines of that restriction.

Antitrust immunity in this consensual decisionmaking context is justified because these organizations require complex rate and other market data. In this way, users and investors can best benefit from optimal market knowledge about the broad range of available services, meeting the congressional objective of improving real competition in the securities areas. By establishing a national market system, investors have access to comprehensive market data permitting investment and broker selection choices based on something other than conjecture or incomplete local information.\textsuperscript{174}

The self-regulatory organizations in the securities field operate as consensual decisionmaking bodies. Their decisions are reviewed by the Securities and Exchange Commission (SEC). In addition, the SEC performs fact gathering functions, and regularly reviews decisions


\textsuperscript{170}422 U.S. 694 (1975).

\textsuperscript{171}422 U.S. 659 (1975).


\textsuperscript{173}See \textit{Shumate and Co. v. New York Stock Exchange, Inc.}, 486 F. Supp. 1333 (N.D. Tex. 1980), defining the scope of the implied immunity provided in the Gordon and National Ass’n of Securities Dealers cases: \textit{See supra} notes 112 and 120.

made by the self-regulatory organizations. SEC involvement in the consensual decisionmaking process is substantial. Indeed, through case-by-case oversight performed by the Securities and Exchange Commission is the premise for the maintenance of the implied immunity or repeal of the antitrust laws in this area.\(^7\)

A second example of a system which produces decisions required to be made by statute is collective ratemaking in the regulated sector of the transportation industry. Collective ratemaking is permissible only because of an express immunity.\(^7\) This system is discussed in detail in II(C) of this article.

This brief description of four different types of decisionmaking indicates the flexibility and applicability of consensual process for the development of policy, resolution of day-to-day ratemaking and for promulgation of technical guidelines or industry standards. It is hoped that the range of areas where consensual decisionmaking is used is not confined by this brief listing, but will include more direct government sponsored negotiation, either as a substitute for rulemaking, adjudication, or to accomplish other "informal" decisional tasks now performed by federal agencies. The following section describes such a proposal.

**B. The Proposal of the Administrative Conference of the United States**

On June 18, 1982, the Administrative Conference of the United States (ACUS) adopted recommendation 82-4 by unanimous vote, "Procedures for Negotiating Proposed Regulations."\(^17\) The recommendation urges agencies to "consider using regulatory negotiation . . . as a means of drafting for agency consideration the text of a proposed regulation. A proposal to establish a regulatory negotiation group could be made either by the agency . . . or by suggested interested persons."\(^17\) The proposal is based on the perceived problems of conventional decisionmaking systems. It is the creative and innovative idea of Phillip Harter, then counsel to the conference.\(^17\)

Under the proposal, not every decision an agency makes should be subjected to the consensus or negotiation process. Instead, once Con-

\(^17\)See [*Shumate*](486 F. Supp. at 1339; Sloan v. New York Stock Exchange, Inc., 489 F.2d 1 (2d Cir. 1973)].


\(^15\)Supra, n.3 (Administrative Conference of the United States (ACUS) Recommendations 82–4, Procedures For Negotiating Proposed Regulations, [hereinafter cited as ACUS Proposal].

\(^14\)Id. at 2.

\(^13\)See [*supra* n.6].
gress has authorized an agency to use the consensus model, the agency will have the authority to decide which matters would be facilitated by the use of consensual decisionmaking. In deciding whether to use consensus process, the agency should consider the likelihood that "consensus process . . . would limit output, raise prices, restrict entry, or otherwise establish or support unreasonable restraints on competition." Beyond the potential adverse effect on competition (discussed in I(D)) the Administrative Conference identified the following elements as factors to consider in deciding whether to use consensus process:

(a) The issues to be raised in the proceeding should be mature and ripe for decision. Ideally, there should be some deadline for issuing the rule. . . .

The requirement of ripeness presumably refers to different factors than are involved in a judicial jurisdictional assessment of ripeness factors. It is inconceivable that the ACUS would want concrete legal issues defined before negotiation commenced. A more reasonable interpretation would be that the Conference is interested in having negotiation where the positions of parties have been clearly defined. As to the matter of a deadline, one of the most beneficial aspects of the process of consensual decisionmaking is that deadlines can be reasonably imposed. Whether the model is negotiation, as is suggested in the ACUS proposal, or some other bargaining process, time deadlines have been present, often with sanctions or compulsory arbitration being available for failure to comply with such deadlines.

(b) The resolution of issues should not be such as to require participants in negotiations to compromise their fundamental tenets, since it is unlikely that agreement will be reached in such circumstances. Rather, issues involving such fundamental tenets should already have been determined, or not be crucial to the resolution of the issues involved in writing the proposed regulation.

The idea that negotiation should not cause parties to "compromise their fundamental tenets" is one which may be highly controversial. It seems likely that parties will never go to negotiation if they can avoid the give and take process simply by asserting that a fundamental tenet is at stake. Such disputes may be more difficult to resolve, or may ultimately require arbitration; however, the negotiation format should not be so easily compromised.

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180ACUS Proposal at 2.
181ACUS Proposal at 2–3.
182ACUS Proposal at 3.
183Id.
(c) The interests significantly affected should be such that individuals can be selected who will adequately represent those interests . . . a rule of thumb might be that negotiations should ordinarily involve no more [than] fifteen participants.\textsuperscript{184}

There is little doubt that negotiation can involve significant numbers of persons, but that if the group becomes too large, it will be unwieldy. To arbitrarily draw the line at fifteen persons seems unrealistic. For example, in the collective ratemaking area, negotiation and voting often includes hundreds of participants. To be sure, the voters in the collective ratemaking scenario represent only one interest, and therefore the discussions are not highly disputed. However, experience in other fields might suggest that identification of appropriate interests constitutes the most serious problem for consensual decisionmaking. Accordingly, limiting participants without reference to the particular situation seems unwise. A far greater problem than the number of participants is interest identification and selection of representations. In the consumer product safety area, what person or persons should represent consumer interests; those who are advocates for optimally safe products, or those whose interests include cost savings and nominal safety? The resolution of such value disputes does not appear to be at hand.

(d) There should be a number of diverse issues that the participants can rank according to their own priorities and on which they might reach agreement by attempting to optimize the return to all the participants.\textsuperscript{185}

There is little disagreement that ranking issues in terms of priorities, and then eliminating those matters where there is agreement is an effective form of negotiation. It is ironic that these simple devices have not been more readily utilized. A good example of such utilization is at the United States Nuclear Regulatory Commission, where disputed issues are refined through the process of filing “Contentions” and “Matters in Controversy” during the pretrial stages of NRC licensing hearings. By identifying disputed issues in advance, time required for licensing hearings can be reduced.\textsuperscript{186}

(e) No single interest should be able to dominate the negotiations. The agency's representative in the negotiations will not be deemed to possess this power solely by virtue of the agency's ultimate power to promulgate the final rule.\textsuperscript{187}

\textsuperscript{184}Id.
\textsuperscript{185}Id.
\textsuperscript{187}ACUS Proposal at 3.
The notion that the federal agency should be a participant in consensual decisionmaking is one in which there is general agreement. Whether the agency ought to have the "ultimate power to promulgate the final rule" is a separate question. It is likely that parties will not negotiate openly and in good faith if they feel that the results of the negotiation will subsequently be modified or distilled at some future administrative proceeding. Certainly, in the context of a situation where negotiation is being substituted for adjudication, some subsequent agency review may be available, but could not be used as a form of ultimate decisionmaking or veto. If parties are to be expected to compromise and negotiate, then they must be able to rely on the results of their negotiation. A better model might be that which is used in the antitrust field, where settlements are binding on the parties, but must be approved by a court. If a court determines that a settlement is inconsistent with the public interest, it is free to reject the settlement, although the parties will obviously not be held to concessions made in the negotiation process.

(f) The parties in the negotiations should be willing to negotiate in good faith to draft a proposed rule.

(g) The agency should be willing to designate an appropriate staff member to participate as the agency's representative, but the representative should make clear to the other participants that he or she cannot bind the agency.

Two final points from the Conference proposal are worthy of mention. First, the Conference endorses the use of a mediator if it appears that the situation would be expedited by the intervention of some third party. In implementing a consensual decisionmaking system, great care must be taken to preserve negotiating power in the individual participants. If power is ceded to a mediator or arbitrator, an adversary relationship is likely to develop, with all the trappings presently found in adversary systems. Accordingly, if a mediator is used, they must perform in purely procedural capacity, with no substantive decisionmaking authority. Similarly, if the role of the arbitrator is to "unlock a deadlock," great care must be taken that all parties play a role in the selection of the arbitrator, and agree to be bound by his or her decision.


\[190\] ACUS Proposal at 3.

\[191\] Id. at 4.
A second point of interest is that the Conference endorses unanimous consent in consensual decisionmaking. They define consensus as meaning that "each interest represented in the negotiating group concurs in the result, unless all members of the group agree at the outset on another definition." Unanimous consent in negotiation may well mean a "lowest common denominator result." However, it also means an increase in the likelihood of compliance and, a reduction in enforcement costs. While this proposal might seem controversial, it is absolutely essential to consensual decisionmaking. If parties leave a consensual negotiation without agreeing to the result of the negotiation, the negotiation has failed and the benefits of consensual process will be lost.


Collective ratemaking is a form of consensual decisionmaking used in the trucking industry to produce tariffs. Carriers meet with shippers in the rate bureaus, discuss all components of cost, and then vote on proposed rate increases or decreases.

The rates are submitted to the Interstate Commerce Commission and, if approved, are published by carriers. Rate bureaus provide a forum where single line and joint line rates are discussed, ultimately resulting in published tariffs which can be followed, modified within a "zone of reasonable fares" through subsequent negotiation between carriers and shippers, or not followed, having independently negotiated rates set based on market demand. Such bureaus are required to file an "agreement" with the Interstate Commerce Commission (ICC) which sets out the parameters of permissible conduct for members of bureaus, detailing the voting process, notice procedures and all other operational matters. If such agreements are approved by the ICC,

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197Id. at 4–5.
198A logical tendency for negotiating parties will be to pursue a rule or standard which is the least restrictive from the perspective of all parties. This might sacrifice statutorily designated policy objectives, and is a tendency which merits close scrutiny.
"parties and other persons" who participate in the ratemaking process enjoy an immunity from the antitrust laws so long as that activity does not exceed the limits of the agreement.

This system of ratemaking allows carriers to meet on a regular basis, discuss cost information and vote on individual or class price changes in a manner which, outside of the grant of express immunity, would be a violation of the antitrust laws. The process permits carriers to receive information regarding complex transit options, pricing combinations, and to participate directly in decisionmaking. The system provides an opportunity for shippers to contribute information to voting carriers, but does not permit direct shipper voting. The system is consensual in form, and as such merits serious attention.

The Motor Carrier Ratemaking Study Commission has been studying the merits of collective ratemaking since 1981, seeking to determine whether the antitrust immunity provided for collective ratemaking should continue. The Study Commission conducted hearings throughout the United States over a twelve-month period, taking testimony from hundreds of witnesses on the immunity question, holding its final meeting December 9, 1982. That meeting resulted in a tie vote on the question of the maintenance of antitrust immunity. The effect of this deadlock is that immunity now provided for single-line ratemaking will end on January 1, 1984 unless further congressional action is taken. The difficulty in reaching a decision on immunity in part reflects the dilemma inherent in consensual decisionmaking: most consensual systems require an interchange between horizontally aligned competitors giving rise to highly beneficial exchanges of information and concomitantly to the opportunity for price fixing and other conspiratorial transgressions of antitrust law.
The value of any consensual system must be weighed against the risks that such systems pose to the competitive marketplace. For collective ratemaking, that balancing has been effected by the Motor Carrier Act of 1980, which changed the competitive dynamics in the industry by liberalizing entry requirements and opening up the bureau process.

The act mandates a number of changes in rate bureau process, while clarifying other procedural matters. In looking at the "sunshine" requirements of the act, the arguments regarding shipper participation, proxy control, the procedural and substantive restrictions on bureau interference with independent action, a picture begins to form of a controlled but functional consensual decisionmaking system. On the downside, the system does not permit shippers to vote, and restricts voting to only carriers actually participating in the route and commodity in question. If collective ratemaking is a onesided process, excluding shipper interests and likewise excluding participation by other indirectly affected groups, then the charge that the collective ratemaking process is flawed by the negative factors of other cartel-like systems becomes difficult to defend.

Shipper participation issues involve several unanswered questions: first, will there be a need for antitrust immunity for collective shipper input; second, is shipper participation meaningful in terms of ultimate results of collective ratemaking; finally, since transportation costs are passed on to consumers and since negotiations between shippers and carriers in a consensual decisionmaking process directly effect those costs, do the bureaus provide an adequate opportunity for consumer involvement. Under a pure consensual decisionmaking model, the ultimate decisionmaking body must consist of the various identifiable interested parties who have a stake in the outcome. This would appear to compel inclusion of shippers if the system is to be defended as a consensual system. However, since legislative attention has been focused on the question of immunity, the issue of direct shipper participation did not become part of the debate before the Congress.

It must be understood that the collective ratemaking process was not set up to be a multi-interest participatory forum. Instead, until 1975 it

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211 Id.
212 Id.
was a fairly closed system which provided carriers a forum for rate-based dialogue. From 1975 forward, congressional attention became focused on the trucking industry, causing the bureaus to begin to reconsider their composition.\textsuperscript{215} The Motor Carrier Act of 1980, with the "openness" modifications now mandated, is the first major step in the process.\textsuperscript{216} It may well be that the final steps will include even greater openness in the process, guaranteeing participation by a variety of directly affected interests, beyond shippers and carriers.

The antitrust immunity in the Motor Carrier Act extends to carriers and "other persons" participating in the collective ratemaking process for discussion of rates. However, the Act prohibits discussions on rates docketed which are within the zone of reasonable fares but which are filed within the bureau system.\textsuperscript{217} Presumably, this is done to permit carriers and shippers to privately negotiate a modified rate without the peer pressure of the bureau membership. Similarly, the Act prohibits discussions on released rates on the theory that individual negotiations are not a matter for the consensual process.\textsuperscript{218} The use of independent action, released rates or pricing within the twenty percent zone reflect a kind of price flexibility in no way characteristic of a cartel. When this is coupled with the free flow of information on a broad range of subjects relevant to the industry, the elements required for effective competition are present.

As noted above, the Motor Carrier Act of 1980 will prohibit collective deliberation on single-line rates after January 1, 1984. Since single-line ratemaking is not the type of rate variation inherent in independent action, released rates, or zone of reasonableness pricing, the reasons for prohibition of such discussion must be closely examined. If the flow or exchange of information required for intelligent rate decisionmaking is adversely affected by the loss of data which would surround single-line dialogue, then the prohibition should not go into effect. Further, the consensual process must actively consider the "inte-


grated transportation network," and that requires an awareness of single-line rates.

It is not logical to exclude dialogue on single-line rates if the premise therefore is the stimulation of individual negotiation. The market options now available make such negotiations the norm, not the exception. A more likely consequence of the prohibition of single-line rates is the suppression of important data, required to make intelligent joint-line decisions. Again, the competition neutralizing effect of dialogue between horizontally aligned competitors is balanced against improved compliance, enforcement, reduced administrative costs and the opportunity to make intelligent judgments which can enrich the competitive vigor of the market.

To counter the risks of bureaus in interfering with price competition, the Motor Carrier Act reaffirms the notion that rate bureaus cannot interfere with carrier independent actions. Further, carriers can elect between having independent actions noticed to other competitive carriers or have the bureaus assist in the filing of independent actions, with no notice to competitive carriers. Bureau employees are prohibited from divulging the existence of carrier instructions regarding independent actions. By permitting independent action filings, and guaranteeing that such actions can be done in a private manner (paralleling open market pricing) the Motor Carrier Act of 1980 ensures the continuation of open market alternatives.

Similarly the act prohibits bureaus from protesting tariff items of any carrier, and prohibits bureau employees from "acting on" any

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219 The National Transportation Policy Act, 49 U.S.C.A. § 10101 (West Supp. 1982) requires a "transportation system" (§(a) which permits the transportation of products from origin to destination, a phenomenon that often requires more than one carrier. Intra-city and shorthaul operators must coordinate operation with longhaul carriers to ensure efficient transportation. This notion of a "network" of carriers requires the use of single and joint line rates.)


221 In Hayden, Teamsters, Truckers, and the ICC: A Political and Economic Analysis of Motor Carrier Deregulation, 17 HARV. J. ON LEGIS. 123, 141 (1980), the author states that because bureau membership is voluntary, and because of the ability of free and unrestrained independent action, "rate bureaus lack the power to enforce any price agreements. The lack of price competition in trucking is thus routed elsewhere and could be largely unaffected by repealing Reed-Bulwinkle." Further, current statistics indicate an independent action rate in excess of 65%. These statistics are maintained by Eastern Central Motor Carrier's Association in 1980–81, following the Continuous Traffic Study and are available from ECMCA, P.O. Box 3600, Akron, Ohio 44310. With two out of every three shipments travelling under an individually negotiated rate, the significance of collective ratemaking shifts. Rather than having a cartel-like price pegging effect, the bureau rates are used as a basis for negotiation in what has become a highly competitive market.


This insures that the actual decisionmakers, the carriers, are not unduly inhibited by the professional bureau staff. However, the act does not prohibit the provision of advice and analysis or opinions regarding rate filings. Thus, market data is provided to facilitate intelligent pricing actions without nonparty interference.

In evaluating whether to retain immunity for collective ratemaking, the inquiry must go beyond general attitudes on competition. An equally important question is whether the ICC can handle the oversight which is a fundamental counterpart to a grant of antitrust immunity. The capacity of the agency to function is central to the election of any regulatory consensual system.

Certain policy and role questions plaguing the ICC were eased by the passage of the Motor Carrier Act of 1980. Quite clearly, the Motor Carrier Act of 1980 liberalized entry, simplified ICC decisionmaking processes, and profoundly changed the process and use of collective ratemaking. In terms of entry, the Commission has already begun the task of defining appropriate criteria. Prior to the passage of the act, the Novak\textsuperscript{225} criteria were appropriate for such determinations. However, the ICC quickly abandoned the Novak criteria in \textit{Pre-Fab Transit Co. Extension-Nationwide General Commodities}\textsuperscript{226} in which the Commission sought to articulate the means by which an applicant demonstrates useful public purpose, transportation needs and service demands.

The validity of the "reinterpretation" of entry standards is subject to some question. For example, in \textit{Labar's Inc. Extension-Mountaintop Insulation},\textsuperscript{227} the Commission held that if an applicant makes a prima facie case showing compliance with the facial entry requirements of the act, a protesting party will not have made a successful case by showing the availability of adequate existing service. This decision perplexed Commissioner Clapp, who first agreed that an increase in competition in the motor carrier industry satisfied a valid purpose. However, he went on to say that the decision exceeds the bounds of reason when it asserts that not even bankruptcy—and the resulting loss of service of existing competing carriers—is sufficient to show an explicit connection between harm to carriers and harm to the public. . . .

\footnotesize{\textsuperscript{225}Novak Contract Carrier Application, 103 M.C.C. 555 (1967).}
\footnotesize{\textsuperscript{226}132 M.C.C. 409 (1981).}
\footnotesize{\textsuperscript{227}132 M.C.C. at 263 (1980). (Commissioner Clapp concurring in part and dissenting in part).}
Further criticism of the commission's efforts at reinterpretation of standards is found in *American Trucking Associations, Inc. v. Interstate Commerce Commission*, a case discussed earlier in I(B) of this article. There the court found the Commission's actions inconsistent with statutory intent as well as in contravention of explicit statutory provisions. While the decision of the Fifth Circuit condemns the Commission for a variety of interpretive errors, the decision should not be read as a condemnation of the regulatory decisionmaking process. The Motor Carrier Act is a complicated piece of legislation which leaves open a variety of interpretive problems in the entry field. The concept of "useful public purpose" is no more easily defined than was "public convenience and necessity" under the prior legislative regime. In terms of collective ratemaking and the ICC, the picture is unclear. While the Commission has been capable of preventing price discrimination and insuring a degree of rate reasonability, it has not played an active role in rate practice and tariff formulation. However, the Commission plays an effective role in approval and periodic monitoring of the operating agreements of rate bureaus, suggesting that it is capable of oversight. In the final analysis, it would seem that retention of immunity for collective ratemaking is justified, so long as the basic fairness components of consensual process are met.

**D. Agency Examples**

In the process of preparing this research, legal proceedings in several federal regulatory agencies were examined to determine the extent to which consensual decisionmaking is used. Comparison between...
agencies, however, became most difficult, due to diverse regulatory directives. Similarly, the lack of parallel market factors, from industry to industry, was most evident. Since market efficiency parallels are heavily dependent on common entry phenomena, capital availability, existing regulatory structures, existing market diversity, concentration ratios, service demands, availability of market information and inventory information, and further since these factors differ in most respects, industry to industry, it was impossible to make general conclusions. Indeed, one of the major shortcomings of the deregulation debates during the late 1970s has been constant comparisons on an industry by industry basis where such parallels are illogical. For example, to compare on a market efficiency basis the airline industry which is an oligopoly with less than thirty major participants with the motor freight common carrier industry, which has more than 17,000 participants, makes little sense.

The case studies that follow are, of necessity, extremely brief. They are in no way intended to be a comprehensive analysis of the regulatory programs involved, but only a brief "snapshot" of certain phases of the regulatory programs of these agencies.

1. The Consumer Product Safety Commission

In the area of health and safety regulation, the Consumer Product Safety Commission (CPSC) has been directed by the Congress to utilize consensual decisionmaking systems and voluntary industry standards in a broad and all-encompassing manner. The 1981 amendments to the Consumer Product Safety Act endorse sweeping changes in the use of voluntary industry standards and require the CPSC to seek formulation and compliance with such standards, prior to the initiation of more formal proceedings by the CPSC. The 1981 amendments modify procedural requirements for rulemaking, require the Commission to conduct cost/benefit analyses, require the preparation of a regulatory analysis under certain delineated circumstances along with various procedural mechanisms designed to expedite the rulemaking and adjudicatory process, or circumvent that process where voluntary industry standards are available. The

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238 Id.
amendments also provide for a congressional veto,\textsuperscript{240} and mandate the utilization of voluntary industry standards.\textsuperscript{241} These amendments are designed to substantively restrict the activities of the CPSC in the area of lawn mower hazards\textsuperscript{242} and amusement park rides.\textsuperscript{243}

In opting for the use of voluntary industry standards and in expediting and limiting the use of rulemaking, adjudication and implementation of mandatory bans, the Congress has expressed a direct preference in favor of undisciplined and unchecked consensual decisionmaking. The amendments do not provide guidance for the formulation of industry standards and essentially remove the CPSC from critical components of the decisionmaking process. Rather than working in conjunction with various product safety standard programs, or being a participant in a consensual decisionmaking system, the CPSC is relegated to the role of an observer with vigorous participation restrictions.

While the use of voluntary industry standards and consensual decisionmaking is critical to the position taken in this research, this article should not be read as an endorsement of undisciplined and purely private industry standard development with no obligatory agency oversight. Particularly in the area of health and safety, the reliance on generalized voluntary standards with no reference to participants, interests, process and similar matters within the consensual decisionmaking group appears to be a direct repudiation of prior congressional mandates favoring product safety.

When these procedures are viewed in conjunction with a reduction of more than thirty percent in the operating budget of the Consumer Product Safety Commission\textsuperscript{244}, the purpose of the Congress becomes quite clear. The amendments to the Consumer Product Safety Act of 1981 are designed to restrict the involvement of the federal government in the formulation and implementation of mandatory product safety standards. Moreover, if the thesis underlying these procedural and substantive changes involves a preference for "open market economics," then the legislators have been sorely misled regarding the role of competition in terms of product safety. There is no reason to think that the elimination of regulation regarding product safety will somehow result in a vigorous competitive market which will produce less-expensive, high-quality products.

It may be that the jurisdictional modifications enumerated above are more the consequence of the budget reconciliation process than of any other specific substantive goal. At the present time, the Budget Act, which establishes a standing committee on the budget in each House,\textsuperscript{245} requires a coordination of expenditure actions by the Congress.\textsuperscript{246} The act also establishes the Congressional Budget Office\textsuperscript{247} which is designed to again coordinate congressional expenditures. During the 97th Congress, the reconciliation process coordinated by the Budget committee significantly affected the 1981 amendments to the Consumer Product Safety Act. Subject matter and fiscal revisions took place in order to achieve a budget compromise, rather than have those modifications occur based on a sound assessment of the ongoing capacity of the CPSC to carry out its legislative mandate.\textsuperscript{248} Parenthetically, if the reconciliation process is being used to carry out what members of Congress perceive as a political mandate to "get the government off the people's back" based on the 1980 election, it is likely that the members have misread the actual interests of their constituents in terms of important economic and health and safety regulatory programs. In terms of the foregoing statement, a survey published on November 10, 1981 indicates that only 12 percent surveyed felt the CPSC was doing too much, while 41 percent felt the Commission ought to increase its regulatory activities, with the remainder either uninformed or agreeing that the Commission was performing adequately.\textsuperscript{249}

In terms of the administrative procedures used by the CPSC, as already noted, the amendments to the 1981 act are an attempt to simplify the promulgation of consumer product safety rules. Prior to the passage of the 1981 amendments, the CPSC sought to expedite its procedures, following liberalized but logical standards of administrative practice.\textsuperscript{250} A system was evolving which allowed the Commission latitude to respond expeditiously when there was notice given of a seriously dangerous product, as well as opportunities for the Commission to conduct more relaxed inquiries where the degree of risk was less than imminent. When the Commission acted without an appropri-

\textsuperscript{248} Id.
\textsuperscript{250} Toy Manufacturers of America Inc. v. Consumer Product Safety Comm'n, 630 F.2d 70 (2d Cir. 1981).
It is difficult to predict the consequences of the 1981 amendments to the Consumer Product Safety Act. While it has been argued that the new procedures will restrict the implementation of product safety standards by both the Commission and the courts, it is more likely that the courts will continue to refine both the procedures utilized by the Commission and those products subject to the jurisdiction of the Commission. Certainly, courts have displayed an ability to define which voluntary systems are acceptable, and to define the extent to which commissioners can delegate responsibilities to staff members or utilize private industry standards as a "product safety standard." In the Southland Mower case, the Fifth Circuit held that a private industry standard which has been promulgated without participation, input or guidelines from the Consumer Product Safety Commission cannot be used, by itself, to support a Commission regulation. Unfortunately, it would appear that the thrust of the Southland case is offset, both in terms of the acceptability of purely voluntary standards under the 1981 amendments, as well as in terms of the specific subject matter restrictions regarding mower safety in the 1981 amendments.

Regarding the formulation of voluntary standards, the 1981 amendments require the Commission to provide "reasonable assistance" to private industry groups which are seeking to promulgate standards, and to advise them on the appropriate timing for decisionmaking, methods of providing notice, and information regarding compliance

251 Aqua Slide 'n' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831, 844 (5th Cir. 1978).
258 Id. at 510.
systems and similar matters. In addition, the Commission is to see that the anticompetitive aspects of standards are kept to a minimum.

It is quite possible that if the Commission takes seriously its responsibility to provide guidance to industry standard-setting groups, some of the deficiencies mentioned above will be eliminated. For example, there is nothing expressly prohibiting the Commission from playing an aggressive role in working with various industry standard-setting groups, and providing assistance in the establishment of enforcement and compliance programs. In this context, the Commission would play an advisory role to private industry standard-setting groups, and would not be certifying these groups' performance, as is done by the ICC in the collective ratemaking area. It would be worthwhile to compare the effectiveness of the voluntary system established by the 1981 amendments to the Consumer Product Safety Act, and the more rigorous compulsory controls established to guide collective ratemaking pursuant to the Motor Carrier Act of 1980.

Perhaps because the lobby in favor of vigorous consumer protection is ineffective, the 1981 amendments to the Consumer Product Safety Act include a number of provisions which embody concepts growing out of the economic deregulation arguments of the late seventies. As already mentioned, the use of consensual decisionmaking as a substitute for governmental decisionmaking is one such reform both endorsed in this testimony, and adopted in the amendments. The act also adopts a Congressional veto, a measure that appears to be both unwise and unwieldy. The amendments embody the use of a chronic hazard advisory panel which may prove quite effective as a means for identifying long-term product risks.

Looking specifically to the use of voluntary industry standards, the Consumer Product Safety Commission has always considered as a

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decisional option, voluntary standards in addition to internally-set standards, but only when those standards were reviewed and found to be adequate and reasonable. The Consumer Product Safety Commission has been considered an agency with "the greatest potential of any existing federal regulatory agency for utilizing and participating in the development of voluntary standards." Prior to the passage of the act, the Commission frequently "denied petitions for mandatory standards on the ground that voluntary standards existed that appeared adequate and that were generally adhered to by the industry." There is little question that the agency can use voluntary standards in an effective way, after passage of the 1981 amendments, if the political climate allows for appropriate oversight and review of industry standards.

It is difficult to draw meaningful conclusions from the case study of the Consumer Product Safety Commission. While the activities of the Consumer Product Safety Commission, particularly the 1981 amendments, reflect a strong preference in favor of negotiated or consensual decisionmaking systems, the amendments are imprecise regarding the methodology of formulating voluntary standards, allowing various standard-setting groups to perform their functions in an infinite variety of ways. In terms of competition affected by the formulation of voluntary standards, in the economically sensitive area of product safety development, Congress felt comfortable in endorsing consensual decisionmaking systems with a simple admonition to use means that create the least restrictions on competition. Rigorous standards have an absolute effect on the cost of production. To characterize these negotiations as exclusively "health and safety" oriented, and to justify the lack of competitive concern based on the fact that this is a "noneconomic" area would be illogical.

The process of establishing product tolerance criteria is as economically sensitive in many ways as is the process of establishing rates for transportation services. The risks of improper collusion between competitors is equally great in both areas. However, since it is clear that the

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266 Compare 16 C.F.R. § 1105, with 16 C.F.R. § 1032 (implementing the 1981 amendments).
268 Id. at 1405. For an outstanding description of the history of the use of voluntary standards at the Consumer Product Safety Comm'n prior to the 1981 amendments, the Hamilton article is without parallel. As a guideline for the future, the Hamilton article will only be of relevance if the Commission adopts a vigorous attitude regarding product safety.
main purpose of collective ratemaking involves assisting in the evolution of a pricing structure, a matter considered traditionally to be at odds with antitrust policy, immunity is required for collective ratemaking. In contrast, evolution of product standards has been treated differently under the antitrust system, since the primary purpose relates to product tolerance and safety standards, and not to pricing practices. For that reason, industry standard-setting in the product safety area does not appear to require antitrust immunity.

2. Airline Regulation

The process of consensual decisionmaking evident in collective ratemaking in the trucking industry is discussed in II(C) of this research. That process is often compared to various activities in the airline industry. However, "[b]ecause there are fundamental differences between the two industries, one cannot properly be used to justify the other. It is more logical to compare the probable effects of deregulation of the trucking industry with the effects of deregulation in the air cargo industry." Even in the cargo area it would seem the market parallel is only marginally inferential. Since there are approximately 17,000 motor freight common carriers in the trucking industry and less than thirty significant air carriers in the airlines industry, market comparisons are simply not meaningful.

There may, however, be a few lessons to be learned from looking at present problems in the airline industry, and ascertaining whether those problems have been brought on by the elimination of consensual systems, by the continuation of unwise regulatory programs or by open market forces. While the majority of the debate regarding airline deregulation centers on the Civil Aeronautics Board (CAB), it seems appropriate to discuss both the CAB and the Federal Aviation Administration (FAA) since the FAA is increasingly involved in direct economic regulation.

In selecting an open market approach in the airline industry, Congress consciously decided to allow market forces to become the primary determining factor for most choices to be made in the evolution of the

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271See Street, Airport Access, Paper Delivered to the American Bar Ass'n Seminar on Deregulation and Antitrust: the Airline Experiment at 8 (Oct. 20–21, 1980).
273For an assessment of predicted "ripple effects" in the trucking industry, based on empirical analysis, rather than a political analysis, see Cavinato & Kogan, An Assessment of the Impacts From Partial and Full Repeal of Section 10706 (Antitrust Immunity) Upon the Motor Carrier Industry and its Users, 47 I.C.C. PRAC. J. 427 (1980).
airline industry. Presumably, this choice has been predicated on a careful assessment of the airline industry, evaluated against objective standards for regulating, or not regulating, the airline market.

One of the interesting effects of the Airline Deregulation Act has been a shifting of emphasis from the activities of the Civil Aeronautics Board regarding conduct limitations, to the Federal Aviation Administration. The chronic and recurrent problems of slot allocations and noise control provide an interesting example. It may well be that these "noneconomic" regulatory problems will take on a different dimension, and be used as a modest substitute for the kind of entry and cost-control activities undertaken by the Civil Aeronautics Board prior to the passage of the Airline Deregulation Act. Regarding slot allocation, it was recently held that a local access or use-limiting control plan at a California airport could not be implemented, despite the fact that the airport was not suited to accommodate the demands of various carriers seeking landing rights. Based on the theory underlying the Deregulation Act, the court found that the proposed plan for slot allocation was too limiting, and enjoined its implementation. The case is significant because it is among the first to confine the right of airport proprietors "to limit access on grounds other than noise or nature of services..."

In light of the fact there is only a limited amount of air space and various capacity restrictions (including the 25 percent service reduction caused by the controllers' strike) it seems that the open market may

274The vigor underlying this decisional preference is revealed in two Civil Aeronautics Board cases which came close to complete abdication of statutory responsibility. See Proposed Rules Regarding International Rate Flexibility, No. 97, 444, PSMD-65 (Jan. 14, 1980), as clarified by Order 80-9-146, No. 32, 660 (adopted Sept. 24, 1980) and Complaint of Costha, et al., Against Search Charges for Hazardous Shipments, Order 70-9-189 (filed by Seaboard World Airlines et al.).

275Report of the Congress Filed by the Comptroller General of the United States, Government Regulatory Activity: Justifications, Processes, Impacts and Alternatives, PAD77-34 (Filed June 3, 1977), in which the comptroller isolates ten factors which from the market perspective justify continuation of regulation. They are: "Natural monopoly, resulting in high prices, reduced output and excessive profits; interdependencies in natural resource extraction...resulting in the inefficient use of resources and inequitable sharing of costs; inadequate information in the marketplace, resulting in poor decisions and wasted resources; externalities...resulting in waste for use of resources and unfair costs shifting to third parties;...destructive competition, resulting in chronically sick firms unable to satisfy consumer demand;...[and social policy objectives such as] alter the distribution of income; enhance national security; allocates scarce resources; provides service to small communities; and advance macroeconomic policy objectives." Note 264 at ii-iii.


278Lempert, supra n.276, at 7.
not be the best system for the allocation of this particular scarce resource. To resolve slot allocation problems, "[a]t most airports, airlines take advantage of a CAB granted antitrust immunity that allows 'scheduling committees.' Such committees of carriers operate on a consensus basis, and problems arise, . . . when a group fails to reach an agreement acceptable to all." Such consensus decisionmaking systems, when deadlocked, are presently resolved by the Federal Aviation Administration, with judicial review available.

Where such consensual decisionmaking is unavailable, as was the case in California, the regulatory problems become exceedingly difficult and raise the question of the appropriate role of the FAA as an economic regulatory body. Recently, the FAA was called upon to make a series of procedural and substantive regulatory decisions when Braniff Airlines went bankrupt, leaving several hundred slots up for grabs. To allocate this resource, the FAA decided not to use consensual decisionmaking or conventional notice and comment rulemaking; instead, they used a lottery. The system has been heavily criticized by industry representatives and leaves untouched, major regulatory problems in the field.

In the area of aircraft noise and noise control, the deregulation of the airline industry leaves unaffected a festering jurisdictional and regulatory problem. Pursuant to the Noise Control Act of 1968, the precursor to the Noise Control Act of 1972, the Federal Aviation Administration is responsible for the enforcement of noise control standards promulgated by the administration, in consultation with the Secretary of Transportation and the Environmental Protection Agency. Given the recognized destructive nature of airport noise, the Federal Aviation Administration and the courts have attempted to implement abatement programs by the use of affirmative prospective regulation of aircraft noise. The program has met with limited success, particularly when one considers the tremendous jurisdictional problems that exist in the field.
Regulation of airport noise is within a broad range of social programs where there is little honest theory suggesting that the open market will provide an appropriate resolutory norm. Indeed, it is not uncommon for students of regulation to question economic regulation while at the same time recognizing that "deregulation . . . is not a viable alternative for most health, safety and environmental regulation."

While there is some disagreement regarding the need to control or reduce the amount of noise associated with air transportation, and while negotiation has not been selected as the device for such control, a lesson still exists for those studying consensal process. By the promulgation of affirmative compliance standards by the federal government, in the absence of effective consensual decisionmaking, a uniformly agreed upon social objective (reduction of airport noise) was rendered difficult to implement or enforce. Prospective regulation which is divorced from those directly affected has not succeeded. Consensual decisionmaking systems, on the other hand, appear to hold out a greater opportunity for enforcement and compliance.

An evaluation of the CAB leads to slightly different conclusions. In November 1977, the first major airline deregulation bill affecting air freight, was passed. Less than a year later, the Airline Deregulation Act of 1978 became law, substantially changing the regulatory structure for domestic air travel. During this period, former President Carter also indicated a desire to introduce basic open market competition concepts into international air transportation. Although the legislation that ultimately ensued, the International Air Transportation Competition Act of 1979, cannot be characterized as a deregulation venture, that Act is designed to stimulate international competition but at the same time protect U.S. airlines from anticompetitive acts of foreign government-run competitors.

Since the passage of the Airline Deregulation Act, experts have been in disagreement regarding the validity of the airline deregulation


292 The debate over the appropriate means for stimulating healthy airline competition is by no means over. See Is the U.S. Sabotaging its International Airlines?, BUS. WEEK, Jan. 26, 1981 at 74.
experiment. This change in regulatory focus, coupled with the controllers strike has made it difficult to draw meaningful conclusions. It is clear that the CAB can perform certain functions vital to the consensus process. The board has assessed competitive implications under complex market situations, has determined when and under what circumstances antitrust immunity ought to attach, and oversees a conference system designed to handle collective interests in the ticketing area. By performing these tasks, the agency has demonstrated the capacity to perform functions that would be needed, were the primary form of dispute resolution or policy formulation a consensual format.

There have been profound structural consequences resulting from airline deregulation, going well beyond anything anticipated by the architects of the deregulation program. In the first year and one half after the passage of the Airline Deregulation Act, nineteen of the largest airline carriers have been involved in a variety of merger proposals.

The proponents of deregulation . . . were hopelessly naive in their often implicit, always sanguine evaluations of the structural consequences of deregulation. Armed with the economic theory of competition, with evidence suggesting an absence of significant economies of scale, with faith in the efficacy of free market, . . . and . . . with a contagious fervor to deregulate something, they assumed that there would not be a need for significant

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295 Application filed by various airlines for prior approval of an agreement establishing the Airline Fuel Corp., No. 27067, Agreement CAB 26748–A1, Order (Sept. 20, 1979) (Finding no need to grant antitrust immunity pursuant to Section 414 of the Federal Aviation Act; See UATP–1976 Agreements CAB 26433 and 26433–A1 Order (June 12, 1980) (denying antitrust immunity, at 34 of the Board Order).


298 Id.
structural readjustments in the new competitive environment. (Footnote omitted) . . . in this the proponents of deregulation were wrong. 296

In the airline industry, the most lucid approach to the concentration trend seems to be as follows:

To avoid the inevitable forced merger of a number of failing carriers—and, in fact, to stymie consequent political pressures to deregulate the industry—a policy favoring mergers that allows the development of more rational routes and services should be encouraged. . . .

The critical point is rather that one should not conclude that a merger has the prescribed anti-competitive effects simply because the number of carriers is reduced. . . .

Merger policy should foster efficiency and competition and not protect particular carriers in the interest of preserving large numbers alone. . . . 300

In the last year, deregulation has ceased to be the principle regulatory event determining the success or failure of the domestic airline market. Instead, the 25 percent service reduction which comes as the consequence of the air traffic controllers' strike is of far greater significance. With the number of flights reduced, demand for existing seats has increased, fuel costs have decreased, and with layoffs, salary costs have decreased, all creating a somewhat artificial picture for the airline industry. 301 These factors obscure comparisons or projections for the study of consensus process.

3. Federal Maritime Commission

The power of the Federal Maritime Commission (FMC) to approve conference agreements, and by that approval provide express exemption from the antitrust laws is similar to the power of the Interstate Commerce Commission to approve collective ratemaking agreements. 302 In undertaking the competitive assessment, the Federal Maritime Commission is obligated to conduct an informal proceeding, after publication of notice in the Federal Register indicating the specific agreement under consideration. The FMC may convene an oral hearing,

297 Id. at 879.
and the results of FMC deliberations regarding "approved agreements" are subject to judicial review.\textsuperscript{303}

The FMC is obligated to use fair and open procedures in coming to decisions regarding the antitrust immunity to be provided to different conference activities. The FMC has primary jurisdiction to review the anticompetitive consequences of such agreements, prior to review in a federal court.\textsuperscript{304} As might be expected, the power to grant antitrust immunity has been attacked during the "deregulation" period of the late seventies.\textsuperscript{305} Questions have also come up regarding activities which are technically outside approved agreements, and the resulting antitrust liability that flows from such activities.\textsuperscript{306} In one proceeding involving an allegation of rate discrimination, the United States Court of Appeals for the District of Columbia chastised the Federal Maritime Commission as follows:

The Commission engaged in wholly insufficient analysis of the harm posed to United States commerce by the high shipping rates for waste paper—the principal flaw being the Commission's illogical disregard for the pernicious commercial effects which attend unreasonably steep freight costs. Hence, the FMC's order declining to disapprove the challenged rates must be set aside. The Commission's laxity challenges the very character of the Act which, on one hand, grants considerable license to carriers, and on the other, obligates the Commission to ensure that that license does not work to the disadvantage of the national commerce. The basically facile agency reversal of the ALJ, as evidenced by these formidable and unfound rate differentials cannot stand.\textsuperscript{307}

The Supreme Court has also expressed concern with the ability of the Federal Maritime Commission to implement its own legislation. In \textit{Federal Maritime Commission v. Seatrain Lines Inc.},\textsuperscript{308} the Court found that the Federal Maritime Commission had completely misread its obligations regarding the interrelationship between the conference arrangement system, which allows entities to maintain independence, and the

\textsuperscript{303}Interestingly, in United States Lines, Inc. \textit{v. Federal Maritime Comm'n.}, 584 F.2d 519 (D.C. Cir. 1978), the court held that the review to be given to decisions of the Federal Maritime Comm'n. was an "arbitrary and capricious" test of 5 U.S.C. § 706(2)(A) (1976), whereas such proceedings are at times reviewed under a substantial evidence test. \textit{See} United States \textit{v. Federal Maritime Comm'n.}, 655 F.2d 247 (D.C. Cir. 1980).


\textsuperscript{307}\textit{National Ass'n of Recycling Indus.}, 658 F.2d at 818.

\textsuperscript{308}411 U.S. 726 (1973).
oversight responsibility the Commission has in the area of mergers.\textsuperscript{309} Notwithstanding the problems referenced above regarding implementation of statutory directives, the maritime industry recently sought not only a reaffirmation of the immunity provided by the Shipping Act\textsuperscript{310} but also an elimination of the regulatory powers vested in the Federal Maritime Commission.\textsuperscript{311} The legislation was opposed by the Department of Justice, the Department of Commerce, the Federal Maritime Commission and the President, notwithstanding the fact that those four entities had all demanded some form of reform for the maritime industry, which suffers from extremely inefficient international competition. In opposing the legislation, the ability of the Federal Maritime Commission to continue to provide an oversight role was not questioned; indeed, the government took the position that the Federal Maritime Commission must continue vigorous oversight of the operation of the conferences, using the antitrust laws as a guideline.\textsuperscript{312} In addition to endorsing the capacity of the Federal Maritime Commission to continue some form of competitive oversight over collective rate establishment, the government uniformly supported the creation of shippers' councils, which would be provided antitrust immunity, and which could be used as a negotiation balance to counteract the substantial market power of the immunized carrier conferences.\textsuperscript{313}

While there has been substantial criticism of the Federal Maritime Commission from the standpoint of intelligently taking into account the antitrust laws, there is little question that the Commission is capable of performing this role, and, in large part, has done so in an organized and fair way.\textsuperscript{314} Recently, the Court of Appeals for the District of Columbia found that the Federal Maritime Commission had passed muster under a substantial evidence review in its evaluation of a complex pooling agreement between ten competing lines which carry goods between the United States and Italy.\textsuperscript{315} The court found that the Commission had appropriately supported a decision approving the agreement, although it also found that the Department of Justice had standing to challenge the activities of the Federal Maritime Commission, regarding their competitive effects.\textsuperscript{316} Following recent prece-

\textsuperscript{309}Id.
\textsuperscript{312}Id.; and Letter From President Jimmy Carter to Chairman John M. Murphy (July 20, 1979) (regarding H.R. 6899).
\textsuperscript{313}See Report supra note 301.
\textsuperscript{314}See United States v. Federal Maritime Comm'n, 655 F.2d 247 (D.C. Cir. 1980).
\textsuperscript{315}Id.
\textsuperscript{316}Id. at 251.
dent, the Court found that the Justice Department can be an aggrieved party in such agency proceedings, where the department perceives that appropriate competitive considerations have not been taken into account by the Federal Maritime Commission. Thus, not only does the Federal Maritime Commission have the ability to take into account competitive considerations, but it is also clear that the Justice Department can play a role not only as an intervenor, but as an "aggrieved party" in a subsequent challenge to the activities of the Federal Maritime Commission.

The maritime industry has long relied on a conference method of decision in coming up with specific rate determinations, protected by a right of independent action and antitrust oversight of rate determinations made by conference groups. While the industry pushed for "closed conferences," there has been considerable resistance to this phenomenon. In addition, shipper participation has been at best limited in the conference system. Despite these problems, the FMC has displayed a capacity to evaluate market relationships, service records, effectiveness of conference agreements, problems regarding rate disparities, conference participation and deterioration of participation and similar issues on a regular basis.

There is a limited use of consensual decisionmaking at the rate level as well as components of independent action. Taken as a whole, it would appear that the FMC provides an example of an agency utilizing consensus process, but experiencing periodic oversight problems.

CONCLUSION

In an era of regulatory reform, the elimination of unnecessary or burdensome regulations, and the modification of market structures which have produced noncompetitive markets is paramount. Achieving these objectives is not inconsistent with the use of new or different systems of decisionmaking. Consensual decisionmaking systems, when functioning effectively, hold out the promise of reduced compliance and enforcement costs, optimal access for directly and indirectly affected interests, optimal exchange of market information, and meaningful competition at the level of price, service, efficiency and innovation. On the other hand, a consensual decisionmaking system can sometimes be nothing more than a guise for price fixing, carteliza-
tion, intentional market manipulation, market stagnation, suppressed entry, suppressed innovation and inefficiency.

Analysing individual systems provides little guidance when it is understood that consensual systems require a unique combination of events; the issues to be resolved, agency overseeing the process, and competitive options all must be "just right" for such systems to work. If the conditions are right, the system can be most effective. Under such circumstances, a consideration of antitrust immunity seems reasonable. Naturally, open market theorists would argue that antitrust immunity in almost any situation is inconsistent with basic market directives and ought to be eliminated. A preferred result would be an open market model, emphasizing two party negotiation, rather than collective decisionmaking. The risks inherent in this system are the potential loss of organizational diversity, or other changes in market structure, cream skimming, disparate rate structures, and most assuredly a loss of the information exchange provided by any collective process.

In contrast to the open market, there are fully regulated systems where the government is the primary decisionmaker, and the primary mode of decisionmaking is rulemaking (either standard or hybrid) or adjudication. These systems are often highly inefficient, plagued with delay and subject to massive risks of noncompliance. Such systems are due for change. However, comparing consensual, open market and regulatory systems is not productive.

Each one of these systems has an appropriate place in the highly complex American economy. Different institutional needs, market demands, and service variables dictate the system to be applied. The national policy in favor of competition is not necessarily one in favor of nongovernmental involvement. Rather, it is a policy that favors giving purchasers or users an opportunity to select a particular service or product, and motivating sellers or service providers to act in an efficient, innovative and reliable manner. It is a policy that demands optimal utilization of resources. It abhors artificial monopoly power or market manipulation, and demands that prices have a reasonable relationship to cost and not be the result of some market artificiality. It provides some reasonable screening of those who participate in given markets, ensuring that only the most efficient resource users prevail. These objectives are not accomplished through blind adherence to the platitudes of the open market, the regulated market or some simplistic and politically pleasing amalgamation of the two.

The questions in this area are most perplexing. Is it more likely that a market will become efficient, innovative, fully informed, stable and competitive, and that prices will bear reasonable relationship to cost, if
consensual decisionmaking is adopted? The possibility that these factors will prove true justifies full consideration of the consensual alternative. The authors of Senate Bill 1601 believed this to be true, stating, "[t]he use of negotiation and mediation can, in many cases, result in rules which are developed in far less time and for far fewer resources and which are far more reasonable than rules that would be developed if traditional rulemaking procedures were used." It is hoped that the inquiry begun in Senate Bill 1601 will continue.