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THE ANTITRUST SYSTEM: AN IMPEDIMENT TO THE DEVELOPMENT OF NEGOTIATION MODELS

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INTRODUCTION

This Article examines antitrust problems that are inherent in consensual decisionmaking systems. The discussion is based on the assumption that consensual systems, such as collective ratemaking, provide access to directly and indirectly affected market participants, increased information flow, and improved capabilities for compliance and enforcement. These benefits must be balanced against the risk of adverse and anticompetitive market consequences that is inherent in consensual decisionmaking systems requiring cooperation between horizontally aligned competitors. Although this Article concentrates on the question of competition, a number of generic issues in a negotiation system merit some preliminary consideration. For example, the very premise of effective consensual process is a willingness to negotiate, and that willingness may be difficult to obtain. In many cases in which negotiation is substituted for adversarial decisionmaking, parties become hesitant to participate in the give and take essential for successful negotiation, believing that concessions made informally will haunt them in subsequent litigation.2


1. In horizontal systems, the historical check on anticompetitive behavior comes from application of our antitrust laws. Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). Even when such systems are primarily regulatory, the antitrust laws continue to be applied. See United States v. Otter Tail Power Co., 410 U.S. 366 (1973). Other devices conventionally used to control administrative processes include restrictions on ex parte communication. See Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977). These controls do not, however, apply to purely private consensual decisionmaking.

Another fundamental concern in the area of public sector consensual decisionmaking involves the role the government will play. The need to maintain some agency oversight is constant, notwithstanding that when subsequent agency proceedings are a necessary component to a negotiation model, delay and refusal to disclose positions might plague consensual decisionmaking. Recognizing the need for governmental oversight, one commentator has noted, "It would be unwise and . . . perhaps unconstitutional to adopt a collective bargaining model and use the principle of exclusive representation to empower the participants in an informal negotiation proceeding to bind all those affected by the outcome and deprive them of legal redress." A review board within an agency can provide such redress, although other models of review are possible.

The problems involving the interactive dynamics of such systems are less serious than the risk that consensual decisionmaking will result in the restriction or artificial modification of standard competitive systems. The main portion of this Article analyzes this risk in terms of price fixing and of more conventional antitrust jurisprudence. The competition problems, however, often go beyond price fixing. In theory, increased market information, which flows from intercorporate activities, should lead to more, rather than less, vigorous competition. Nevertheless, authorities have observed that:

In industries where competition is protected by the presence of a large number of companies producing similar products, cooperation between producers has frequently improved the character of competition without lessening the independence of individual firms. Even under the most favorable circumstances, however, some of the most valuable work of the trade association may be used to restrain competition.

This kind of competitive dysfunction was manifested recently in the Hydrolevel case. The facts of Hydrolevel are particularly relevant because the American Society of Mechanical Engineers (ASME) promulgates product safety codes through a consensual process, using a subcommit-
Each subcommittee has the responsibility of evaluating new products, measuring the products against existing standards to determine whether the new product is in compliance with ASME safety codes. A favorable decision is critical for marketing certain products in a variety of fields.

Plaintiff Hydrolevel Corporation produced a device that was submitted to ASME for compliance approval, a process that relied heavily on a consensual format. The submittal was delegated to the appropriate subcommittee, which purportedly had expertise regarding that kind of product. Unfortunately, some representatives on the subcommittee were full-time employees of a primary competitor of Hydrolevel. The competitor allegedly conspired with others on the review subcommittee to set up a response pattern that would result in the Hydrolevel product receiving a noncompliance designation. In private consensual decision-making systems, the ability to protect against this kind of conflict of interest is extremely limited.

As a result of the activity of the subcommittee and of publication of its result through ASME distribution channels, Hydrolevel contended that it was unable to market its product successfully and that it thus suffered serious injury. Although the trial court restricted the liability of ASME to situations in which it had intentionally participated in a conspiracy to affect a competitor adversely, the jury found ASME liable for $7.5 million. The Court of Appeals for the Second Circuit affirmed the jury verdict on liability, but remanded on the amount of damages.\textsuperscript{8} Although the central inquiry in Hydrolevel was whether ASME would be responsible for the acts of its agents in the subcommittee structure, the case raises a broader question of responsibility of parties who are participating in a consensual decisionmaking system. As an "extragovernmental agency," there is little question that ASME owes a special duty to proceed in a fair and orderly manner.\textsuperscript{9} Similarly, there is little question that the antitrust laws apply to trade associations sponsoring this kind of potentially restricted interaction.\textsuperscript{10} Nevertheless, the outer limits of antitrust liability for those participating in such schemes is undefined.

In affirming the court of appeals, the Supreme Court made clear that organizations and officials sponsoring a collective decisionmaking system can be responsible on a respondeat superior basis for the concealed and intentional misconduct of subordinates.\textsuperscript{11} Although it is premature

\textsuperscript{8} Id. at 120, 130.
\textsuperscript{9} Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941).
\textsuperscript{10} National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 683-85 (1978); Associated Press v. United States, 326 U.S. 1, 7 (1945); American Medical Ass'n v. United States, 317 U.S. 519 (1943).
\textsuperscript{11} Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc., 102 S. Ct. 1935 (1982).
to speculate on the implications of this decision, the result would seem to suggest considerable caution for those involved in consensual systems. The case also requires a rethinking of review systems, options for participation, and simple operating details such as notice and decision publication. Historically, a private organization participating in a consensual decisionmaking process was obliged to ensure procedural fairness. Whether these obligations also include liability for an agent's intentionally noncompetitive conduct is a different matter.¹²

From the perspective of implementation, consensual decisionmaking systems raise difficult questions regarding the identification of appropriate participants.¹³ If the negotiation process between government and an industry reflects a "partnership relationship" that is suggestive of an inadequate balance between directly affected entities, the system will be fatally flawed because it will lack credibility in the eyes of the public.¹⁴ Although similar problems of representation have been faced in public interest litigation in the past,¹⁵ there is no directly comparable model. Even where there is clear delegation of authority and identification of participants, certain private consensual systems have not proved more fair or effective than traditional administrative decisionmaking systems.¹⁶

A separate topic underlying consensual decisionmaking is the ques-


¹³. In April 1977 Dean F. Karl Willenbrock of the School of Engineering at Southern Methodist University testified before the Senate Judiciary Committee on the validity of consensual decisionmaking systems. Dean Willenbrock gave general support to consensual decisionmaking, but noted systematic problems in terms of party representation: "It is usually difficult to get adequate numbers from the consumer and public interest groups to balance the number of members and also the technical expertise of the representatives of industrial producers. If that job is not done well, the standard can be biased towards a narrow interest." Voluntary Standards and Accreditation Act: Hearings on S. 825 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 281 (1977) (statement of Dean F. Karl Willenbrock, Southern Methodist University School of Engineering).

¹⁴. Id. at 283. Parenthetically, Dean Willenbrock testified that there may be antitrust problems initially in technological consensual decisionmaking based on the standardization of products that might create disincentives for innovation and product development. Id. at 285. This particular kind of antitrust problem is not present in economic consensual decisionmaking systems, in which flexibility and change are critical to the effectiveness of the process.


tion of delegation to private groups that proceed by collective action. Delegation to private groups has been accomplished,\(^ {17}\) although not without considerable debate.\(^ {18}\) In *Todd & Co. v. Securities & Exchange Commission*\(^ {19}\) the Court of Appeals for the Third Circuit found that a private delegation was appropriate as long as the Securities and Exchange Commission had the opportunity to make both additional de novo findings and independent decisions on matters that theretofore had been before a consensual decisionmaking group. In the securities field, private consensual decisionmaking groups have substantial power to act, although the Securities and Exchange Commission has review power, including the power to make de novo findings to determine the validity of decisions of independent consensual decisionmaking bodies.

Under the Motor Carrier Act of 1980,\(^ {20}\) the Interstate Commerce Commission (ICC) retains authority and jurisdiction to review decisions made through the collective ratemaking process. As a general matter, if the ICC does not abdicate\(^ {21}\) its statutorily designated role to make findings of rate reasonability, then delegation to the rate bureaus undoubtedly is constitutional under circumstances set out in the Motor Carrier Act of 1980.\(^ {22}\)

Problems regarding an adverse effect on competition, clear delegation, general fairness, and selection of appropriate participants in the end may be insurmountable in some isolated market settings. Nevertheless, the existing alternatives to consensual decisionmaking, including adjudicatory and rulemaking techniques, have substantial drawbacks that have remained unresolved for decades, despite various modifications. The alternatives proposed to conventional adjudication and rulemaking, with the exception of consensual decisionmaking, are not particularly encouraging. For example, the Ash Commission\(^ {23}\) suggested the creation of a separate administrative court, similar to those in the tax and patent fields, to handle a variety of review functions that federal administrative agencies presently perform. According to the Ash

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\(^{19}\) 557 F.2d 1008 (3d Cir. 1977).


\(^{21}\) Several early state cases focused on the question of abdication of legislative responsibility. See Davis v. Fowler, 114 So. 435 (Fla. 1927); State v. Intoxicating Liquors, 117 A. 588 (Me. 1922).

\(^{22}\) See 49 U.S.C. § 10706(b) (Supp. IV 1980).

Commission report, this court might provide a uniform system for dispensing with numerous administrative problems.\textsuperscript{24} Other proposals include the use of technical review boards or the designation of an ombudsman to handle a broad range of problems within individual agencies.\textsuperscript{25}

From a procedural perspective, the exact form of a consensual decisionmaking system remains to be defined within each given market setting. Now pending before Congress is legislation to develop regulatory negotiation committees to be used as a substitute for rulemaking.\textsuperscript{26} The chance that one piece of legislation could isolate an ideal procedural format for consensual decisionmaking systems, however, is slight. Indeed, one of the problems with the Administrative Procedure Act (APA)\textsuperscript{27} is that it has been used as a procedural model in too many diverse factual settings, each with radically different regulatory objectives.

The benefits of consensual decisionmaking can be stated in simple terms: such systems increase information flow, facilitate enforcement and compliance, and provide access to decisionmaking for directly and indirectly affected entities. Consensual models, such as collective ratemaking, provide an opportunity for individuals to participate directly in a decisionmaking system that has a clear and perceptible effect on day-to-day business affairs. This exceeds the opportunities for participation provided in rulemaking and other forms of administrative decisionmaking. It obviously exceeds opportunities for participation provided in the adjudicatory setting, where standing requirements and other jurisdictional matters may prevent consumer participation.

The benefits of access are part of the principle argument in support of the Regulatory Mediation Act of 1981,\textsuperscript{28} which seeks to provide an opportunity for affected interests to participate in the development and implementation of various rules. This proposed legislation envisions a substantial continuing role for federal agencies as mediators and ultimate decisionmakers, a role different from that contemplated for collective ratemaking under the Motor Carrier Act of 1980. The motivation for a consensual decisionmaking system, such as collective ratemaking, and that underlying the Regulatory Mediation Act of 1981, however, are similar: legitimate and open coalescence of individuals who are af-


\textsuperscript{25} Id. at 160-61.

\textsuperscript{26} See Regulatory Mediation Act of 1981, S. 1601, 97th Cong., 1st Sess. (referred to Committee on Governmental Affairs).

\textsuperscript{27} 5 U.S.C. §§ 551-559, 701-706 (1976).

\textsuperscript{28} S. 1601, 97th Cong., 1st Sess. (1981).
fected by decisions about which they have great personal knowledge and on which they must act routinely.\textsuperscript{29} Although earlier arguments suggested that rulemaking could provide an open political process for those affected by agency decisions,\textsuperscript{30} a common sense evaluation would suggest that rulemakings have not been models of public participation.

Instead of a rulemaking becoming an open forum for participation and decisions being rendered with the advice and participation of the affected public, a different system evolved. During the 1970's, a "subgovernment phenomenon" occurred: commission staff, trade association personnel, private sector counsel, lobbyists, and congressional aides formed an unofficial but extremely powerful decisional body.\textsuperscript{31} This kind of system simply did not provide effective access. Unfortunately, decisionmakers in such systems appear to be isolated and distrusted, and substantive political considerations frequently seem to influence decisions.\textsuperscript{32} All too often, political appointees are insulated by lawyers, special assistants, legislative advisors, and others whose actions have the effect of preventing those who need to make the decision from access to those who are most dramatically affected by those decisions.\textsuperscript{33}

The aforementioned deficiencies in decisionmaking systems reached a high point in the deregulation movement.\textsuperscript{34} The evisceration of the regulatory system, however, has left a void, and again has resulted in denying directly affected individuals and groups access to primary decisionmaking authorities. Such a void might be filled effectively through consensual decisionmaking methodologies.\textsuperscript{35} Although most of


\textsuperscript{32} See Reich, Industries in Distress, 184 New Republic 19 (1981).

\textsuperscript{33} See Bingham, Does Negotiation Hold the Promise for Regulatory Reform, RESOLVE, Fall 1981, at 1.
the work in the consensual decisionmaking area has been in product safety and in development of technical standards, the model is also suitable to economic decisionmaking. A familiar argument is that systems designed to evolve technical standards create a lower degree of risk to competitive vigor than those dealing directly with price-sensitive data. Nevertheless, when private, directly affected entities negotiate technical standards for products, positions are taken based on a combination of the negotiators' perceptions of both the cost and feasibility of compliance. For economic decisions, such as those that are at the heart of collective ratemaking, the considerations are quite similar. When cost is broken down into component parts and then aggregated through a negotiation format, the resulting proposed rate structure reflects cost assessment coupled with market feasibility, with feasibility defined in terms of user acceptance.

As a general matter, consensual decisionmaking can provide an effective decisionmaking model by allowing affected parties access to the decisionmaking center, providing accurate information about market activity, and facilitating compliance and enforcement efforts. These benefits must be balanced against problems relating to accurate delegation, party identification, fairness, and timing. This balancing often is not done, however, because those looking at consensual decisionmaking typically are overwhelmed by the antitrust problems that inhere in decisionmaking systems in which competitors must collaborate. The remainder of this Article focuses on these antitrust problems.

I. THE MOTOR CARRIER ACT OF 1980: COLLECTIVE RATEMAKING AND CONSENSUAL DECISIONMAKING IN CONTEXT

Collective ratemaking is a consensual decisionmaking system in the motor freight common carrier industry in which carriers, shippers, and other persons meet on a regular basis. These meetings are held in rate bureaus, which are private nonprofit organizations established to coordinate and facilitate the ratemaking process. The essence of these meetings is a discussion of the cost of providing transportation service for individual commodities in a given region between defined geographical points. The result of these discussions is a vote in which those carriers with regulatory authority to provide service may express a preference for an increase or decrease in a specific rate or class of rates.

If the vote results in a change of the rate in question, the bureau pub-
lishes a proposed tariff. Carriers or others thereafter may file that rate with the Interstate Commerce Commission, and unless the rate is found unreasonable, it can go into effect. Carriers without authority to serve the specific route or to transport the commodity in question, shippers, consumer group representatives, and representatives of a state or the federal government may not vote, although they are permitted to participate in the dialogue prior to the vote. Carriers and other persons participating in the process of collective ratemaking enjoy an express immunity from the antitrust laws. The immunity is acquired only after the ICC reviews and publishes an "approval" of a comprehensive set of operating procedures that a bureau files with the Commission.

The capacity of the rate bureau system to impose a uniform artificial price level was changed by the Motor Carrier Act of 1980, which reformed the bureau decisionmaking process. The Act facilitates price competition, guaranteeing that those carriers who wish to petition the ICC for a rate level at variance with a collectively produced rate—to file an "independent action"—may do so without bureau interference, either in the form of a "protest" filed by the bureau or by bureau modification or cancellation of that rate. This has resulted in a dramatic increase in the number of independent action filings, which now account for two out of every three rates filed. Along similar lines, bureau employees may not "docket or act upon any proposal affecting a change in any tariff item," guaranteeing that only those who are directly involved in the market interaction participate in the process. In addition, all bureau meetings are open to any person, and votes cast by any member are disclosed on request. Finally, collective discussion is not permitted on rate changes within the "zone of reasonable fares" or on "released rates," on the theory that these price modifications have their greatest competitive effect when they are relegated to purely private negotiation.

The changes that the Motor Carrier Act of 1980 has made allow for a more open voting process and greater participation by both directly and

39. Id. § 10701.
40. Id. § 10706(b).
41. Id. § 10706(b)(3)(A).
44. See infra note 112.
46. Id. § 10706(b)(2)(B)(v).
47. Id. § 10706(b)(3)(C). Released rates are individually negotiated price reductions in which the reduction is premised on a diminution of loss responsibility for the carrier. See generally id. § 10730(b). Modifications within the "zone of reasonable fares" involve an increase or decrease of up to 10% from the established rate for any transit covered by a published tariff. See generally id. § 10708(d).
indirectly affected entities. The Act, however, does not permit shipper participation in the voting process in any form. In a consensual system, competitive dynamics are well served by negotiation among truly conflicting interests. The absence of such negotiation means that collective ratemaking is only partially a consensual system. Voting by shippers, consumer representatives, or even government representatives might be an effective means of achieving a more appropriate balance in the system.

Concern over the perceived anticompetitive aspects of collective ratemaking led Congress to empanel the Motor Carrier Ratemaking Study Commission, which was to report to Congress on the need to continue antitrust immunity—the sine qua non of collective ratemaking. Pursuant to the Motor Carrier Act, the Commission was to issue a report by January 1, 1983, but at an open meeting on December 9, 1982, the Commission rejected its staff recommendation. The effect of the absence of a report is that antitrust immunity for single-line collective ratemaking will end on July 1, 1984, unless Congress takes further action prior to that date. The lack of dialogue on single-line rates will have a negative effect on the consensual process because it will eliminate market information now central to rate bureau dialogue.

In its present form, collective ratemaking unquestionably creates an opportunity for price fixing, market manipulation, and other activities that historically have been condemned under the antitrust laws. It is also a system that uses consensual process with some success. A stronger argument certainly could be made for collective ratemaking were all aspects of the system in conformity with classical notions of collective negotiation, including voting by appropriate representatives of directly

50. Id. § 14(b)(4).
51. At the December 9 meeting, the Commissioners were deadlocked five-to-five on the Commission's staff recommendation presented as a discussion draft. The staff recommendation proposed the abolition of immunity for single- and joint-line collective ratemaking. The Commission consists of three Senators, three Congressmen, and four White House appointees. Id. § 14(b)(3). Members through 1981 included the Chairman, Sen. Bob Packwood (R-Ore); Sen. Howard W. Cannon (D-Nev); Sen. Edward M. Kennedy (D-Mass); Rep. Robert A. Roe (D-N.J); Rep. John F. Seiberling (D-Ohio); Rep. Bud Shuster (R-Pa); James H. Edler, Corporate Director of Traffic, American Greetings, Ohio; Stephan Murphy, Senior Vice President & General Counsel, Yellow Freight Systems; Michael C. Thometz, Blakeman Trucking; and Richard Warren, General Manager, Distribution Division, Lever Bros., New York. In January 1982 Sen. Barry M. Goldwater (R-Ariz.) replaced Sen. Cannon, who was not re-elected.
and indirectly affected interests.\textsuperscript{53} The system provides, however, an effective model for a discussion of the antitrust issues in consensual decisionmaking.

II. ANTITRUST ISSUES IN COLLECTIVE RATEMAKING

Because participants in the collective ratemaking process at present are expressly immunized from the antitrust laws pursuant to an approved agreement, it is difficult to predict market forces in the absence of immunity. These activities, however, would be problematic in an antitrust context. Nonetheless, the benefits to competition resulting from the increased flow of information, participation in an effective consensual decisionmaking process, and reduced compliance and enforcement costs, among other factors, compel consideration of the continued existence of antitrust immunity. Accordingly, the first step in the process is to investigate collective ratemaking as a reasonable restraint. To support this characterization, unique market circumstances and "public interest" factors must be asserted. Further, the benefits that flow from any consensual system must be considered in terms of the ratemaking process. In this context, the burden of demonstrating the reasonability of the restraint implicit in collective ratemaking would be met by proof of the following factors: indirectly affected parties are given an opportunity to participate in market decisionmaking; market diversity is maintained; there is a lack of power actually to fix a price; a highly complex rate structure is organized and easily implemented; the cost of doing business is reduced by using a central computer and other information facilities; a highly visible and flexible rate structure exists; or a market exists that does not sustain inefficient carriers.

A. Reasonable Restraints

1. Horizontal price-affecting agreements: not always unlawful per se

Collective ratemaking, as a consensual decisionmaking process, is a system of self-regulation coupled with federal agency oversight. Although some would construe any decisionmaking system with price-affecting potential as unlawful per se,\textsuperscript{54} an assessment of the specific processes used\textsuperscript{55} and an evaluation of the market success of the decision-

\textsuperscript{53} See Kerwin, supra note 48, at 405-09.

\textsuperscript{54} United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). The Court emphasized its firm adherence to the principle "that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." \textit{Id.} at 218.

\textsuperscript{55} For an example of the Court attaching great weight to the "fundamentally unfair manner" in which self-regulation was actively carried out, see Silver v. New York Stock Exch., 373 U.S. 341, 364 (1963).
making system\textsuperscript{56} are critical before coming to that judgment in the context of collective ratemaking.

Despite the "exception from the per se rule for reasonably self-regulated industries,"\textsuperscript{57} the mere existence of self-regulation provides little protection from a system designed to influence price.\textsuperscript{58} Instead, there must be an evaluation of whether discernible social benefits have been realized, whether procedures used are fair and reasonable, and whether the alternative of horizontal coordination is the least restrictive alternative for accomplishing a preferred market goal.\textsuperscript{59} Depending on these factors, the benefits to be derived from such amalgamations could preclude automatic characterization of collective ratemaking actions as a "naked restraint" of trade.\textsuperscript{60}

Courts nevertheless have not been lenient when clear violations are present. Antitrust law is replete with decisions condemning agreements that are "plainly anticompetitive,"\textsuperscript{61} lacking in "any redeeming virtue,"\textsuperscript{62} and thus are conclusively presumed illegal. Prior to such a characterization, however, courts require comprehensive analyses of market variables\textsuperscript{63} at least the first time such a practice is under review.\textsuperscript{64} A court will evaluate specific competitive effects, business relationships between parties, and any increased interbrand competition.\textsuperscript{65}

Without antitrust immunity, a consensual decisionmaking system like collective ratemaking is highly vulnerable to an antitrust attack. This leads to speculation regarding how such systems might be handled if antitrust immunity were not provided. Questions are raised concerning a court's inclination to evaluate factors of "reasonability" or simply to

\textsuperscript{56} Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 2 (1979) (courts must look to possible effects on "the proper operation of a predominantly free-market enterprise"); Cooney v. American Horse Shows Ass'ns, 495 F. Supp. 424, 431 (S.D.N.Y. 1980) (court must consider history of challenged restraint, reason for its implication, and effect on the industry).

\textsuperscript{57} Cooney v. American Horse Shows Ass'ns, 495 F. Supp. 424, 430 n.3 (S.D.N.Y. 1980).

\textsuperscript{58} See, e.g., Silver v. New York Stock Exch., 373 U.S. 341 (1963). The Court noted that certain self-regulatory practices of the stock exchange were "within the scope and purposes of the Securities Exchange Act," and therefore could withstand an antitrust challenge. \textit{Id.} at 361.


\textsuperscript{60} \textit{Id.} at 430.


\textsuperscript{62} \textit{E.g.}, Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

\textsuperscript{63} Exceptions to this requirement may arise when agreements are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978).

\textsuperscript{64} See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977). The Court expressly overruled the per se rule for vertical restraints set out earlier in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). Under the per se rule, any restraints regarding territory or customers were illegal if they were ancillary to price fixing; in such cases it was "needless to inquire further into competitive effect." \textit{Id.} at 375-76. See also White Motor Co. v. United States, 372 U.S. 253 (1963) (defining generally per se violations in antitrust laws).

\textsuperscript{65} Courts, however, are less likely to undertake a comprehensive evaluation of these factors if the restraint is a horizontal one. A horizontal restraint occurs between competitors at the same level of the marketplace. See, \textit{e.g.}, United States v. Topco Assocs., 405 U.S. 596 (1972).
apply a per se prohibition and declare the system to be a naked restraint of trade. The United States Supreme Court recently held in Broadcast Music, Inc. v. Columbia Broadcasting System\(^6\) that "not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints."\(^6\)

In the Broadcast Music case, a clear "price fixing" arrangement existed, although those affected by that system had independent pricing options available to them. Additionally, because the blanket licensing system effectively provided an opportunity to accomplish a market objective that, but for the price-fixing system, would have been impossible, the Court found the matter not subject to a per se prohibition. In fact, the Court noted that certain price-fixing agreements even might "increase economic efficiency and render markets more, rather than less, competitive."\(^6\)

Although an overly broad interpretation of the Broadcast Music rulings would be unwise, inclusion of a "reasonableness assessment" does appear feasible in the collective ratemaking field. In Central Iowa Power Cooperative v. Federal Energy Regulatory Commission,\(^6\) for example, the Court of Appeals for the District of Columbia Circuit upheld a pooling arrangement between horizontally aligned competitors, recognizing that the pricing system did "restrict competition in transactions between pool members."\(^7\) The court, nevertheless, found the agreement reasonably necessary to ensure the benefits of power pooling, to enhance predictability, and to facilitate rapid exchanges of price information that occur during complex rate transactions.\(^7\) Similar reasoning appears in City of Groton v. Connecticut Light & Power Co.,\(^7\) in which the court demonstrated a willingness to evaluate a power pool arrangement with clear price consequences on a "rule of reason" rather than on a per se basis. Citing Keogh v. Chicago & Northwestern Railroad,\(^7\) the court deemed itself free to evaluate whether a competitive market existed and whether consumers were receiving goods at a fair price.\(^7\)

Indeed, a number of courts have begun to require a "demonstrable economic effect" before designating any practice to be automatically

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67. Id. at 23.
68. Id. at 20 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).
69. 606 F.2d 1156 (D.C. Cir. 1979).
70. Id. at 1163.
71. The court cited Broadcast Music as support for its finding that the price-affecting arrangement was reasonable. Id.
73. 260 U.S. 156 (1922).
unreasonable and thus subject to the per se standard. In this regard, the comments of Justice Stevens, writing for the Court in *National Society of Professional Engineers v. United States*, become relevant:

"[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress." This standard suggests that a market practice should receive a reasonability assessment before the application of per se principles. Nonetheless, there is a strong probability that the per se rule will be applied to carriers and shippers who collectively discuss prices. Characterization of the collective ratemaking process therefore is critical in deciding whether the per se rule will be applied. In *Wire Mesh Products, Inc. v. Wire Belting Association* a federal district court held that "trade associations which compile industry statistics in composite form do not violate antitrust laws." The *Wire Mesh* case concerned a trade association that affected only a small percentage of the marketplace; as a result, the court found no adverse market effect. The Supreme Court, however, has asserted, "An effect can be 'substantial' under the Sherman Act even if its impact on interstate commerce falls far short of causing enterprises to fold or affecting market price." In light of this, it is possible to assume that collective ratemaking would be found to have a "substantial" effect on the market.

Other antitrust cases escaping the per se prohibition have involved data exchanges that were shown to have no adverse effect on competition. In *Kreuzer v. American Academy of Periodontology*, for example, a federal district court approved exchanges of information about ethical considerations and interpretations of by-laws in the absence of anticompetitive intent. In *Eliason Corp. v. National Sanitation Foundation* the Court of Appeals for the Sixth Circuit found that standards-setting and

77. *Id.* at 692 (footnote omitted).
78. *See*, *E.g.*, United States v. Gillen, 559 F.2d 541, 545 (3d Cir.) (mere existence of price-fixing agreement establishes illegal purpose), cert. denied, 444 U.S. 866 (1979). This is consistent with the basic rule laid down four decades earlier by the Supreme Court: "Any combination which tampers with price structures is engaged in an unlawful activity." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).
80. *Id.* at 1008 (citing Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921)).
industry self-regulation groups would pass antitrust scrutiny—even if their standards-setting programs tended to exclude certain entities—as long as the purpose of the organization was to develop industry standards and not to create a monopoly of a particular market.\textsuperscript{84} Discussions of rules of practice and of standards do occur in the collective ratemaking area. Nevertheless, the primary focus of dialogue is price, and it is therefore unlikely that the system would be characterized as nonprice sensitive.

Until a few years ago, all horizontal price-affecting restraints were construed as “naked restraints.”\textsuperscript{85} More recently, however, courts have shifted away from strict application of the per se rule.\textsuperscript{86} The Court of Appeals for the Ninth Circuit, for example, has ruled recently that “the presence of a horizontal element does not require the use of a per se rule.”\textsuperscript{87} The court noted that before applying a per se rule, a court must “examine the nature, history, purpose and probable effect of the restraint.”\textsuperscript{88} Cases of this nature reflect a tendency to look at competition between parties, rather than to focus on horizontal alignment, with the idea that “the antitrust laws are primarily concerned with interbrand competition.”\textsuperscript{89} Interbrand competition may not be adversely affected by a horizontal exchange of information or similar data transactions. Whether collective ratemaking can escape the “adverse” effect designated is, however, a different matter.

2. *Reasonable restraint arguments for collective ratemaking*

For many years, any direct current price exchange agreement was construed to fall within the per se prohibition and would not be evaluated on a reasonability basis. The Supreme Court in *Broadcast Music*, however, modified that proposition. Lower courts also have tempered the per se approach to antitrust scrutiny. In *Lektro-Vend Corp. v. Vendo Co.*\textsuperscript{90} the Court of Appeals for the Seventh Circuit listed the traditional antitrust violations that have a deleterious effect on the economy. In that category, the court included group boycotts, market allocation, and

\textsuperscript{84} For an interesting case involving nonapplication of the per se doctrine to an obvious price-fixing agreement, see *Workman v. State Farm Mut. Auto. Ins. Co.*, 520 F. Supp. 610 (N.D. Cal. 1981). In *Workman* the court held that a horizontal agreement between insurance companies setting benefit levels was not in violation of antitrust laws. The court reached this result in light of two significant factors: the protection afforded to the “business of insurance” by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1014 (1976), and the absence of an anticompetitive effect.

\textsuperscript{85} This proposition has been considered “settled law” since *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). See generally L. SULLIVAN, supra note 12, § 74, at 198-203.


\textsuperscript{87} *Ron Tonkin Gran Turismo, Inc. v. Fiat Distribs.*, 637 F.2d 1376, 1385 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981).

\textsuperscript{88} Id. at 1385 n.8.

\textsuperscript{89} Id. at 1387.

\textsuperscript{90} 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1277 (1982).
certain kinds of tying arrangements.\textsuperscript{91} Interestingly, this list did not include price-fixing agreements. The decision in \emph{Official Airline Guides, Inc. v. Federal Trade Commission}\textsuperscript{92} also reflects this greater flexibility. In \emph{Airline Guides} the Court of Appeals for the Second Circuit found that publishers of airline rates did not violate the antitrust laws. Rate compilation was permitted despite the appearance of monopoly power, an arbitrary and damaging method of locating pricing schedules, and a refusal to list prominently the rates of certain lines.

\emph{Airline Guides} reflects a more restrained approach to competition enforcement and represents a retreat from the earlier, more vigorous approach to antitrust law.\textsuperscript{93} Whether collective ratemaking would receive similar treatment, however, is a matter of some speculation.

The debate over collective ratemaking recently has focused on whether the system provides appropriate competitive incentives, in terms of price, entry, efficiency, innovation, and stability, or whether the process fosters the negative market consequences normally associated with horizontal alignments of competitors.\textsuperscript{94} Collective ratemaking exists as a unique form of consensual decisionmaking in the most difficult test setting: economic decisionmaking. Consensual decisionmaking has advantages over conventional public decisionmaking in health and safety areas, but those advantages seem less convincing when the decision involves the establishment of a factor as critical and sensitive as cost. In addition to the consensual process itself, questions have been raised about the system's ability to prevent excessive prices, to prevent price discrimination, to ensure adequate profits, to maintain economic service in small communities, and generally to meet classical regulatory expectations.\textsuperscript{95} A test to determine if these expectations are met is to evaluate the condition of the market.

The national market structure in the trucking industry is diverse: of 17,000 motor freight common carriers, the "big 8" account for less than 14\% of the market.\textsuperscript{96} In contrast, the major market participants in automobile and steel production completely dominate the marketplace.\textsuperscript{97}

\begin{itemize}
  \item \textsuperscript{91} Id. at 265 n.11.
  \item \textsuperscript{93} \textit{See} Recent Decision, 49 GEO. WASH. L. REV. 595 (1980) (\emph{Airline Guides} forbids FTC interference in monopolized market if new entry is likely to remedy anticompetitive situation).
  \item \textsuperscript{94} \textit{See} J. Meeks, Legal Issues and Consequences of Changes In Motor Carrier Rate Making Regulations, Speech Before the DANA-ATA Foundation Academic Symposium, Stanford University 29-30 (Dec. 1981).
  \item \textsuperscript{95} \textit{See} Jacobs, \emph{Regulated Motor Carriers and the Antitrust Laws}, 58 CORNELL L. REV. 90, 129 (1972).
  \item \textsuperscript{96} Ogborn, \emph{The Impact of Deregulation of the Trucking Industry}, 10 MEM. ST. U.L. REV. 1, 12 (1979).
  \item \textsuperscript{97} Id.
\end{itemize}
Indeed, one observer has noted, "There is not another comparable segment of the economy in which there are as many entities significantly competing for available business . . . [and] in which the largest members divide as small a portion of the relevant market." Yet this is by no means the uniform perspective regarding the market. One commentator believes that "the concentration ratios are . . . surprisingly high. They range from an average of 55% in the corridors in the eastern and central states up to an average value of 80% in corridors in the western states." Others, taking a less statistical approach, simply condemn the entire system in fairly broad terms. For example, one commentator argues that collective ratemaking "is defective precisely because it is unjust, and it is unjust because it forcibly interferes with the rights of private individual citizens to pursue voluntarily their own solutions to economic problems." Significantly, even those critical of the collective ratemaking systems frequently recognize a need for the process.

The trucking market is not dominated by monopolistic or oligopolistic entities. Such entities traditionally have been inefficient and historically have been looked on with disfavor. The market structures invariably promote dysfunction and inappropriate allocation of resources. As one observer suggested, "Firms with monopoly power are substantially free to disregard the best interests of both their owners . . . and consumers." In a complex market, not dominated by any one entity or group of entities, the reasonability assessment is all the more difficult. Objective standards are virtually nonexistent. Experts on both sides of the collective ratemaking issue draw opposite conclusions from identical data. One commentator recently concluded that it is "probably not necessary and may be quite harmful to eliminate antitrust immunity for collective ratemaking." The risk inherent in collective

101. For example, Senator Kennedy vigorously opposes the maintenance of antitrust immunity, while simultaneously supporting legislation allowing bureaus to publish rates and collect data. See Senate Hearings, supra note 99, pt. II, at 361 (statement of Sen. Edward M. Kennedy). The elimination of antitrust immunity, however, would most likely signal the elimination of the publication and data collection process that Senator Kennedy advocated.
102. Shuman, The Application of the Antitrust Laws to Regulated Industries, 44 TENN. L. REV. 1, 8 (1976). Professor Shuman proposes that a specialized antitrust court be established to apply the antitrust laws to regulated industries and to evaluate the necessity of antitrust immunities.
103. See id.
104. Id. at 10.
ratemaking is the establishment of anticompetitive "cartel-like" behavior. Nevertheless, the rate bureau system in the trucking industry is not likely to create an oligopolistic market.\textsuperscript{106}

To summarize thus far: The structure of the industry; the low barriers to entry, coupled with the easing of legal barriers; the restrictions placed upon . . . rate bureau[s]; the more flexible regulatory approach to rate changes; all of these factors make it very unlikely today that significant, lasting [anticompetitive] behavior on the part of the rate bureaus is possible.\textsuperscript{107}

The process of collective ratemaking in the trucking industry is remarkably complex and involves numerous considerations. Accurate determinations of cost require an evaluation of data relating to labor, fuel, origin and destination options, infinite commodity variations, equipment modifications, and scheduling.\textsuperscript{108} The nature of the costing process, coupled with the bureaus' lack of power to fix a price, suggests that the process is desirable, perhaps even necessary, to create stable, predictable rates and available information . . . . In this industry, as in some others, an ordering mechanism appears essential . . . . In short, rate bureaus cut the information costs to the industry, both shippers and carriers. This would all be true whether or not federal regulation existed. But the job of the ICC to oversee rates makes the case stronger. There is little doubt that the job the rate bureaus commonly do in researching and documenting the applications for rate changes helps the ICC to carry out its statutory mandate.\textsuperscript{109}

It is interesting to note that those in the traffic or transportation departments of virtually every shipper and carrier, who participated in a survey that was part of the extensive hearing reports leading up to the Motor Carrier Act of 1980, favored maintenance of antitrust immunity. In contrast, however, many senior executives of various companies favored elimination of immunity, reflecting their general philosophy of deregulation.

The tremendous volume and conflicting nature of the testimony provided to congressional committees investigating collective ratemaking yield little clear or certain guidance. Yet several factors remain true. Bureau tariffs presently cover approximately 900 million transit combinations for single- or joint-line service in the United States. When factored with the thousands of different commodity descriptions and six or seven weight categories, the total number of possible transportation

\textsuperscript{106} See id. at 33.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 33-34.
\textsuperscript{109} Id. at 34-35.
combinations is almost beyond calculation. In the absence of a coordinating mechanism, it is unlikely that the open market could reasonably dispense this kind of information. When collective ratemaking is considered in the context of the benefits of providing both an open forum and ICC oversight, an organized and competitive system exists. Direct price competition exists by virtue of price options within the “zone of reasonable fares” and the opportunity to proceed on the basis of independent action. There are market options beyond regulated common carriers, including contract carriers, private carriers, and freight forwarders, and the use of shipper associations for cargo accumulation purposes.

Notwithstanding the range of available substantive “reasonable restraint” arguments, collective ratemaking all too often is discussed in the political rhetoric of “price fixing.” One individual’s view of the “public interest” or one set of economic rationales will not resolve the policy dilemma that collective ratemaking and consensual decisionmaking presents. The preferred treatment is a process-oriented approach that focuses on the nature of consensual decisionmaking as an alternative reasoning model.

3. Market response and inefficient carriers

Beyond the conflicting personal perceptions of “public interest” that tend to confuse the collective ratemaking debate is a more difficult argument attacking the reasonability of collective ratemaking on the premise that it protects inefficient or weak carriers. This argument is both misleading and statistically unsound. The trucking industry is undergoing serious structural and economic changes. These changes are not, however, indicative of gross market dysfunction. Factors such as the decline of rate of return on investment and the increase in the number of bankruptcies demonstrate that the market is significantly affected by open-market factors.

Industry representatives may object to the forces brought to bear by the Motor Carrier Act of 1980. The combination of increased price competition, radically increased use of the independent action format, and reduced entry control—all in the midst of a national recession—has

111. See Meeks, supra note 94, at 34.
112. Current statistics indicate an independent-action rate in excess of 60%. These statistics are maintained by Eastern Central Motor Carrier's Association, following the Continuous Traffic Study, and are available from ECMCA, P.O. Box 3600, Akron, Ohio 44310.
brought fairly predictable results.\textsuperscript{114} The basic industrial structure of the trucking industry has, nevertheless, remained intact during this period of change. The industry is diverse, whether measured by size, ownership patterns, method of operation, pricing choices, or technological sophistication. This is a nonconcentrated, highly diverse market, and from an organizational standpoint it lacks all of the fundamental elements of a cartel. It is illogical, therefore, to believe that the industry could be highly responsive to these economic trends while still supporting its "least efficient members" and remaining artificially stabilized.\textsuperscript{115}

The industry is highly responsive to recession.\textsuperscript{116}

Under conventional structural market theory, diverse and nonconcentrated markets tend to be responsive, highly competitive and, as a structural matter, supportive of basic competition interests. Market objectives in this or any other industry are simple and easily agreed on. They include establishment of prices that bear a reasonable relationship to costs plus a rate of return sufficient to stimulate further investment; entry nominally controlled by market success and efficiency and public need in order to avoid waste of valuable resources; efficiency in the delivery of goods and services; innovation and research to keep misuse of critical resources to a minimum; and finally, in a service industry, the predictability of services that is deemed necessary for the public interest. If such factors exist, a market is healthy, competitive, and successful. No single market process—regulatory, open, or mixed—will provide these results in all industries. Different industries and different economies of scale dictate different roles for the federal government. Present market conditions in the trucking industry indicate that these objectives are at least partially being met. Accordingly, a reasonable restraint characterization could apply to collective ratemaking.

\textbf{B. Collective Ratemaking Perceived as a Classical Restraint: Differing Standards for Evaluation}

Although an evaluation of the collective ratemaking process could result in a judicial finding of reasonability, there is considerable support for a finding that the process is per se unlawful. The Sherman Act is applicable to all transactions that are designed to affect price between horizontally aligned entities. This is true regardless of whether the

\textsuperscript{114} Id.

\textsuperscript{115} See J. Miller III, Chairman, Federal Trade Commission, Statement Before the Motor Carrier Ratemaking Study Commission (Nov. 18, 1981). Chairman Miller asserted that the industry supports its least efficient entities and is artificially stabilized with upward pricing patterns. Such assertions are radically at odds with the bankruptcy statistics, price variation statistics, and other factors that have become apparent in the industry structure. \textit{See also} Meeks, \textit{supra} note 94; Silberman, \textit{supra} note 113.

\textsuperscript{116} Silberman, \textit{supra} note 113.
transaction keeps prices down,\textsuperscript{117} facilitates competition,\textsuperscript{118} or controls and eliminates apparent negative market forces.\textsuperscript{119} The per se doctrine is used when a court is convinced that the nature of the particular market practice will have an adverse market effect, notwithstanding any justifications that the defendants might raise.\textsuperscript{120} In the price-fixing field, per se standards will be operative unless some overwhelming "controlling circumstance" necessitates the need for a price exchange.\textsuperscript{121} To the extent that there is a "controlling circumstance" exception to the application of the per se doctrine for price-fixing cases, it apparently is bounded by considerations of fraud or elimination of double-dealing.\textsuperscript{122}

There appears to be a growing trend to allow various business justifications for activities that heretofore have been considered per se violations of the antitrust laws.\textsuperscript{123} Many courts, however, are inclined to follow traditional antitrust dogma and recite a predictable litany that incorporates a rigid per se analysis when dealing with exchange of price information.\textsuperscript{124} The Supreme Court relatively recently has at times espoused a fairly straightforward and inflexible posture in this regard. In \textit{United States v. McKesson & Robbins, Inc.}\textsuperscript{125} the Court condemned price exchanges and held:

It makes no difference whether the motives . . . are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or decrease

\textsuperscript{118} United States v. Topco Assocs., 405 U.S. 596 (1972).
\textsuperscript{119} Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
\textsuperscript{121} United States v. Container Corp. of Am., 393 U.S. 333, 335 (1969); \textit{see} FTC v. Cement Inst., 333 U.S. 683 (1948).
\textsuperscript{122} \textit{See} FTC v. Cement Inst., 333 U.S. 683 (1948).
\textsuperscript{124} The litany typically proceeds as follows:

\begin{quote}
Price fixing agreements are per se violations of § 1 of the Sherman Act . . . . If the defendants' purpose was to fix prices, it is not material that they had reasonable goals for doing so . . . . In \textit{Socony-Vacuum Oil} the Supreme Court considered an alleged conspiracy to raise gasoline prices for the purpose of stabilizing the market . . . . It was held that even if the purpose of the conspiracy was to eliminate the evils within the system, with the aim of establishing more reasonable and more fair prices, the conspiracy was nevertheless violative of the Sherman Act. The Court held that there is no justification for price fixing in a free economy.
\end{quote}

\textit{King & King Enters. v. Champlin Petroleum Co., 657 F.2d 1147, 1151 (10th Cir. 1981) (citations omitted).}
\textsuperscript{125} 351 U.S. 305 (1956).
Additionally, the absence of an enforcement device to guarantee reciprocal exchange of prices will not offset the application of per se standards to price-fixing arrangements. Although the rate bureaus have no enforcement mechanism to control or "fix" a price, the likelihood that collective ratemaking would be subsumed within these standards cannot be ignored. As one authority simply stated, "Explicit price fixing and market division are per se unlawful and no justification can be made."\(^{128}\)

The passage of the Motor Carrier Act of 1980 has created a much different market environment than had existed previously.\(^{129}\) The power of precedent in the antitrust field, however, may influence even the most independent of courts. For example, the Court of Appeals for the Fifth Circuit recently recited "boiler plate" standards for price-fixing cases.\(^{130}\) After articulating the Standard Oil rule of reason,\(^{131}\) the court noted, "Certain practices . . . have such a 'pernicious effect on competition' . . . that they are considered to be per se violations of section 1 of the Sherman Act. Among these practices is price fixing . . . . [T]he machinery employed to achieve that end is immaterial . . . ."\(^{132}\)

If collective ratemaking is construed as price fixing, the probability is that a court will find that "no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy."\(^{133}\) Courts seem willing to presume purpose, making statements such as "the mere existence of a price-fixing agreement establishes a defendant's illegal purpose. . . . Thus, the conscious object of every price-fixing conspiracy is an illegal act."\(^{134}\) The Court of Appeals for the Third Circuit has gone so far as to find that proof of intent is irrelevant in a criminal antitrust case if the vehicle for artificially affecting a given market is price fixing.\(^{135}\)

Once a practice falls in the per se category, judicial latitude toward arguments about market justification is closely circumscribed: "What is

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126. Id. at 310 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-24 (1940)).
128. L. SULLIVAN, supra note 12, § 88, at 252.
129. See Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (rate-fixing combinations have no immunity from the antitrust laws); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (voluntary association of railway companies to establish rates illegal).
131. Standard Oil Co. v. United States, 221 U.S. 1 (1911).
133. United States v. Gillen, 599 F.2d 541, 545 (3d Cir. 1979).
134. Id.
135. Id.
meant to be avoided by the use of per se standards is the need to explore extensive dealings between parties to determine the existence of anticompetitive effects on trade.\textsuperscript{136} It is significant that courts following traditional per se analysis would be prohibited from evaluating a broad range of factors in the collective ratemaking area, such as a shipper's claim of market efficiency, if the collective ratemaking scheme were presented in an antitrust proceeding. Courts have found that per se violations are "no less so because of the purchasers' preference for the allegedly tied product."\textsuperscript{137} A basis therefore exists for concluding that collective ratemaking will be construed as price fixing and will not be evaluated with regard to industry needs, public interest factors, shipper demands, or similar business justifications.

As the Fifth Circuit stated, "A purpose to fix wholesale and/or retail prices is per se unreasonably anticompetitive."\textsuperscript{138} If the process is characterized, however, as something less than "purposeful" price fixing, a rule-of-reason approach will be followed.\textsuperscript{139} The reasonableness standard permits an assessment of collective ratemaking in light of general transportation problems, but would not necessarily involve an evaluation of the validity of consensual decisionmaking as an institutional process.\textsuperscript{140} To accept the comprehensive transportation argument, a court must be willing to concede that there are certain competitive losses inherent in consensual decisionmaking. For example, the Fifth Circuit recently used a standard that calls for balancing the reduction of competition against the benefits of a particular apparently anticompetitive practice.\textsuperscript{141}

\begin{enumerate}
\item \textsuperscript{137} Id. (dealing with tying arrangements and asserted justifications).
\item \textsuperscript{139} The following test includes the operative factors under the rule-of-reason approach:
\begin{quote}
The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.
\end{quote}
\item \textsuperscript{140} See Eiberger v. Sony Corp. of Am., 622 F.2d 1068, 1076 (2d Cir. 1980) (adopting the Chicago Bd. of Trade standard).
\item \textsuperscript{141} The court stated the balancing standard in these terms:
\begin{quote}
When a practice tends to reduce competition . . . but nevertheless operates to make the market more efficient—thereby aiding in the reduction of prices and the better allocation of resources, for example—then it may still be found, under the rule of reason, to further aid the Act's goal of aiding competition.
\end{quote}
Even if a court characterizes collective ratemaking as price fixing, there is a chance that the process will not be condemned on a per se basis.\textsuperscript{142} A court reviewing the collective ratemaking process under a reasonability standard could look into the total rate structure, the process of decisionmaking, and the actual rates that result.\textsuperscript{143} Nevertheless, this seems unlikely in view of the early condemnation of collective ratemaking\textsuperscript{144} and prevailing sentiment regarding deregulation.

Finally, simply because shippers benefit from vigorous service competition does not necessarily mean that a court will find a particular practice to be outside the per se category, or reasonable.\textsuperscript{145} There is some disagreement about service competition, often on the premise that "if all rate bureau antitrust exemptions were removed, rates would be considerably competitive."\textsuperscript{146} Whether this is based on a belief that the bureau consensual process is per se unlawful or is an unreasonable restraint, the conclusion is the same: in the name of competition, collective ratemaking should be eliminated. The validity of this conclusion, however, is subject to doubt in light of the gains that can be achieved through the application of the antitrust laws.

\textit{C. The Antitrust Illusion}

\textit{I. General discussion}

During the period of general deregulation, 1977-82, a familiar argument was that there would be no loss of the protections that regulatory


\textsuperscript{143} United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978).

\textsuperscript{144} United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

\textsuperscript{145} Georgia v. Pennsylvania R.R., 324 U.S. 439, 452-55 (1945). Similarly, the Supreme Court has stated:

\begin{quote}
The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition . . . .
\end{quote}


\textsuperscript{146} In a request by the Federal Trade Commission (FTC) to institute a rulemaking to consider adoption of a "zone of reasonableness" for motor carrier rates, economists for the FTC acknowledged the presence of service competition and found it to be unpersuasive in terms of reasonability of the collective ratemaking process. See R. Lieb, Competitive Pressures in the Motor Carrier Industry, Petition of the Federal Trade Commission for the Institution of a Rulemaking Proceeding to Consider Adoption of a "Zone of Reasonableness" for Motor Carrier Rates app. A-1 to -34 (filed before I.C.C. Mar. 12, 1979).

regimes had provided to consumers and users. Vigorous implementa-
tion of the antitrust laws would preserve protections against price dis-
CRIMINATION AND SIMILAR UNFAIR MARKET PRACTICES. ON THIS ASSUMPTION, 
Several regulatory structures were abolished. Open market antitrust en-
FORCEMENT, IT WAS BELIEVED, PROVIDED INCENTIVES FOR GREATER COMPETITION 
AND ENHANCED ALLOCATIVE EFFICIENCY AS WELL AS INTERVENTION BY THE REGULA-
TORY REGIMES WHEN NECESSARY. INSTEAD, THERE HAS BEEN A SHIFT AWAY FROM 
VIGOROUS ANTITRUST ENFORCEMENT, AND THERE HAVE BEEN CHANGES IN THE JUDI-
CIAL PERSPECTIVE OF THE ANTITRUST LAWS SUGGESTING THAT CERTAIN MARKET 
PRACTICES, HERETOFORE CONSIDERED TO BE UNLAWFUL, WILL NOW BE TOLERATED. 
VALUES PROTECTED IN THE PAST, SUCH AS DIVERSITY AND NONCONCENTRATION, 
HAVE BECOME LESS IMPORTANT. STRUCTURAL ANTITRUST CASES DESIGNED TO "IM-
PROVE MARKETS" ARE NOT LIKELY TO BE FILED IN THE UPCOMING YEARS. FURTHER, 
JURISDICTIOnAL PROBLEMS UNDER THE ROBINSON-PATMAN PRICE DISCRIMINA-
TION ACT147 PROHIBIT THE USE OF THE ANTITRUST LAW PROVISIONS GOVERNING 
PRIMARY PRICE DISCRIMINATION. IN SHORT, TO THINK THAT THE ANTITRUST LAWS 
WILL SUPPLANT THE REGULATORY SYSTEM, PROVIDING PROTECTION FOR SMALLER EN-
TITIES IN NEED THEREOF WHILE SIMULTANEOUSLY PROVIDING VIGOROUS COMPET-
ITIVE INCENTIVE AT THE OTHER END OF THE SIZE SPECTRUM, WOULD BE UNSAFE 
LOGIC. THE ANTITRUST LAWS MAY BE NOTHING MORE THAN AN ILLUSION OF PRO-
TECTION THAT MAY PROVIDE LITTLE MORE THAN A VEHICLE FOR DISMANTLING VARIO-
US REGULATORY OR CONSENSUAL DECISIONMAKING SYSTEMS.

As a general proposition, the antitrust laws are designed to protect 
COMPETITIVE SYSTEMS FAR MORE THAN CONSUMERS OR INDIVIDUAL COMPETI-
TORS.148 THE CASE LAW SUGGESTS, HOWEVER, THAT THE ANTITRUST LAWS CAN BE A 
VITAL DEVICE FOR CONSUMER PROTECTION IN CERTAIN CIRCUMSTANCES.149 IN 
1976 THE PARENTS PATRIAE ACT150 PROVIDED AN OPPORTUNITY FOR STATE ATTOR-
NEYS GENERAL TO PURSUE CONSUMER INTERESTS ADVERSELY AFFECTED BY ANTI-
COMPETITIVE PRACTICES. AT ABOUT THE SAME TIME, CONGRESS REPEALED THE 
MCGUIRE AMENDMENT151 AND THE MILLER-TYDINGS ACT,152 EFFECTIVELY PUT-
TING STATE FAIR TRADE LAWS TO REST. EVENTS OF THIS NATURE SUPPORT THE PREM-
ISe THAT VIGOROUS ANTITRUST SCRUTINY MIGHT SUPPLANT THE REGULATORY 
AGENCY'S PROTECTIVE ROLE.

Since 1977, however, the emerging trends suggest that consumers or 
USER GROUPS CANNOT DEPEND ON THE ANTITRUST LAWS TO PROVIDE A GENERAL 
PROTECTIVE PATTERN. THESE TRENDS INCLUDE THE EXPANSION OF THE "BUSINESS

justification" defense, the modification of the policy of the Supreme Court on the use of per se standards, the Court's decision in Illinois Brick Co. v. Illinois,\textsuperscript{153} and procedural impediments to class actions following Eisen v. Carlisle & Jacquelin.\textsuperscript{154} These must be considered in light of a shift in national policy as reflected by the statements of antitrust enforcement officials and substantive refusals on the part of the Federal Government to go forward in a variety of pending antitrust proceedings. From the standpoint of shipper or user groups in the transportation market, the major protective premise of the antitrust laws is the prevention of price discrimination. The major legislative prohibition against price fixing is the Robinson-Patman Act; this Act is jurisdictionally unavailable for cases involving a service as opposed to a commodity.\textsuperscript{155}

The decline of the antitrust laws as protection for shipper or consumer interests does not support the conclusion that negotiated decisionmaking formats will be uniformly acceptable. Per se standards are still applied to direct price discussion and dialogue. The possible immunities available, except express congressional immunity, have become highly defined and difficult to acquire. A Parker v. Brown\textsuperscript{156} formulation requires compulsory filing requirements coupled with substantive regulatory approval. This would prevent application of this state-action exception in the area of intrastate ratemaking. In the area of derivative or implied immunity, the Supreme Court has held that unless there is a patent repugnancy between the implementation of a regulatory system and the antitrust laws, immunity will not be implied.\textsuperscript{157}

The Noerr-Pennington doctrine\textsuperscript{158} provides a vehicle for immunizing the activities of entities seeking to affect a governmental process, notwithstanding their competitive purposes or the price-affecting consequences of such integration. It is now clear that in the absence of an ongoing governmental regulatory program, the Noerr-Pennington doctrine will be of little use.\textsuperscript{159} If the ICC provides only occasional oversight of collective ratemaking transactions, a fundamental element of the Noerr-Pennington doctrine will be absent: there will be "no government process to affect." Protection under the Noerr-Pennington doctrine therefore will be minimal. The antitrust illusion therefore includes two aspects: a gen-

\textsuperscript{153} 431 U.S. 720 (1977).
\textsuperscript{154} 417 U.S. 156 (1974).
\textsuperscript{156} 317 U.S. 341 (1943).
\textsuperscript{159} See infra notes 244-72 and accompanying text.
eral reduction in antitrust vigor that indicates a new role for antitrust law in the American economy and targeting of the existing antitrust system primarily at processes like collective ratemaking regardless of the apparent utility of such systems.

Since 1979, the Supreme Court and various lower federal courts have indicated a willingness to participate in a “reasonability” assessment, even when the cases involve direct price exchange agreements.\textsuperscript{160} The “business justification” defense appears to have resurfaced, calling into question the utility of antitrust enforcement as a moderating force in the economy.\textsuperscript{161} Further, the Court has greatly reduced the scope of consumer recourse to the antitrust laws.\textsuperscript{162} In addition, the Federal Trade Commission, the “other half” of the government’s antitrust enforcement arsenal, recently has dropped three major cases, suggesting a significant reduction of antitrust enforcement vigor.\textsuperscript{163} Finally, the Reagan administration has given clear signals that it is hesitant to enforce the antitrust laws and is willing to approve corporate integrations in concentrated markets.\textsuperscript{164}

Those seeking protection from price discrimination and other forms of market abuse often advance the antitrust laws as an “answer.” If the antitrust laws are not vigorously enforced, however, and if the courts do not interpret the law to prohibit a broad range of potentially dangerous business practices, then the promise of protection from the antitrust laws is merely illusory. It is impossible to predict whether future prosecution of currently immunized activities or consistent antitrust enforcement will occur. In the trucking industry, if the antitrust laws are the sole protective mechanism for both the small shipper and the small carrier, then long-term organizational diversity will suffer and concentration in the trucking industry will increase.

2. Political intervention in antitrust decisionmaking

It would be naive to assert that those charged with enforcement of the antitrust laws are immune from political pressure. Indeed, this problem is manifested in the inappropriate use of executive authority in the en-


\textsuperscript{161} Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

\textsuperscript{162} \textit{Illinois Brick Co. v. Illinois}, 431 U.S. 720 (1977), (because pass-on theory may not be used defensively by antitrust violator against a direct purchaser, the theory may not be used offensively by indirect purchaser against an alleged violator).

\textsuperscript{163} \textit{In re Kellogg Co.}, F.T.C. Docket No. 8883 (dismissed Jan. 15, 1982); \textit{In re Exxon Corp.}, 98 F.T.C. 453 (1981); \textit{In re E.I. du Pont de Nemours & Co.}, 96 F.T.C. 653 (1980).

\textsuperscript{164} Wash. Post, Aug. 23, 1981, at G1, col. 1.
forcement of the antitrust laws. According to the current administration, "conglomerate mergers, or mergers generally, have [not] increased economic concentration to dangerous levels." In addition, the government "must recognize that bigness in business does not necessarily mean badness." These statements indicate that the Reagan administration embraces a laissez-faire, free market economic theory that does not foster an impression of active antitrust enforcement. The Chairman of the Federal Trade Commission recently suggested a reduced rule for antitrust enforcement and stated that a "major review of the antitrust laws and their public and their private enforcement is sorely needed." So clear was the signal, one Senator observed that "the Reagan Administration, in my view, has demonstrated a singular lack of interest in the

165. See Hearings on H.R. 803 Before the House Comm. on the Judiciary, 93d Cong., 2d Sess. (1974). The following dialogue is transcribed from the White House tapes of April 19, 1971, reprinted in H. LINDE & G. BUNN, LAW AND ADMINISTRATIVE PROCESS 571-73 (1981). The discussion between President Richard Nixon and Assistant Attorney General Richard Kleindienst was whether Mr. Kleindienst should prevent Assistant Attorney General Richard McLaren, then head of the Antitrust Division of the Department of Justice, from continuing the ITT antitrust case. Only the President's side of the conversation was taped.

PRESIDENT: Hi, Dick [Kleindienst], how are you?
P: Fine, fine, I'm going to talk to John [Mitchell] tomorrow about my general attitude on antitrust, and in the meantime, I know that he has left with you, uh, the I T and T thing because apparently he says he had something to do with them once.
P: Well, I have, I have nothing to do with them, and I want something clearly understood, and, if it is not understood, McLaren's ass is to be out within one hour. The ITT thing—stay the hell out of it. Is that clear? That's an order.
P: The order is to leave the god damned thing alone. Now, you keep him the hell out of that. Is that clear?
P: Or either he resigns. I'd rather have him out anyway. I don't like the son of a bitch.
P: That's right. Don't file that brief.
P: The question is, I know, that the jurisdiction—I know all the legal things, Dick, you don't have to spell out the legal—.
P: That's right. Don't file that brief. You're—my order is to drop the god damn thing. Is that clear?

PRESIDENT: [now speaking to John Ehrlichman, chief assistant for domestic affairs] The problem is McLaren's a nice little fellow who is a good little antitrust lawyer out of Chicago. Now he comes in and all these bright little bastards that worked for the Antitrust Department for years and years and learned to hate business with a passion—any business—have taken him over . . . .

PRESIDENT: [now speaking to George Schultz, Director, Office of Management and Budget] The problem is McLaren's a nice little fellow who is a good little antitrust lawyer out of Chicago. Now he comes in and all these bright little bastards that worked for the Antitrust Department for years and years and learned to hate business with a passion—any business—have taken him over . . . .


167. Id. at G2, col. 4.
168. Id.
enforcement of the antitrust laws." The politics of nonenforcement have overwhelming consequences for much of the deregulation theory of the late 1970's. The antitrust laws are already complex, making both outcome prediction and prophylactic counseling extremely difficult. In an era of reduced vigor in antitrust prosecution, and in the absence of collective interactive systems, prospects for a stable and responsible economic order dim considerably.

On July 8, 1981, the Antitrust Division of the Department of Justice dismissed a complaint against the Mack Truck Corporation. The Government concluded that a fairly complex and broad-reaching vertical arrangement did not impair market efficiency. The Government reasoned that the existence of a National Distribution Advisory Council did in and of itself permit the conclusion that there might be horizontal abuse problems in the Mack organization. The dismissal of the Mack Truck case followed the dismissal of actions against Exxon and General Electric. The Federal Trade Commission's termination of the Cereal shared monopoly case and of the oil industry investigation is further evidence of the Reagan administration's lack of interest in antitrust enforcement. This has resulted in a broad public debate on the role of antitrust enforcement under the present administration. It would be unfair, however, to attribute the movement toward reduced antitrust enforcement exclusively to the administration. The trend to increase the scope of acceptable mergers and otherwise to relax antitrust standards is not new.

Present antitrust policy, according to a former member of the Federal Trade Commission, is less vigorous because "the values of populism, which supported antitrust enforcement, are now in decline. Preferring small business over large enterprises, even though the former might be

169. Id. at col. 5 (remarks of Sen. Danforth (R-Mo.).)
171. Id.
172. See supra note 163 and accompanying text.
173. Id.
175. See S. Reid, THE NEW INDUSTRIAL ORDER (1976). The author asserts that "an examination of the record leads to the inevitable conclusion that antitrust law enforcement has been ineffective in curbing major waves of merger activity despite the fact that it may have influenced the size and shape of the waves." Id. at 157.
categorized by inefficiencies, is an attitude that is waning.

In a similar vein, the New York Times reported that big business can "breathe easier" based on the Reagan administration's antitrust policy. The Times stated that "what it all apparently adds up to is that big is no longer bad." The New York Law Journal reported that American industry is on the brink of a "return to neutral antitrust enforcement."

In analyzing a series of antitrust cases prior to the 1980 election, the Journal concluded that the strength of antitrust enforcement has been diluted dramatically. One commentator has noted, "Antitrust by its very nature is an imprecise discipline; an area of law that produces a Rule of Reason as its governing legal principle is not likely to be amenable to very clear and limited remedies." Some authorities argue that treble damage cases produce unpredictable results. Many with long experience in the antitrust field now hold the view that the systems deter socially useful conduct. Reliance on such a fluid system to protect interests now protected by consensual decisionmaking would be misguided. This supports, indirectly, the need for reliance on consensual decisionmaking where it has been operating productively.

3. Substantive shifts in antitrust decisionmaking

The political uncertainties reflected in the current administration's policy regarding consensual activity is not surprising, in light of recent judicial interpretation of the antitrust laws. In William Inglis & Sons Baking Co. v. ITT Continental Baking Co., the Court of Appeals for the Ninth Circuit found that direct evidence of intent to monopolize would be insufficient to constitute an "attempt to monopolize" case. Although this is not a dramatic deviation from previous attempt cases, it is symbolic of a judicial receptiveness to the activities of vigorously competitive entities. The court in Inglis noted, "Price reductions that constitute legitimate, competitive response to market conditions are entirely proper." Under prior antitrust theory, the price reductions under scrutiny in Inglis might have been found to be predatory or discriminatory. The decision thus signals a relaxed judicial perspective on opera-

177. Id. at A-5.
181. Id. at 46.
182. 668 F.2d 1014 (9th Cir. 1982), cert. denied, 51 U.S.L.W. 3254 (U.S. Nov. 5, 1982) (No. 81-2289).
183. Id. at 1031.
tion of the antitrust laws in nonregulated markets. The court in Inglis, presented with an allegation of conspiracy germane to the evolution of consensual systems, articulated the following standard:

[Although a conspiracy may be inferred from circumstantial evidence, Inglis must show an understanding between the alleged coconspirators with the specific intent of each to restrain trade or monopolize the market . . . . Antitrust laws should not deter legitimate consultation between the holding company and the subsidiary with regard to the financial planning or the establishment of lawful economic goals . . . .]

This standard reflects a distinct deference to corporate amalgamation. As regulation of ownership patterns decreases, this kind of interrelationship between parent and subsidiary corporations, which doubtless will become common in the transportation industry, raises questions about the value of maintaining a diverse market structure.

Renewed judicial interest in the business justification defense renders suspect the presumption that the antitrust laws would "fill in the gap" left by elimination of the regulatory programs. Whether the defense should be expanded to include any affirmative allocable efficiencies consistent with growth objectives or instead should be available only in extreme and compelling cases remains a matter of debate. By any definition, however, the defense is expanded beyond "business acumen or superior product development."

Similarly, those charged with monopolization have been given

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184. Id. at 1055.
greater latitude to modify pricing structures, without fear of antitrust consequences for the taking of "monopoly profits." In *Berkey Photo, Inc. v. Eastman Kodak Co.* the court found:

Excessive prices, maintained through exercise of a monopolist’s control of the market, constituted one of the primary evils that the Sherman Act was intended to correct . . .

But unless the monopoly has bolstered its power by wrongful actions, it would not be required to pay damages merely because its prices may later be found excessive. Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive. Indeed, although a monopolist may be expected to charge a somewhat higher price . . . there is probably no better way for it to guarantee that its dominance will be challenged than by . . . extracting the highest price it can.192

The court in *Berkey* specifically rejected the argument that the antitrust laws could be used in a manner similar to regulatory statutes implemented by a public regulatory commission.193 Such a distinct rejection of the public utility theory may surprise those who believed the antitrust laws could fill in the gap left by the absence of existing regulatory protections.

These substantive shifts in antitrust enforcement have entered the dialogue in the collective ratemaking area. In hearings before the Motor Carrier Ratemaking Study Commission, the Chief of the Department of Justice’s Antitrust Division testified as follows:

Nothing in the antitrust laws prohibits motor carriers from establishing jointline rates so long as such rates are devised in good faith and are not intended as a guise for colluding on rates for competing services. Likewise . . . the joint publication of rates that have been independently established does not constitute an antitrust violation. Finally, the antitrust laws do not proscribe establishment of standard systems for classifying freight according to its transportation characteristics so long as such systems are not used as facilitating devices to restrain competition.194

Applying this standard, a federal district court in New York recently held that the exchange of price information to verify prior prices charged is not a per se violation of the antitrust laws. In *Vermont Interna-

191. 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).
192. Id. at 294 (citations omitted).
193. Id.
195. This position seems at variance with the policy underlying the “historical” collective ratemaking cases. See, e.g., *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); *United States v. Joint Traffic Ass’n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897).
tional Petroleum Co. v. Amerada Hess Corp.\textsuperscript{196} the court stated that such price exchanges must be evaluated carefully to determine the reason underlying the verification program.\textsuperscript{197} If the exchange of prices is in fact a tacit agreement to set a higher or lower price, then a violation can be found.\textsuperscript{198} A caution to be drawn from the Vermont International case involves the formula for damages. Even when parties are found to have conspired with intent to verify and raise or lower prices, if the conspiracy exists between varying levels of distribution, specific proof of injury may be almost impossible. The court acknowledged, "It is admittedly difficult, costly, time-consuming, and perhaps ultimately bootless to assemble such a quantity and quality of proof. Without such proof, however, courts and litigants face the twin dangers of speculative and unfair damage awards."\textsuperscript{199}

Such recent restrictive formulations are difficult to reconcile with the "hard language" of cases such as Container Corp. of America\textsuperscript{200} and Socony-Vacuum Oil Co.\textsuperscript{201} It is undeniable, however, that this new antitrust ideology represents a less than comprehensive enforcement of the antitrust laws.\textsuperscript{202} Along these lines, the Federal Trade Commission cases suggest giving serious consideration to "efficiency and competitive virtues of the practices under scrutiny against their exclusionary characteristics and effects."\textsuperscript{203} Given this formulation, consensual decisionmaking processes may in fact survive a rule-of-reason analysis. Specific parties aggrieved by discriminatory pricing patterns may, however, find themselves without recourse, assuming that a legitimate business purpose justifies those patterns.

The antitrust laws have not been completely eliminated in the field of public interest litigation.\textsuperscript{204} The District Court for the Southern District of New York recently asserted, "Far more important than the interests of either the defendants or the existing industry, however, is the public's interest in the enforcement of the antitrust laws and in the preservation of competition. The public interest is not easily outweighed by private

197. \textit{Id.} at 434.
198. \textit{Id.} at 438.
199. \textit{Id.} at 441.
Nonetheless, private persons seeking judicial resolution of individual disputes that arise from alleged anticompetitive practices will find the antitrust system complex, costly, and all too frequently jurisdictionally unavailable.\(^{205}\)

These access problems are not restricted to private entities. In *Illinois Brick Co. v. Illinois*\(^ {207}\) the State of Illinois was precluded from invoking the antitrust laws on behalf of consumers who were the victims of a price-fixing scheme, if the consumers were indirect purchasers. The *Illinois Brick* decision is explained and refined in *In re Mid-Atlantic Toyota Antitrust Litigation*,\(^ {208}\) in which a federal district court set out the basic preclusion standard and the "cost-plus" exemption to the *Illinois Brick* rule.\(^ {209}\) Because this jurisdictional preclusion problem relates primarily to the sale of products and not to the provision of services, its applicability to either the collective ratemaking process specifically or consensual decisionmaking functions generally is limited.

Disinterest in antitrust enforcement at the Federal Trade Commission\(^ {210}\) and at the Department of Justice clearly evidences the decline of that system. At the latter, the appointment of Assistant Attorney General Baxter cannot be viewed with favor by those enthusiastic about an-

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205. *Id.* at 434 (citing United States v. Ingersoll-Rand Co., 320 F.2d 509 (3d Cir. 1963)).

206. Two obvious examples of this involved the Federal Trade Commission. First, private persons cannot invoke the jurisdiction of a federal court to "bring suit" under the Federal Trade Commission Act for "unfair methods of competition in or affecting commerce" or "unfair or deceptive acts or practices in or affecting commerce." Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976), is specifically restricted to enforcement by the FTC. *See* Dreisbach v. Murphy, 658 F.2d 720 (9th Cir. 1981).

Second, the Robinson-Patman Act, 15 U.S.C. §§ 13, 13a-13b, 21a (1976), is inapplicable to all "service" transactions; it is restricted exclusively to sales of commodities. For a discussion of the Robinson-Patman Act, see *infra* notes 214-22 and accompanying text. Even if a commodity is sold, the scope of the Robinson-Patman Act is highly restricted. For example, in Bunker Ramo v. Cywan, 511 F. Supp. 531 (N.D. Ill. 1981), the court was confronted with a blatant bribery situation. The plaintiff and defendant were in a buyer-seller relationship, and it appeared that the seller had been involved in egregious anticompetitive conduct. The court found

Their relationship is one of buyer and seller, and regardless of any common law cause of action . . . for fraudulent misrepresentation, commercial bribery, or conspiracy to induce a breach of a fiduciary duty, the clear import of the cases . . . is that [a bribery injury from fraudulent billing] is not cognizable under section 2(c) of the Robinson-Patman Act.

*Id.* at 534 (footnotes omitted).


210. In addition to consumer access problems, the administration's desire to enforce the antitrust laws is suspect. It was suggested that the FTC should have its antitrust jurisdiction reduced or eliminated. On February 7, 1981, the Office of Management and Budget proposed a 36-month "phasing-out" of the antitrust enforcement jurisdiction of the FTC. *Reagan Team Retreats on FTC's Scope*, Wash. Post, Mar. 3, 1981, at F1, col. 1. The administration later retreated on its stand to eliminate jurisdiction, and instead pursued a course designed to cut 15% from the budget of the FTC. *See* id.
Another negative factor is the recent public disclosure that the Antitrust Division may be closing field offices in Los Angeles, Philadelphia, Cleveland, and New York. From a political perspective, the message seems clear: structural antitrust cases designed to "improve markets" are not to be a hallmark of the Reagan administration. Instead, practice or behavior cases doubtless will be the targets of antitrust enforcement. For collective ratemaking, assuming the elimination of antitrust immunity, the manner of development might be a series of "price-fixing" cases designed to purge the market of collective ratemaking, taking along with it certain values inherent in consensual decisionmaking. These challenges, however, will not be followed by structural cases or vigorous antimerger action. Should the market become nondiverse, concentrated, stagnant, and oligopolistic, or should prices increase dramatically in isolated markets, no antitrust protection can be expected.

4. Collective ratemaking and the Robinson-Patman Act

Price discrimination is directly addressed in the Robinson-Patman Act, which makes it "unlawful for any person engaged in commerce... to discriminate in price between different purchasers of commodities of like grade and quality." The term "commodities" refers to "products, merchandise or other tangible goods," rather than to services. Although some courts have held that "the word 'commodity' might possibly include items of trade other than those in tangible form—for example, advertising, insurance, brokerage services and similar items," the clear meaning of the word would exclude transportation services. In *T.V. Signal of Aberdeen v. AT&T* the Court of Appeals for the Eighth Circuit found that providing space on a telephone pole for purposes of cable T.V. transmission did not constitute a commodity for purposes of triggering the Robinson-Patman Act, notwithstanding an actual sale of physical space.

The more compelling decisions of the last few years require an assess-
ment of the “dominant purpose” of any transaction in determining whether that transaction is “commodity based” or primarily concerns noncommodity services.\textsuperscript{218} Under the dominant purpose analysis, the “tangible-intangible” test is no longer used. Instead, the inquiry is whether a manufactured product is transmitted, such that the purchaser has some form of an ownership interest. Using this analysis, electricity, natural gas, and coal all have been found to be commodities for purposes of the Robinson-Patman Act.\textsuperscript{219} These cases note that transfer of a property interest—for example, coal or electricity—confers a right of any appropriate use of the “property” in the purchaser. These situations stretch any reasonable interpretation of the commodities clause of the Robinson-Patman Act to its limits. Even under these liberal interpretations, however, there is no logical way to define common carrier transportation as a “commodity.” In the absence of a regulatory scheme for transportation ratemaking, rate discriminations by carriers or, for that matter, by shippers or shipper groups\textsuperscript{220} would be outside of the remedial power of the Robinson-Patman Act.\textsuperscript{221} The antitrust system will not provide the same protection that the existing regulatory structure now provides. It is possible that the open market system will not only render carriers and shippers vulnerable in price discrimination settings, but will also provide less rate flexibility and less competitive interaction than exists under the Motor Carrier Act of 1980.\textsuperscript{222}

\section*{D. User Participation in Collective Ratemaking}

An unbalanced consensual decisionmaking system that has a decisional bias regarding only one of the primarily affected parties is not a fully effective system. The Motor Carrier Act of 1980 partially addresses the imbalance by making clear both the need for shipper involvement and the restrictions on bureau activities that might impede such involvement. Options for participation increased beyond this scope should provide some method for direct contribution of information to the decisional process. Users of the existing motor freight common carrier system must continue to participate actively in the collective ratemaking process. If shippers fall within the category of “other persons,”\textsuperscript{223} they

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\textsuperscript{221} That is not to say that such discriminations might not be otherwise the subject of antitrust liability under a conspiracy or monopoly theory. In City of Newark v. Delmarva Power & Light Co., 467 F. Supp. 763, 772-74 (D. Del. 1979), the court found that the commodity clause of the Robinson-Patman Act would prevent the applicability of § 2 to transactions involving electricity.

\textsuperscript{222} See Meeks, supra note 94.

\textsuperscript{223} 49 U.S.C. § 10706(b)(2) (Supp. IV 1980).
would enjoy immunity for activities undertaken pursuant to an approved agreement. Stripped of this antitrust immunity, shippers would not do better than carriers if their actions appeared to be little more than agreements between horizontally aligned competitors to affect directly a current pricing system. An "implied immunity" argument seems completely devoid of merit. Even if a defense such as the Noerr-Pennington doctrine could be used, its limitations would restrain the dialogue in the consensual decisionmaking setting.

1. Substantive antitrust issues in user participation

Activities within the scope of an approved rate bureau agreement undertaken by carriers are immune from the antitrust laws. A more difficult issue is the role of shippers and other users in the rate deliberation process. If shippers are not immunized from antitrust enforcement, they will never provide a decisionmaking balance essential to the consensual process. An initial element in the calculation is whether there is agency oversight sufficient to justify immunity. Because shippers are not licensed, the oversight issue may be insurmountable. ICC review of shipper group activity must exist if the following analysis is to be given effect. Antitrust immunity should never be provided to individual interest groups to facilitate cost-based dialogue without also providing regulatory oversight, which would include an ongoing review of the structure and performance of the particular regulated market. To provide immunity and then to forego subsequent agency review of market health is unsound and inconsistent with broad-based national policy interests.

In the context of collective ratemaking in the motor carrier industry, any agreement filed by a rate bureau seeking antitrust immunity should not be approved unless that agreement ensures direct individual or collective participation by directly affected entities, including shipper groups or associations. Despite the potential awkwardness of such participation, fairness and balance in the decisionmaking process compel participation.

The role of the shipper in the ratemaking process has not received the same degree of attention that has been given to the role of the carrier.
Nevertheless, the antitrust liability of a shipper involved in the collective ratemaking process has been the subject of some debate.\textsuperscript{227} Some have argued that shippers are fully entitled to participate in the collective ratemaking process by virtue of the \textit{Noerr-Pennington} doctrine,\textsuperscript{228} although there is substantial disagreement in the field.\textsuperscript{229} Indeed, there is disagreement regarding the meaning of the basic immunity language of the Reed-Bulwinkle Act.\textsuperscript{230}

The Reed-Bulwinkle Act\textsuperscript{231} provides antitrust immunity for carriers and “other persons with respect to making or carrying out the agreement.”\textsuperscript{232} The “other persons” language applies to entities who are critical to successful consensual decisionmaking in the ratemaking area. When collective ratemaking is viewed as a consensual process, shipper participation is critical. To argue that Congress intended only carriers to be immune ignores the reality of the process, the implications of the legislative debate from 1947 to 1948, and the clear import of the Motor Carrier Act of 1980.\textsuperscript{233} Carrier and shipper participation in the collective decisionmaking process now involves sharing vital cost information and discussing individual rate problems; it should include voting on such matters. It is simply illogical to deny shippers participatory rights equal to those of carriers, either because of the threat of antitrust scrutiny or because of a strict and unrealistic interpretation of the Reed-Bulwinkle Act.

When national policy dictates immunity for carriers to negotiate collectively and to set rates, the only sensible approach is to provide shippers with countervailing powers, either in the context of the carrier deliberation process or through the establishment of individual, immunized “shippers’ councils.”\textsuperscript{234} In the ocean shipping area, the government has asserted its support for “the concept of shippers’ councils because they can provide a valuable forum for discussion between ship-


\textsuperscript{228} For a discussion of the \textit{Noerr-Pennington} doctrine, see infra notes 244-53 and accompanying text. \textit{See also Senate Hearings, supra} note 99, at 1399.

\textsuperscript{229} \textit{See H.R. Rep. No. 1100, 80th Cong., 1st Sess. 12 (1947); id., Minority Report 3-4 (ratemaking and the ICC).}

\textsuperscript{230} \textit{See Senate Hearings, supra} note 99, at 1399; Popper, \textit{supra} note 227.

\textsuperscript{231} Ch. 491, 62 Stat. 472 (1948) (codified as amended at 49 U.S.C. \S 10706 (Supp. IV 1980)).

\textsuperscript{232} 49 U.S.C. \S 10706(b)(2) (Supp. IV 1980).

\textsuperscript{233} The Motor Carrier Act includes the phrase “carriers and other persons.” \textit{id.} \S 10706(b). Debate over the meaning of “persons” seems fruitless. In another antitrust context, the Supreme Court has held, “The word ‘persons,’ however, is not a term of art with a fixed meaning wherever it is used, nor was it in 1890 when the Sherman Act was passed.” \textit{Pfizer Inc. v. India}, 434 U.S. 308, 315 (1978) (citations omitted).

\textsuperscript{234} For a discussion of shippers’ councils, see \textit{HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, REPORT WITH ADDITIONAL NEWS, H.R. REP. NO. 935, 96th Cong., 2d Sess., pt. III, at 24 (1980).}
pers and carriers and because they can act as a counterweight to the collective power of the conferences." Shippers' councils would be designed to offset conference power; theoretically, they would not be used to suppress independent action because they would be open to all shippers. Shippers' councils should, however, be prohibited from discussing and negotiating rates for specific commodities. Express antitrust immunity is necessary for the exchange of relevant industry data, even if there is no specific discussion and negotiation of rates.

Few courts have addressed whether shippers in the motor carrier area are "other persons" within the meaning of the Motor Carrier Act of 1980 and are accordingly entitled to immunity for their participation. In *Asbury Graphite, Inc. v. Dehyco Co.* a federal district court ruled that the antitrust laws would not apply to shippers who participate in a rate bureau function, even if the ratemaking were "conspiratorial" and "monopolistic." The court gave a fairly broad reading to the Reed-Bulwinkle Act, stating that express immunity would attach to transactions undertaken within a rate bureau, based on the broad scope of express immunity and notwithstanding allegations of "evil motive and intent."

If a manufacturer-shippers used its immunity as an opportunity to discuss the price of manufactured goods, rather than the cost of transportation services, courts would find this activity to be outside the scope of the immunity provided pursuant to the "other persons" language of the Act. Whether immunity is express or implied, courts always have insisted that only those activities specifically envisioned by Congress in granting the immunity or by the courts in implying the immunity be provided with a defense from antitrust liability.

In the context of intrastate activity, the opinion in *Wisconsin v. Wisconsin Motor Carrier Associations* is instructive. The court found immunity

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236. Id.

237. 1981-I Trade Cases (CCH) ¶ 63,980 (N.D. Cal. 1980).

238. Id.

239. Id. Cf. *Atchison, T. & S.F. Ry. v. Aircoach Transp. Ass'n*, 253 F.2d 877, 883-84 (D.C. Cir. 1958), cert. denied, 361 U.S. 930 (1960). The court in *Aircoach* found that express immunity for conference decisionmaking would be far more confined than the court in *Asbury Graphite* suggested, and implied that a conspiracy to obtain an unlawful objective would take shipper behavior outside the scope of express immunity. See id. at 883-84, 887. But see *Seatrain Lines, Inc. v. Pennsylvania R.R.*, 207 F.2d 253, 261 (3d Cir. 1953) (presence of express immunity would prohibit a court from declaring unlawful a conspiracy that was otherwise a classical restraint of trade).


pursuant to the *Noerr-Pennington* doctrine for rate bureau collective action that was specifically designed to influence a government agency. A dialogue between similarly situated shippers had occurred, however, prior to the submission of commodity rates to the state board. On this issue, the court, in recognizing that "the Noerr-Pennington doctrine has never been applied to immunize a conspiracy restraining competition simply because the result of the conspiracy was subsequently presented to and approved by a government agency," held that the price-fixing conspiracy in question—the agreement regarding prior submission of commodity rates—was "a completed unlawful act in itself" that did not depend on the later interaction of the Wisconsin Motor Carrier Associations and the state transportation commission.²⁴² The activities envisioned by the court involved various regular meetings during which common carriers discussed charges for new commodities. This discussion occurred in a bureau context and was open to carriers who were permitted to make proposals as well as to amend, withdraw, and ultimately vote on the proposal to be submitted to the transportation commission. The court found this activity to be expressly outside of the *Noerr-Pennington* defense.

Carriers and shippers currently participating in the collective ratemaking process pursuant to an approved agreement should be immune from the antitrust laws. In the absence of such express immunity or in the presence of activities outside the permissible scope of an approved agreement, the parties participate at risk. Implied immunity for shippers in the collective ratemaking context is highly unlikely.²⁴³ Because shipper participation is essential, other immunities should be considered.

2. The *Noerr-Pennington* doctrine and user liability

One aspect of consensual decisionmaking is its potential to influence policy. In this context, first amendment activity could be threatened if antitrust enforcement is pursued vigorously. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*²⁴⁴ the Supreme Court determined that first amendment speech and associational interests must be considered in applying the antitrust laws to activities undertaken by groups of horizontally aligned competitors, if one objective of such collective interaction was to influence legislative and executive governmental action.

²⁴². *Id.* at D-7.
²⁴⁴. 365 U.S. 127 (1961) (collective action by railroad defendants to defeat passage of legislation favorable to trucking industry does not violate Sherman Act).
As a companion idea, the Court in *Noerr* found that even if the consequence of such interaction were anticompetitive, no unlawful restraint of trade exists. The Court reasoned that competitors, even acting collectively, must be permitted to inform the government of their wishes. In a major clarification, the Court subsequently held in *Cantor v. Detroit Edison Co.* that the "government action" resulting in the restraint must be legitimate governmental action, not a mere approval of a privately delineated plan. The interrelationship between *Cantor* and *Noerr* is significant notwithstanding that *Cantor*, unlike *Noerr*, involved private action that a state regulatory agency had approved. At an intrastate level, these constitutional principles are compounded by other state action cases, such as *Parker v. Brown*, and create an outline for user immunity that is relatively difficult to apply.

The Court in *Cantor*, analyzing "state action" under *Parker*, provided the following guidance:

We may assume, *arguendo*, that it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command. Such an assumption would not decide this case, if, indeed, it would decide any actual case. For typically cases of this kind involve a blend of private and public decisionmaking. The Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity.

Participants in the intrastate collective ratemaking process have been unsuccessful in asserting an immunity claim based on either *Noerr* or the state action cases. These principles do not translate readily to the federal immunity question, and one federal district court has held expressly that participants in collective ratemaking are outside the protection of the *Noerr-Pennington* doctrine. If the activities of carriers are outside the protection of the *Noerr-Pennington* doctrine, it follows logically that shippers also would be excluded. Although courts have acknowledged

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245. *Id.* at 144.
246. *Id.* at 137.
248. 317 U.S. 341 (1943) (Sherman Act does not apply to state action).
250. *See* United States v. Southern Motor Carriers Rate Conference, Inc., 467 F. Supp. 471 (N.D. Ga. 1979), aff'd, 672 F.2d 469 (5th Cir. 1982). Collective ratemaking, in any context, is beyond *Noerr-Pennington* protection: The First Amendment principles underlying *Noerr-Pennington* are nevertheless applicable by analogy [to collective ratemaking]. If the defendants may, in exercise of their right to petition the government, jointly submit rate proposals to state commissions, it would follow that they must be permitted to confer to formulate the rates they wish to propose . . . . The difficulty with this analysis is that it ignores the teaching of *Cantor*. Justice Stevens' characterization of the regulatory process as a blend of public and private decision making illustrates that the regulated industry does not merely propose, but also decides. Even though the proposals require state sanction to take effect, the industry's
the possibility that a situation "may arise in which a regulatory or legislative scheme, while not explicitly requiring a particular act, is structured so as to render the act indispensable to compliance with the scheme," such a development seems unlikely in the collective ratemaking context. As compelling as the argument might seem for shipper participation, simply because "the state scheme adversely affects smaller shippers does not justify an antitrust exemption." When a collective system is designed to change basic price structure, it would appear unlikely that the system would be immunized, outside of an express legislative grant.

E. Immunity From Antitrust Enforcement

The collective ratemaking process could be a vital and effective consensual decisionmaking system that provides a forum for the exchange of critical industry data. It permits prompt and accurate decisionmaking through a discussion and voting process that expressly immunizes carriers but leaves open the question of shipper antitrust liability. The absence of this immunity threatens the consensual process; accordingly, immunity, in all its forms, must be considered further.

1. Implied immunity

The national policy favoring competition disfavors horizontal relationships between competitors. In the absence of express immunity, that policy would dominate an antitrust case in the collective ratemaking area if shippers or carriers alleged standard justifications for collective ratemaking. The question would become whether the existence of a transportation network, optimal information exchange, nondiscriminatory service, and other benefits under the present consensual system are more compelling than the simple fact that collective interaction involving price establishment is inconsistent with antitrust policy. Consideration of immunity would be the first step in such an analysis.

Express immunity is provided to carriers and "other persons" participating in the collective ratemaking process pursuant to an approved agreement. This express immunity applies only to those participating within the bureau system. Express immunity is the only reliable anti-

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251. Id. at 485.
252. Id.
253. See supra note 242 and accompanying text.
trust immunity in the field. The Noerr-Pennington doctrine is a restrictive alternative, and has been held expressly inapplicable to the intrastate collective ratemaking process. Further, in light of the Supreme Court's decision in Cantor, the Noerr-Pennington doctrine could be wholly inapplicable if the government merely approves rather than sets rates that a private consensual decisionmaking group previously had established. If express immunity lapses, as scheduled on July 1, 1984, or if shipper groups are sued under the present legislative scheme on the premise that the Reed-Bulwinkle Act applies only to carriers, consideration of implied immunity is important.

2. Implied immunity: general substantive problems

In National Geremedical Hospital & Gerontology Center v. Blue Cross the Supreme Court confronted the propriety of implied immunity in a field that lacked regulatory review of competitive interaction. The federal government, however, did perform extensive planning and oversight functions. The Court found that antitrust laws did not frustrate or conflict with the policies underlying the National Health Planning and Resources Development Act of 1974. The existence of general regulatory decisionmaking did not provide a basis for implied immunity.

Notwithstanding the "clear repugnancy" standard, the Court questioned whether the parties were immunized from the antitrust laws because Congress had determined that, for purposes of the specific program run by the hospital, "the health care industry does not respond to classic market place forces." The Court found that even though a "substitution of regulation for competition was necessary," the antitrust laws could not be set aside. To the extent that a regulatory structure will provide immunity by implication, it must be found that the conduct to be performed is authorized or permitted by the regulatory standard, subject to review by a regulatory agency, and that the regulatory agency "has actually been supervising the activity."

Parties seeking implied immunity must show that the activity they

258. See id. at 592-93 (relying on Parker v. Brown, 317 U.S. 341, 351 (1943)).
262. Shuman, supra note 102, at 21.
perform is necessary or compulsory under the regulatory statute and that there is a regulatory agency actively involved in oversight of that regulatory function. The notion of active regulatory oversight is a companion to the concept of "plain repugnancy" in implied immunity doctrine analysis. The argument in favor of implied immunity becomes far less powerful if the regulatory agency involved is unwilling or unable to undertake the responsibilities inherent in regulatory oversight.

Two theories of implied immunity have evolved since 1975. One involves the "plain repugnancy" concept. The other centers on extensive regulatory programs, as did the Court in United States v. National Association of Securities Dealers, in which active agency intervention and oversight were at the heart of the regulatory process.

In Sound, Inc. v. AT&T the Court stated:

[A] finding of implied immunity [is warranted] when enforcement of the antitrust laws would interfere with the operation of the regulatory agency. Interference has been found when the antitrust laws would prohibit action specifically contemplated by the regulatory statute or when the antitrust laws would prohibit conduct falling precisely within the detailed statutory scheme of enforcement and that statutory scheme specifically required consideration of competition.

This standard, however, is extremely difficult to meet. In Sound, Inc. the Court articulated how antitrust immunity can be found by implication. Merely because the particular conduct was regulated by the Federal Communications Act and was in the "public interest" did not justify the conduct thereby becoming immune from the antitrust laws. If a federal agency vigorously and thoroughly assesses competitive implications prior to approving or disapproving a particular kind of regulatory conduct, however, the possibilities increase that immunity will attach.

In the consensual decisionmaking context, one conclusion is clear: "There is a presumption against implied exclusions from coverage under

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264. Shuman, supra note 102, at 21.
268. 631 F.2d 1324 (8th Cir. 1980).
269. Id. at 1328 (citations omitted).
270. See id. at 1330. See also Cantor v. Detroit Edison Co., 428 U.S. 579, 595-96 (1976).
271. See, e.g., Allegheny Airlines, Inc., C.A.B. Order No. 79-2-108, Docket No. 32773, slip op. at 13 (Feb. 15, 1979) (Civil Aeronautics Board openly considered antitrust consequences of approving interline arrangement). Interline agreements are almost invariably undertaken pursuant to an express rather than an implied formulation.
the antitrust laws. Even if there is no dispute that the conduct is potentially in the public interest, the courts have been hesitant to find immunity from the antitrust laws. In those circumstances, some courts have observed that the conduct is consistent with regulatory guidelines and the public interest. It is questionable, however, whether a court would find a price-establishing system that is not immunized to be "reasonable," based solely on the values underlying consensual decisionmaking.

3. Reasonable restraints and immunity reconsidered

In light of the antitrust risk implicit in most consensual decisionmaking systems that do not benefit from express immunity, cases focusing on "reasonable restraints" must be studied carefully. No common thread runs through reasonable restraint cases to give guidance to those involved in the consensual decisionmaking process. In all likelihood, an evaluation of the decisionmaking system's market effect, its underlying purposes, the parties involved and excluded, the fairness of the process, the necessity for the process in the context of the "public interest," regulatory oversight, and ethical overtones would occur in any assessment of reasonability.

In United States v. American Society of Anesthesiologists, Inc. a professional society of anesthesiologists, physicians, and scientists was attacked for the adoption, publication, and circulation of relative value guides to be used in determining fees. The guides consisted of a list of medical procedures and a "unit value" for each procedure. Physicians using their individual hourly rate could then use the value guide to establish a set fee. The society periodically reviewed and then formally adopted the guides, strongly urging its members to employ them. Not all society members used the guides, but failure to do so was not subject to any sanction.

After finding that the activities of the society in promulgating the guides had an effect on insurance premiums in interstate commerce, the
District Court for the Southern District of New York went on to ask whether such collective action produced "an adverse effect on interstate commerce."\textsuperscript{277} The court found that for such an agreement to be unreasonable, it must "substantially and adversely affect . . . interstate commerce."\textsuperscript{278} The court then determined that there was no detrimental effect on interstate commerce and that the parties affected by the agreement derived no greater benefit from the agreement than they would have derived from free market competition.\textsuperscript{279} Relying on \textit{National Society of Professional Engineers v. United States},\textsuperscript{280} the court found that these kinds of agreements should be considered under a rule-of-reason approach, unless their nature was "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality," in which case the agreements would be per se unlawful.\textsuperscript{281} Despite the industry-wide dissemination of the value guides, the court characterized them as nothing more than a "suggested methodology for arriving at appropriate fees,"\textsuperscript{282} which would not even subtly influence physicians to maintain a set fee. The fee flexibility inherent in the formula, which permitted doctors to insert any hourly rate, resulted in a finding that the agreement was a purely advisory fee schedule.\textsuperscript{283} Within the ambit of the Supreme Court's price-fixing definition,\textsuperscript{284} the agreement could not be characterized as an illegal conspiracy to fix prices.\textsuperscript{285} Because the challenged activities did not have an adverse effect, the court found the particular arrangement to be reasonable. The "defendant's activities tended to promote the interplay of such competitive forces as existed in the area. This conclusion is reinforced by the absence of any evidence that the [guides] . . . actually fixed fees or in any way hampered the free play of market forces."\textsuperscript{286} The decision in \textit{American Society of Anesthesiologists} is the high-water mark in cases permitting interaction between horizontally aligned competitors without immunity.

In \textit{Keogh v. Chicago & Northwestern Railway}\textsuperscript{287} the Supreme Court held that if the Interstate Commerce Commission had specifically approved a rate, a shipper could not recover antitrust damages from a carrier on the

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\item \textsuperscript{277} \textit{Id.} at 157 (emphasis in original).
\item \textsuperscript{278} \textit{Id.} at 157 (citing Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976)).
\item \textsuperscript{279} \textit{See id.} at 160.
\item \textsuperscript{280} 435 U.S. 679 (1978).
\item \textsuperscript{282} \textit{Id.} at 158 (emphasis in original).
\item \textsuperscript{283} \textit{Id.} at 159.
\item \textsuperscript{284} United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).
\item \textsuperscript{286} \textit{Id.} at 160.
\item \textsuperscript{287} 260 U.S. 156 (1922).
\end{itemize}
ground that the rate either had been established through conspiracy or had effectuated some discrimination.288 Nevertheless, the Court found that the carrier was not immune from possible antitrust action by the government simply because of ICC rate approval.289 It follows that an entity is not immune from the antitrust laws merely because it operates pursuant to a filed, but as yet unapproved tariff. Indeed, that the activity is within the regulatory jurisdiction of an agency—or even approved by an agency—does not establish antitrust immunity for that activity. Immunity can be inferred only if federal agency review of a substantive nature exists and if there is a clear and plain repugnancy between the antitrust laws and the regulatory provisions involved.290 As the Court of Appeals for the Third Circuit noted, “A fair approach in the accommodation between the seemingly disparate goals of regulation and competition should be to assume that competition, and thus antitrust law, does operate unless clearly displaced.”291

To determine whether a regulatory scheme will displace the antitrust laws, a careful analysis of the statute involved as well as its legislative history is required. The Third Circuit undertook such an analysis in *Essential Communications Systems v. AT&T*,292 in which it reviewed the early history of common carrier regulation to determine whether the regulatory scheme was intended to establish just and reasonable rates that would preclude discrimination and protect consumers. These were the goals of the original Interstate Commerce Act,293 the Elkins Act,294 and the Hepburn Act.295 When the obligations of common carriers were superimposed on the communications industry, however, the regulatory objectives lost some of their breadth.296 The entire history of communications regulation, from its genesis to the passage of the Federal Communications Act of 1934,297 indicates congressional intent to supplant the forces of the open market with comprehensive regulatory controls. In *Essential Communications* the court concluded that the regulatory process in the communications field was not designed to supplant

288. *Id.* at 161-63.
289. *Id.*
292. *Id.*
the antitrust laws and was not repugnant to the application of those laws.\textsuperscript{298}

The Third Circuit also discussed \textit{Keogh v. Chicago & Northwestern Railway}.\textsuperscript{299} In \textit{Keogh} the Supreme Court had been concerned with defining the legal rights of a shipper against a carrier regarding a public tariff. The Court asserted:

The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. . . . If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors.\textsuperscript{300}

The Court found:

[\textit{U}nder the Anti-Trust Act, a combination . . . to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6. . . . The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government.\textsuperscript{301}

Thus, the filed-tariff doctrine generally does not immunize the party who has filed the tariff from antitrust liability.\textsuperscript{302}

A conflict apparently exists between \textit{Keogh} and other recent cases in the area of implied immunity. In \textit{Mid-Texas Communications Systems v. AT&T},\textsuperscript{303} for example, the Court of Appeals for the Fifth Circuit held that an anticompetitive practice undertaken to vindicate the public interest would be exempt from antitrust scrutiny, notwithstanding the obvious anticompetitive effect\textsuperscript{304} of the practice. Such a holding is inconsistent with the \textit{Keogh} tariff doctrine. Moreover, the Fifth Circuit's determination had been rejected outright by the Third Circuit in \textit{Essential Communications}. Also, a federal district court has directly questioned the validity of the reasoning in \textit{Mid-Texas}:

Does this decision [\textit{Mid-Texas}] mean that a specific course of conduct approved by a regulatory body, as being conduct in the "public interest," falls outside the proscription of the antitrust laws? . . . Such an assertion is completely at odds with finding no implied antitrust immunity for defendants' activities, and this Court continues to reject

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  \item \textsuperscript{298} Essential Communications Sys. v. AT&T, 610 F.2d 1114, 1121 (3d Cir. 1979).
  \item \textsuperscript{299} 260 U.S. 156 (1922).
  \item \textsuperscript{300} \textit{Id}. at 163.
  \item \textsuperscript{301} \textit{Id}. at 161-62 (emphasis added).
  \item \textsuperscript{302} \textit{See} Essential Communications Sys. v. AT&T, 610 F.2d 1114, 1211 (3d Cir. 1979).
  \item \textsuperscript{303} 615 F.2d 1372 (5th Cir.), \textit{cert. denied}, 449 U.S. 912 (1980).
  \item \textsuperscript{304} \textit{See id}. at 1380-81.
\end{itemize}
In Cantor v. Detroit Edison Co. the Supreme Court held that "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." Whether federal authorization would provide antitrust immunity, however, is unclear. The general regulation of an industry confers, in and of itself, no antitrust immunity unless the regulation is pervasive and the regulatory agency involved exercises oversight over the particular regulatory scheme. In determining antitrust immunity, consideration should be given to the following criteria: First, the regulatory agency involved should exercise continual supervisory authority over the conduct challenged in the antitrust complaint as well as over rates, entry, and investment in the market; second, the agency should have the power to grant the relief requested by the antitrust plaintiff; third, the benefits of competition should enter into the agency's public interest calculation; fourth, agency expertise should be particularly useful in deciding issues in the antitrust suit; and fifth, the antitrust suit should involve important regulatory policy questions.

In the consensual decisionmaking context, the strength of the argument in favor of implied immunity will depend on the specific industry involved, the nature of the system, the issues at stake, and the proclivity of the courts. If there is a pervasive regulatory system and if that system requires the regular filing and aggressive substantive review of tariffs, the Keogh doctrine may immunize the filing party from antitrust liability. It is, however, more likely that the policy underlying Cantor, National Ger'medical, and similar decisions will be controlling.

For collective ratemaking in the trucking industry, the implied immunity question is currently supplanted by the express immunity provided for joint-line activity. Should that express immunity be lost, it is unlikely that such a regulatory system would be a basis for finding implied immunity. Moreover, because the Motor Carrier Act of 1980 requires consideration of competition, it is difficult to argue that implementation of the Act is inconsistent with implementation of the antitrust laws. If the express antitrust immunity that it presently provided for activities undertaken in the context of an approved rate bureau is lost and if the Interstate Commerce Commission continues to enlarge its role regarding

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307. Id. at 592-93 (footnotes omitted).
the approval of tariffs, determination of the issue of implied immunity would depend on analysis and application of *Keogh* and its progeny. In the absence of express immunity, carriers and shippers participating in the collective ratemaking process will be subject to antitrust scrutiny and, thus, to potential liability. They probably will not be able to take advantage of the implied immunity of the *Noerr-Pennington* doctrine. Although they may attempt to demonstrate that their activities are reasonable restraints, the effectiveness of such an argument before a federal court is uncertain.

III. THE ICC AND COLLECTIVE RATEMAKING: CONCLUDING REMARKS ON A CONSENSUAL SYSTEM

Federal agencies possessing responsibility for oversight of systems immunized from antitrust liability are obligated to monitor the industries they are charged with regulating and to give constant consideration to competition in agency decisionmaking. The ICC, for example, has the responsibility of overseeing the consensual decisionmaking process of collective ratemaking. In considering this particular regulatory process, the agency must evaluate whether the gains made by a consensual decisionmaking system further or frustrate the defined policy objectives. Maintenance of the consensual system and regulatory regime must not suppress competition; competition must be enhanced and invigorated.

The appropriate roles of the ICC in the collective ratemaking field are to provide oversight of the decisionmaking system and to review select rules or decisions made by the system. It also determines whether the rate level is consistent with the "reasonableness requirements" under the Motor Carrier Act of 1980 and ensures that the immunized collective ratemaking process is not being used in a noncompetitive manner, which produces stagnant or otherwise "unhealthy" markets. If a regulatory body oversees a consensual decisionmaking process that is designed to set costs and to be a supplement to competition, the agency has an obligation to ensure that the pricing structure ultimately produced by the consensual body appears to be at a "competitive level."

In the trucking industry, competitive pricing performance is difficult to assess; more than sixty percent of the rates charged are set based on

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independent negotiations, although the starting point for such discussions is often the collectively set rate. In addition, industry performance becomes difficult to assess if private or contract carriers handle a large share of the total business. Since the passage of the Motor Carrier Act of 1980, rate bureaus have not had the power to set price, and the consensual system appears to be functioning in an effective way. Whether the ICC has contributed to this success is a separate question, particularly in terms of antitrust review. Given the difficulty inherent in such assessments of competition, consideration might be given to coordinating antitrust review with the Department of Justice, because the obligation to oversee markets in which antitrust immunity is granted remains absolute.

If the ICC proceeds without intervention by the Department of Justice, it nonetheless must "seriously consider[ ] the antitrust consequences of a proposal and weigh[ ] those consequences with other public interest factors." This balancing of the public interest considerations that inhere in the statutory scheme with the competitive consequences of proposed industry action is essential to the legitimacy of the consensual system in the transportation industry. Prior evaluations of the ICC regarding its capacity to make antitrust assessments raise questions about the agency's competence. One commentator has suggested that "ICC practices in this area demonstrate that even though an agency's decisions may contain lengthy discussions of competitive considerations

313. See supra note 112.
314. See Meeks, supra note 94.
315. For example, to assist in making decisions concerning coal leasing programs, the Secretary of the Interior is required to consult with the Department of Justice for advice regarding the anticompetitive effects of the regulatory choices under consideration. See 30 U.S.C. § 184(f) (1976). Similarly, the Attorney General is required to advise the Nuclear Regulatory Commission on situations that may create an inconsistency with the antitrust laws in the area of licensing nuclear power plant facilities. See 42 U.S.C. § 2135(c)(1) (1976).
316. Professor Shuman suggests that federal agencies with authority to regulate immunized industry processes must provide vigilant but non-intrusive oversight. See Shuman, supra note 102, at 16-17. In the securities industry, for example, the obligation of the Securities and Exchange Commission (SEC) to consider competition in making regulatory decisions and to establish a balance between competitive benefits and regulatory necessities is equally clear. See 15 U.S.C. §§ 78k-c/ (1976). Indeed, the SEC is obligated to evaluate regulations and decisions to determine their effect on competition. This effect is then balanced with legitimate regulatory objectives. See id. §§ 78b, 78(b). In securities regulation, Congress has moved toward relying on self-regulatory organizations to promulgate various industry standards, with agency oversight of the competitive implications of these organizations' decisions. See Senate Subcomm. on Securities, Securities Industry Study Report, S. Doc. No. 13, 93d Cong., 1st Sess. (1973).
318. Id.
319. In McLean Trucking Co. v. United States, 321 U.S. 67 (1944), the Court held that the "Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy." Id. at 87.
it is still possible for the outcome of those decisions to be consistently favorable to monopolistic industry interests."320 Indeed, it was asserted that "the SEC, ICC, and FCC each apparently have allowed [non-competition] . . . factors to dominate their decisions in cases where antitrust policies would seemingly militate against a decrease in competition."321 The difficulty in antitrust competition balancing resulted in a bill that would require all federal agencies, on a uniform basis, to evaluate competition consequences in all decisionmaking.322 The legislation failed, however, leaving any general competition balancing to the discretion of federal agencies.

The ICC's periodic failure to assess competitive effect323 does not mean that the agency is inherently incapable of undertaking competitive assessment.324 In addition, an improved consensual decisionmaking system, consisting as it does of comprehensive integration of market impulses into one central setting, should make the assessment of certain kinds of competitive interaction far easier. A careful monitoring of markets coupled with a judicious oversight of rates should create a workable combination for the Interstate Commerce Commission.

The process of consensual decisionmaking in an economic context benefits from the reduced enforcement costs, reduced compliance problems, increased access to information, and an "opening up" of an otherwise closed decisionmaking process. Such benefits are the result of collective interaction. When cast in a different light, this process represents a restraint of trade. Keeping such systems functional and efficient is a difficult task for the agency involved, for those participating in the system, and for Congress. The difficulties, however, including the antitrust issues discussed in this Article, must be balanced against the benefits extant in an effective consensual system. Accordingly, comprehensive study and improvement of existing consensual systems, such as collective ratemaking, are recommended.

320. Shuman, supra note 102, at 47.
321. Id. at 46.
322. See S. 2625, 95th Cong., 2d Sess. § 3(a) (1978).
323. See, e.g., Navajo Terminals, Inc. v. United States, 620 F.2d 594 (7th Cir. 1979) (ICC did not adequately measure extent of competition between common carriers).