

Replacing Antitrust Exemptions for Transportation Industries: The Potential for a “Robust Business Review Clearance”

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Congress has scattered among various statutes at least thirty exemptions or modifications of antitrust law.¹ The greatest concentration of these exemptions is in the area of commercial transportation where there are six such exemptions, the oldest relating to ocean shipping.² Indeed, until the deregulatory movement of the 1970s and 1980s, most rates, routes, and terms for transportation were the subject of direct regulatory control. However, starting in the 1970s, legislative policy toward transportation dramatically changed.³ Increasingly, federal policy favors market competition in transportation sectors and discourages regulatory interference. Yet the exemptions remain on the books, and companies regularly seek their benefit. This leads to an empirical question, which will form the core of this Article: what kinds of conduct are now being presented to regulators for approval and antitrust immunity?

The empirical evidence presented in this Article shows that the exemptions no longer serve their historic purpose of shielding anticompetitive agreements among firms supervised by direct regulation from the conflicting demands of antitrust. Instead, they primarily provide unnecessarily strong protection for conduct that would likely be lawful under modern antitrust law. But if that is true, then (1) why would the parties to such agreements expend resources, make public disclosure of their plans, and invite administrative litigation in order to seek immunity for conduct that is probably lawful in any event?, and (2) is it in the public interest to continue to immunize these arrangements?

The central empirical claim of this Article is testable by an analysis of the transactions that have received immunity. An examination of the last ten years of agency actions in light of the plausible alternative explanations for the transaction or merger involved establishes the dramatic change in the economic functions of the overwhelming majority of the matters receiving antitrust immunity.⁴ Further, the

¹ See ABA SECTION OF ANTITRUST LAW, MONOGRAPH NO. 24, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 33–52 (2007) [hereinafter ABA MONOGRAPH] (listing thirty statutory exemptions or modifications of antitrust law as of 2006).

² Part I has a fuller discussion of these exemptions.

³ See ABA MONOGRAPH, *supra* note 1, at 193–216 (describing changes in railroad regulation); see also DANIEL J. SWEENEY ET AL., TRANSPORTATION DEREGULATION: WHAT'S DEREGULATED AND WHAT ISN'T (1986).

⁴ As explained in more detail later, both the Department of Transportation (DOT) and the Surface Transportation Board (STB) must actually approve the transactions or combinations receiving immunity. But the Federal Maritime Commission (FMC) is only a

outliers protecting conventional cartelistic or monopolistic activity are almost without exception contrary to the public interest.

This leads to the question of why the participants in the transportation industry both seek to obtain antitrust immunities and work actively to retain these exemptions. The hypothesis is that most of these transactions and ventures provide or are expected to provide efficiency gains, but in many cases, the value that the parties can capture is modest. This may be because the gains themselves yield relatively little pecuniary advantage or because the inherently competitive nature of many transportation markets results in cost savings being competed away to the benefit of customers generally. Under such circumstances, the antitrust liability risks (i.e., the direct and indirect costs of litigation as well as the *ex ante* perception of costs and disruption) may deter parties from pursuing legitimate, efficiency-enhancing collaboration. Hence, a robust protection from the possibility of antitrust litigation may ensure that the participants can enjoy the modest pecuniary gains from their efficiency-enhancing collaboration and provide an incentive to increasing efficiency in moving goods and people. However, complete insulation from antitrust liability risk may well also provide parties with the hope and expectation of some additional gains resulting from the adoption of unnecessarily restrictive terms that facilitate either exploitation of customers or exclusion of competitors.

An analysis of the agreements presented to the agencies would first provide insight into the kinds of transactions being proposed and could provide the basis of support for continuing some form of protection from antitrust liability. Evidence that most transactions are not on their face efficiency-enhancing joint ventures would also weigh against continued protection of inefficient, cartelistic restraints on competition in transportation. The analysis of agency actions is generally consistent with the hypotheses in the preceding paragraph. Further, it is reasonable to infer that, at least in part, the role of immunity for otherwise probably lawful ventures is to reduce the transaction cost risks associated with collaboration among competitors.

If the foregoing hypotheses are correct, the current immunity provisions are maladapted to the tasks they now perform. What is needed is access to a robust form of a time-limited, business review

file keeper. Basically, shipping companies enjoy immunity as a matter of law by filing a notice with the FMC concerning their activities. *See infra* text accompanying notes 9–10.

clearance explicitly focused on avoiding unnecessarily anticompetitive agreements or mergers while providing better protection for legitimate, reasonable ventures. However, because many of these ventures are probably both lawful and unlikely to produce any significant antitrust risks—either public or private—the step of seeking antitrust protection should be an option for the parties and need not be inherent in the process of reporting the venture to the relevant agency and obtaining whatever public interest approval may be necessary.⁵ The process should be based on the current review procedures already employed by the U.S. Department of Justice (DOJ) but should contain a more robust result, such as suspension of antitrust liability for the duration of that clearance, if the transaction or venture is found not to raise serious competitive concerns. The relevant regulatory agencies should still play a primary role in the overall process because of the noncompetitive reasons for regulation of transportation services. An additional insight of this analysis is that, even in a world in which market processes are central, it is important to retain regulatory oversight in transportation. Antitrust immunity is a discrete and special issue relevant in the changed world of transportation to a limited set of ventures that raise significant risks of costly litigation that would offset the efficiency gains. Only in such circumstances should the parties and the agencies have to concern themselves with this question.

The analysis of this Article proceeds as follows: Part I provides a brief summary of the six statutes that provide immunity for some aspect of transportation as well as the contemporary business review clearance process used by the Antitrust Division; Part II sets forth plausible alternative explanations for retaining antitrust immunity in the transportation industries; Part III then provides the empirical part of this Article, analyzing agency grants of antitrust immunity in light of the possible explanations for the transactions being immunized; Part IV explains why the exemption process is not well adapted to the needs of the parties or the public interest; Part V presents the basic concept of a robust business review clearance process; Part VI considers two arguments against the proposal; Part VII then identifies

⁵ As discussed *infra* Part VII.C, notice to the agency overseeing the transportation sector is important for reasons outside of competition. Moreover, because of the interconnected nature of air, rail, and, to a lesser extent, ocean transportation, changes within parts of such networks can have a variety of positive and negative externalities. The resulting impacts on economic activity warrant a more general public interest review than antitrust alone can provide.

and discusses some key elements of the process that involve important choices if it were to be implemented.

I

THE EXEMPTIONS AND THE BUSINESS REVIEW CLEARANCE LETTERS OF THE ANTITRUST DIVISION

A. *The Statutory Exemptions for Transportation Industries*

There are six identifiable exemptions from antitrust law for various aspects of the transportation industries. The exemptions include The Shipping Act, railroad exemptions, collective agreements among motor carriers, intercity bus mergers and acquisitions, international air carrier agreement exemptions, and airport congestion.

1. *The Shipping Act*⁶

This statute exempts from antitrust law agreements that create and implement ocean shipping conferences, which are cartels in which competitors agree on prices for specific routes. This is the oldest surviving exemption in the statute books, having been originally adopted around World War I. Congress has revised it several times. The Federal Maritime Commission has oversight of industry conduct and establishes rules and regulations governing it. Shipping companies must charge their customers either their posted tariffs or a price based on a specific contract.⁷ Historically, shipping conferences established those tariffs based on an agreement among members on rates for particular routes, which are published and to which adherence can be required. Today, shipping companies must still have published tariffs either of their own or of the conference, but they may also enter into confidential agreements with shippers for terms other than the tariff rates.⁸ A wide range of agreements among shipping companies and ocean terminal operators are also immune from antitrust law when filed with the FMC.⁹ The Commission can commence proceedings to challenge such agreements only after the

⁶ Pub. L. No. 98-237, 98 Stat. 67 (codified in scattered sections of 46 U.S.C. (2006)).

⁷ 46 U.S.C. § 40501 (2006).

⁸ *Id.* § 40502 (establishing that these agreements are to be filed with the FMC, but the price terms are to remain confidential).

⁹ *Id.* § 40301 (establishing the list of agreements); *id.* § 40303 (establishing the content requirements); *id.* § 40304 (establishing that agreements come into effect forty-five days after filing). All such agreements are exempt from antitrust law. *Id.* § 40305(a).

fact.¹⁰ Conferences are open to all carriers that want to participate. Despite the apparent sweep of the exemption, the courts have had to define and redefine its boundaries.¹¹

In 2006, the European Union, after extensive review, terminated its antitrust exemption for shipping conferences.¹² This action further reduced the potential cartel gains of any exemption from only American antitrust law. Indeed, in the summer of 2010, the media reported that the EU and U.S. authorities were investigating price fixing by general cargo lines.¹³

2. Railroad Exemptions¹⁴

This statute, which replaced the Interstate Commerce Commission and Reed-Bulwinkle Acts¹⁵ as part of the deregulation of railroad

¹⁰ *Id.* § 41307(b)(1) (authorizing the FMC to investigate and challenge agreements that harm competition). Only the FMC can bring such a challenge. *Id.* § 41301(a). The FMC has the burden of proof in any such challenge. *Id.* § 41307(b)(3). The FMC has brought only one case under this section, and that was to challenge efforts by Long Beach and Los Angeles to coordinate air pollution regulation of trucks hauling containers into and out of the harbor area. *Fed. Mar. Comm'n v. City of Los Angeles, California*, 607 F. Supp. 2d 192 (D.D.C. 2009) (denying a preliminary injunction to enjoin trucking programs at ports in Long Beach and Los Angeles).

¹¹ *See, e.g., Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213 (1966).

¹² Prior to 2006, the European Union had an exemption analogous to that in the United States. *See* Council Regulation 4056/86, 1986 O.J. (L 378) (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31986R4056:EN:HTML>. The European Commission repealed this exemption in 2006, and new guidelines were to be developed to take its place. *See* Press Release, European Union, Competition: Repeal of Block Exemption for Liner Shipping Conferences—Frequently Asked Questions (Sept. 25, 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/344&format=HTML&aged=1&language=EN&guiLanguage=en>. Interestingly, the European Union continued to allow joint ventures among shipping companies with an aggregate of less than thirty or thirty-five percent of the trade in a market through a “block exemption,” which is akin to an antitrust immunity; however, this exemption expired on April 25, 2010. *See* Press Release, European Union, Antitrust: Commission Prolongs and Amends Block Exemption for Liner Shipping Consortia (Apr. 25, 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/477&format=HTML&aged=1&language=EN&guiLanguage=en>. *See generally* Christopher Sagers, *The Demise of Regulation in Ocean Shipping: A Study in the Evolution of Competition Policy and the Predictive Power of Microeconomics*, 39 VAND. J. TRANSNAT'L L. 779 (2006).

¹³ John W. Miller, *U.S., EU Scrutinize Container Shipping Rates*, WALL ST. J., June 1, 2010, at B3.

¹⁴ *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified in scattered sections of 49 U.S.C. (2006)) (abolishing the Interstate Commerce Commission, creating the Surface Transportation Board, and revising the statutes governing railroads including the exemptions).

¹⁵ Ch. 491, 62 Stat. 472 (1948) (codified as amended at 49 U.S.C. § 10706 (2006)).

services, still delegates to the Surface Transportation Board (STB) exclusive authority to review and approve railroad mergers, and it confers the power to authorize restrictive terms in connection with such mergers or acquisitions.¹⁶ In addition, the STB can approve joint rate agreements among railroads, thereby conferring antitrust immunity.¹⁷ The substantive standards that the STB is to employ, given the deregulated nature of transportation, include a concern for competition; however, the STB is also instructed to consider a variety of other values, including sufficiency of revenue.¹⁸ The statute also modifies antitrust standards of proof for conspiracy claims when railroads are charged with price fixing outside the STB's authority.¹⁹ Those modified standards essentially require direct proof of conspiracy and reject the use of inferential lines of proof based on consciously parallel conduct.

3. *Collective Agreements Among Motor Carriers*²⁰

The provision authorizes agreements among motor carriers to set rates for moving household goods, general rules, through rates, joint rates, and classifications of freight.²¹ Thus, the statute permitted, with STB approval, rate fixing among competitors. However, the statute allowed the trucking companies to enter into contracts with shippers at rates other than the rates set by the approved agreements. In fact, most trucking was done at a discount—often substantial—from the posted rates prior to the STB decision to terminate the

¹⁶ 49 U.S.C. § 10501(b)(2) (2006).

¹⁷ *Id.* § 10501(b) (declaring that the STB's authority is "exclusive"); *id.* § 10706 (authorizing the STB to recognize and regulate rate setting groups, i.e., rate bureaus, and imposing restrictions on the activities of such groups and appearing to focus then primarily on interline traffic agreements); *id.* § 10706(a)(5) (permitting the STB to authorize shippers that provide railcars for use by the railroads to enter into agreements among themselves with respect to negotiating rates for the railroads' use of their equipment); *see also id.* § 11321(a).

¹⁸ *Id.* § 11324. Sufficiency of revenue stands in potentially significant conflict with the idea of vigorous competition.

¹⁹ *Id.* § 10706(a)(3)(B)(ii) (noting that conspiracy may not "be inferred" from "similar action" nor are any lawful discussions or agreements "admissible" as evidence of collusion).

²⁰ *Id.* § 13703.

²¹ *Id.* § 13703(f) (restricting the ability of motor carriers to enjoy the benefit of the filed rate doctrine with respect to "undercharge" claims that had been a major source of dispute in the 1990s). Such claims arose when motor carriers discounted from filed tariffs and then sought to collect the difference between the discounted price and the tariff rate. *E.g.*, *Sec. Servs., Inc. v. KMart Corp.*, 511 U.S. 431 (1994).

authorization for the trucking rate bureaus. The STB had to approve these agreements under a public interest standard, and such approval carries an exemption from the antitrust laws.²² However, all such agreements could last no more than five years unless the STB reapproved the agreement.²³ Another immunity exists to allow movers of household goods to enter into agreements with their agents concerning charges and ownership of moving vans.²⁴ The STB can, on its own motion or at the request of a third party, review such activities and order modification or termination.²⁵

4. *Intercity Bus Mergers and Acquisitions*²⁶

This provision grants the STB exclusive jurisdiction to review mergers, acquisitions, leases, and any other method of transferring control between or among bus companies engaged in interstate commerce. The standard for approval is “public interest” that includes “adequacy of transportation” as well as the costs and impact on employees of the carrier that is acquired.²⁷ The statute explicitly preempts antitrust law and “all other law, including State and municipal law, as necessary to . . . carry out the arrangement.”²⁸

5. *International Air Carrier Agreement Exemptions*²⁹

In making the transition from regulated service to competitive service in domestic air travel, Congress recognized two contexts involving international air services in which the secretary of transportation might grant antitrust exemptions. The first involves cooperative agreements involving international air travel.³⁰ The second involves “mutual aid agreements” when there is a strike

²² 49 U.S.C. § 13703(a)(6).

²³ *Id.* § 13703(c).

²⁴ *Id.* § 13907(d)(1).

²⁵ *Id.* § 13907(d)(2). This provision immunizes conduct involving the joint ventures among local movers and a national coordination system, whether the agreements were vertical or horizontal, despite the fact that the one case in the area, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), resulted in a dismissal of the antitrust claims against the venture.

²⁶ 49 U.S.C. § 14303.

²⁷ *Id.* § 14303(b).

²⁸ *Id.* § 14303(f).

²⁹ *Id.* §§ 41308–41309, 42111.

³⁰ *Id.* § 41309(b) (requiring approval of any cooperative agreement and establishing standards for approval, including a requirement that there be no less anticompetitive method of achieving the primary goal of the agreement); *id.* § 41309(b)(1)(B).

affecting international service of an air carrier.³¹ Both impose restrictive standards before the secretary can approve the agreement.³² An antitrust exemption exists only if the secretary makes a separate finding that an exemption is “required by the public interest” and then only “to the extent necessary to allow the person to proceed with the transaction specifically approved”³³ Moreover, such exemptions must be periodically reviewed and reapproved.

6. *Airport Congestion*³⁴

This statute, enacted in 2003, authorizes the Federal Aviation Administration (FAA) to develop a pilot program for reducing congestion at airports. The program may include “collaborative decision making among carriers at [designated] airports,” with the acquiescence of the Attorney General.³⁵ Unless the Attorney General objects within five days of notice, the Secretary of Transportation may confer an exemption from antitrust law.³⁶ This statute, therefore, exempts agreements among competitors to allocate landing rights, which are a central form of non-price competition. Congress authorized this program for two years. It was to expire in 2005, but if the Attorney General and the Secretary of Transportation agreed, it could be extended for two more years to 2007.³⁷ However, the current version of the U.S. Code still contains this provision raising the question of whether it is still available to facilitate collective action by airlines.

Three administrative agencies are responsible for these six exemptions. The FMC has one exemption; the Department of Transportation (DOT), which includes the FAA, oversees two exemptions; and the STB has three exemptions. Although the STB is nominally part of the DOT, the STB operates as an independent regulatory agency. Except for the airport congestion exemption, these immunity provisions have their roots in the period when all transportation was subject to direct regulation of rates, services, and

³¹ *Id.* § 42111. The agreement may provide for only sixty percent of the losses, may apply to only eight weeks of losses, and may not apply to the first thirty days of a strike, and the dispute must be arbitrated at the request of the striking employees. *Id.*

³² *Id.* § 41308(b).

³³ *Id.*

³⁴ *Id.* § 40129.

³⁵ *Id.* § 40129(c)(1)(B).

³⁶ *Id.* § 40129(h)(1).

³⁷ *Id.* § 40129(k).

routes to be served. In that era, all providers had to adhere to published tariffs, and they could not compete with respect to prices. Only gradually, the market process came to dominate the pricing of transportation. But even as it has, the old exemptions from antitrust law remain on the books.

B. *The Business Review Clearance Process*

The current system codified in the Code of Federal Regulations requires parties to submit their proposals to the Antitrust Division prior to taking any action to initiate the activity.³⁸ The Antitrust Division, after review, will issue a letter stating its enforcement intent.³⁹ The statement has no formal legal significance,⁴⁰ but courts frequently cite this review as a factor in judicial approval of such arrangements.⁴¹ Indeed, there is no reported case in which an approved agreement was subsequently held to be unlawful.⁴² This may be reflective only of a conservative review process, but the more plausible explanation is that, when the DOJ approves an agreement that is close to the line of legality, this review provides substantial credibility for the agreement's claim to legality.

It would appear that, in response to the initial request for approval, the Antitrust Division's attorneys will negotiate with the parties requesting clearance in order to modify or clarify the nature of the conduct and its competitive implications. Hence, the parties have some ability to revise their agreements to satisfy the views of the Antitrust Division.

The Antitrust Division's current business review program is not available for most of the conduct of concern in this Article—various kinds of agreements and mergers in the transport sector that can

³⁸ FTC Statements of Policy, 28 C.F.R. § 50.6(2) (2010) (“The Division will consider *only* requests with respect to *proposed* business conduct . . .”) (emphasis added).

³⁹ *Id.* § 50.10.

⁴⁰ *Id.* § 50.9 (“[The] letter states only the enforcement intention of the Division . . .”).

⁴¹ *E.g.*, *Matsushita Elec. Indus. Co., v. Cinram Int'l, Inc.*, 299 F. Supp. 2d 370, 379 (D. Del. 2004) (“Furthermore, the court does not overlook the fact that the DOJ issued a Business Review Letter concluding that the 6C Pool was not likely to violate antitrust laws. The court appreciates the DOJ's familiarity and experience analyzing complex pooling arrangements and is strongly persuaded by the DOJ's conclusions.”).

⁴² However, in at least one situation, the court found that the alleged conduct was not within the scope of the matters covered by the clearance and thus held that the matter could proceed. *Chase v. Nw. Airlines Corp.*, 49 F. Supp. 2d 553 (E.D. Mich. 1999) (distinguishing the conspiracy at issue from that which had been cleared by a review letter).

currently qualify for antitrust immunity if they are first approved by industry-specific regulators. First, the business review program currently applies only to new proposals. If the conduct or agreement already exists, it will not qualify for clearance. Second, the clearance is of indefinite duration. There is no record of the Antitrust Division revisiting and reconsidering matters that it has approved, even though its letters reserve the right to do so. Hence, when an industry is subject to significant change over time, there is no automatic way to get reconsideration of clearances that may no longer be reasonable. Third, the clearance process is available to review only section 1 type agreements. Neither merger nor monopoly conduct is considered, but merger analysis has a different pre-consummation review process through the Hart-Scott-Rodino legislation.⁴³ There is no readily available method for a dominant firm to get review and approval of any course of conduct that might arguably involve a violation of section 2 of the Sherman Act. However, the matters subject to review and immunization by the transportation regulatory agencies all involve either agreements among firms or mergers. Hence, for purposes of this analysis, it is feasible to focus on those areas of antitrust law, having noted that there might be room for an expansion of the business review concept to cover single firm conduct, much as the European Union currently does.⁴⁴

II

THE POTENTIAL EXPLANATIONS FOR THE CONTINUED SUPPORT FOR THE EXEMPTIONS

There are two general explanations for why, despite the movement to embrace competition in the transportation industries, the exemptions from antitrust law retain significant support among the affected firms. This Part sets forth the alternative explanations and suggests the ways in which the matters given immunity can be tested to determine which of the contending theories best explains the result.

A. Cartel and Monopoly Benefits Still Exist Even if Reduced

It may be that the right to coordinate competition—whether by a shipping conference, railroad, trucking or intercity bus rate bureau, or

⁴³ Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified at 15 U.S.C. § 18a (2006)).

⁴⁴ See Council Regulation 1/2003, para. 14, 2003 O.J. (L 1) 4 (permitting declaratory decisions only in extraordinary cases).

the International Air Travel Association (IATA)⁴⁵—still provides some modest cartelistic benefits. The exchange of competitively sensitive information and the setting of base rates may provide a point of departure for “competitive” pricing that makes it more likely that industry members will be able to keep prices somewhat above the level that full competition would produce.⁴⁶ For example, to the extent that it is possible to differentiate among groups of customers, establishing default prices may facilitate the exploitation of those customers with the least elastic demand and the highest search costs. Another potential abuse is to coordinate charges for “ancillary services” which are often essential to the transportation of goods from one point to another. Similarly, an agreement among competitors to set, for example, a “fuel surcharge” might actually be a means to inflate prices outside the basic charge for services.⁴⁷ Many outside observers believe that this is the primary consequence of retaining these exemptions and the associated collective activity. This explanation would also suggest that the underlying anticompetitive objectives that the exemptions shielded historically remain the primary objective today, even if their impact on competition may be less.

If the primary goal of transactions and agreements seeking immunity is this kind of market exploitation, it should be obvious from the nature of the agreement. The parties to the agreement would have no relationship to each other except as competitors in the market. They would then be using the agency approval as a means of insulating their coordination of pricing and output from antitrust liability.

⁴⁵ IATA is the international entity through which airlines coordinate a great deal of their activities. Alliances are approved on condition that the parties not participate in IATA coordinated rate setting with respect to the services to any country whose airline is in any immunized alliance. *See, e.g.,* Alitalia-Linee Aeree Italiane-S.p.A., DOT Order 2008-5-32, 2008 WL 5550453 (Dep’t of Transp. May 22, 2008) (final order) (“We direct [the parties] . . . to withdraw, or to remain withdrawn, from participation in any International Air Transport Association tariff coordination activities that discuss any proposed through fares, rates, or charges applicable between the United States and any countries whose airlines have been or are subsequently granted antitrust immunity, or renewal thereof, to participate in similar alliance activities with a U.S. airline(s).”).

⁴⁶ *Cf.* *United States v. Container Corp. of Am.*, 393 U.S. 333, 336–37 (1969) (exchanging customer-specific prices allowed conspirators to keep prices above a competitive level despite entry and excess capacity).

⁴⁷ In the case of airlines, a number of airlines have paid fines for engaging in such a price-setting activity. In ocean shipping, the concern is often about agreements setting the terms for transferring containers from ships to other modes of transportation.

The one major challenge to classification on the naked cartel side of the ledger will be those agreements that serve as the means to set uniform standards for the network aspects of these industries. The definition and test for such agreements is discussed below.

B. Contemporary Transportation Coordination Often Benefits from Legitimate Collective Action

On the other hand, there might be efficiency-enhancing reasons that exemptions are still valued. Even if the exemptions traditionally served only to shield cartel and monopoly behavior, it may be that changing market conditions and technology have fundamentally altered the exemptions' functions. The protected conduct may involve two types of economically efficient activities.

1. Legitimate Joint Ventures

The exemptions may shield the creation and implementation of joint ventures to provide services. Such ventures would involve enterprises that are actual or potential competitors, and the resulting agreements would be likely to affect prices, areas of operation, allocation of business, and limits on membership. Such agreements would likely include terms resembling horizontal price fixing, customer or territorial allocations, and refusals to deal that resemble boycotts. All of these are per se violations under older antitrust case law. However, recent case law⁴⁸ has restored the ancillary restraint analysis of *United States v. Addyston Pipe & Steel Co.*⁴⁹ Under *Addyston Pipe*, joint ventures are subject to a rule of reason that asks (1) whether there is a legitimate joint venture or transaction; (2) if so, whether it is subject to the risks of opportunistic conduct or otherwise requires restraints on the parties in order to achieve its legitimate objectives; (3) if so, whether the restraints at issue function to achieve the legitimate needs of the venture; and (4) whether there are any less restrictive ways to achieve the primary objective that would have

⁴⁸ See, e.g., *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing, Co.*, 472 U.S. 284 (1985); *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979). But see *PolyGram Holding, Inc. v. Fed. Trade Comm'n*, 416 F.3d 29 (D.C. Cir. 2005) (condemning a restraint after a "quick look," despite the efforts of the parties to claim the agreement was ancillary to their joint venture).

⁴⁹ 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

been reasonable options at the time of the transaction or venture.⁵⁰ In many contexts, however, a convincing prima facie claim that there is a legitimate venture and that the restraints are at least arguably ancillary to that venture will suffice to create a presumption of legality.⁵¹

The appropriate test for whether results are ancillary is found in the first three steps listed above. The parties to the restraint should be (1) engaged in a legitimate productive transaction or venture that (2) faces risks of opportunism or needs to define (i.e., restrain) the role of participants and that (3) the restraint at issue functions to resolve. Such an agreement falls in the category of presumptive legality even if, upon further inspection, the agreement is overbroad or contains unnecessary restraints. While such restraints are arguably unreasonable, the dominant contemporary version of the “rule of reason” requires an initial showing of market power on the part of the party or parties imposing such a restraint once the initial prima facie legitimacy of the transaction or venture is established.⁵² Thus, the absence of market power creates a strong presumption of legality. There is also a small subset of cases involving direct competitors that have agreed to restrain their independent economic activity, which suggests that some restraints may be presumptively illegal.⁵³

⁵⁰ See, e.g., *United States v. VISA U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003); *Gen. Leaseways, Inc. v. Nat’l Truck Leasing Ass’n*, 744 F.2d 588 (7th Cir. 1984). This analysis is discussed in Peter C. Carstensen & Richard F. Dahlson, *Vertical Restraints in Beer Distribution: A Study of the Business Justifications for and Legal Analysis of Restricting Competition*, 1986 WIS. L. REV. 1 (1986).

⁵¹ The presumption of legality is manifest in the usual statement by courts that a restraint functionally associated with “pro-competitive” conduct (i.e., legitimate joint venture) can be challenged only if the plaintiff can plausibly allege that the defendant has market power. See, e.g., *Nw. Wholesale Stationers*, 472 U.S. at 296 & n.7.

⁵² See, e.g., *VISA U.S.A.*, 334 F.3d 229.

⁵³ See, e.g., *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) (holding the restraint on resale competition by members of a grocery buying group to be presumptively illegal). See generally *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) (holding that a market allocation agreement associated with “franchise” was nevertheless per se illegal based on lack of justification); *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332 (1982) (holding that an agreement among competing doctors to set “maximum” prices was illegal as unnecessary to legitimate aspects of their joint venture to provide specific services to health insurers); *PolyGram Holding*, 416 F.3d 29 (holding a price-fixing agreement between joint venturers illegal based on a “quick look” because it related to products outside the venture); Peter C. Carstensen & Harry First, *Rambling Through Economic Theory: Topco’s Closer Look*, in *ANTITRUST STORIES* 171 (Daniel A. Crane & Eleanor M. Fox eds., 2007).

If such restraints are likely to be lawful, especially in industries with modest overall concentration levels, such as trucking, air travel, and ocean shipping, why would parties want the benefit of immunity from antitrust challenges?⁵⁴ Any venture poses risks that can outweigh its value to the parties. In particular, if the expected gains to the firm from the transaction are modest, uncertain, or likely to be dissipated through competition, this would reduce the incentive for the parties to engage in the transaction. Thus, when the economic gains to the parties are likely to be modest relative to the perceived risk of litigation, the parties may forego the opportunity to engage in legitimate, efficiency-enhancing collaboration. This analysis assumes also that the efficiency gain can come only from some form of collaborative activity. Hence, there is an unambiguous loss if the venture does not occur. If individual firms can achieve the benefits on their own, then obstructing one alternative does not create the same social costs. If unilateral options are more costly, however, there is still some social inefficiency when the best option is precluded.

In addition, if parties can secure immunity from antitrust liability, this will affect the incentives that they have in developing their legitimate venture. Immunity means that the parties have the opportunity, if the economics of the situation permit, to impose more restrictive terms than necessary in order to facilitate either greater exploitation of customers or exclusion of rivals. An antitrust analysis of a legitimate joint venture, especially one with any degree of market dominance, requires critical review of any significantly anticompetitive restraints when a plausible case can be made that less restrictive options would have provided sufficient protection for the legitimate interests and needs of the parties. Thus, the presence of a real antitrust review is likely to play a role in inducing parties to look for the least restrictive controls consistent with their primary objectives. Absent that incentive, the parties may well adopt unnecessarily anticompetitive restraints whenever such restraints will either directly advantage the parties or create a barrier to new entry.

⁵⁴ There is high concentration in most railroad service markets. Hence, any agreement imposing restraints ought to be subject to stricter scrutiny under antitrust law. Thus, continued pursuit of antitrust immunity has more plausibility in that field of transportation.

2. Standard Setting for Transportation Networks

The second collective activity in which these industries engage involves market facilitation by collective agreement. This is a form of standard setting in a general sense. The size of containers and the contract terms under which containers will move into intermodal service, the terms for exchanging rail cars or franchising travel agents⁵⁵ and for ensuring the integrity of the reservation system, and other similar activities are necessary components of market facilitation. The standardization of railroad track width is an example of the impact of the network nature of the transportation business. Without standardization, it would be impossible to switch cars from one line to another, and equipment producers would have experienced diseconomies as a result of having to satisfy a variety of different gauges.⁵⁶

Moreover, with the rise of intermodalism in freight transport, there is a need to agree about a variety of standards to facilitate the efficient operation of the market. This involves standardization both of physical components and of the contractual and other transactional elements of the business of moving goods.⁵⁷ Even in passenger transport, especially when agents are used, there may be a need for standardized contract terms, and the carriers need to have some system for oversight of the integrity and financial responsibility of such agents. Once again, there are public interest arguments for coordination of these aspects to facilitate efficient market operation. Such conduct, however, whether with respect to freight or passengers, is facially comparable to cartelistic conduct because both exclude

⁵⁵ See *Chase v. Nw. Airlines Corp.*, 49 F. Supp. 2d 553 (E.D. Mich. 1999) (discussing the role of Airport Reporting Corporation, a joint venture of all major American airlines, in overseeing travel agents selling tickets for airlines).

⁵⁶ Prussian railroads quickly established a uniform gauge that facilitated the growth of rail traffic connecting various parts of the country, as well as adjacent countries. In contrast, early American railroads failed to establish a uniform gauge for trains. The result was a “fragmented network” in which local interests “did their best to prevent the development of through traffic.” COLLEEN A. DUNLAVY, *POLITICS AND INDUSTRIALIZATION: EARLY RAILROADS IN THE UNITED STATES AND PRUSSIA* 198 (1994); *accord id.* at 195–201.

⁵⁷ The Supreme Court has resolved the tension between the railroad statutes governing liability for railroad accidents and the conflicting rules for ocean transportation. The problem arises because of the use of intermodal contracts moving goods directly from foreign producers to inland American buyers via containers transported by ship and rail. See *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433 (2010) (holding the ocean shipping contract to preempt the railroad liability rules).

alternatives and commit the parties to a uniform method of business.⁵⁸ The need for such standards remains vital to the transportation industries, but at the same time, agreements imposing such standards are more readily challenged as antitrust violations in the absence of some form of immunity.

Congress, through the Standard Development Organization Advancement Act (SDOAA), has determined that standard setting needs to be treated differently from ordinary cartel behavior.⁵⁹ The Act requires the organization to employ an open policy with respect to participation by all stakeholders and to reach decisions in a consensus manner. This qualified recognition of the need for standard setting also signals that there is a real concern that the process of setting standards can be abused to undermine competition or to exclude competitors without justification.⁶⁰ An important difference from the general standard-setting context of the SDOAA is that any private group's proposal for transportation industry standards in railroad, trucking, airline, and intercity bus service would be subject to review on the merits by the regulatory agency using procedures in which all stakeholders can participate.⁶¹ Moreover, the resulting standards are usually imbedded in regulations that all firms must obey.

III

TESTING THE HYPOTHESES

We have collected and summarized the actions of the three transportation agencies insofar as we can locate them for the past decade.⁶² In general, the following descriptions do not attempt to go

⁵⁸ See Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941 (2000) (explaining how many naked restraints involve limits on how the parties will compete by setting standards or other limits on competition rather than directly controlling prices or output).

⁵⁹ Pub. L. No. 108-237, 118 Stat. 661 (codified as amended at 15 U.S.C. §§ 4301-4305 (2006)). For a discussion of the Act and its justification, see ABA MONOGRAPH, *supra* note 1, at 263-76.

⁶⁰ See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

⁶¹ It is less clear whether the FMC has comparable ability to review standards set by ocean shipping firms.

⁶² The empirical discussion of this Article rests on data compiled from decisions and filings with the STB, as well as decisions available elsewhere in reported sources. The data are available at Peter C. Carstensen, *Anti-trust Research*, U. WIS. L. SCH., <http://hosted.law.wisc.edu/faculty/carstensen/index.html> (last updated Oct. 26, 2010).

behind the text of the orders except in the most minimal way. The goal is to examine the reported facts to determine a facial characterization of the agreements while examining a few specific matters in a little more detail to highlight some issues. The decisions of the STB, however, allow more evaluation because of the partial change in policy from that agency.

A. The Transactions and Agreements Approved by the Agencies

1. The Federal Maritime Commission (FMC)

The FMC produced the largest number of actions. In the period under review, there were about 220 exemptions reported by the FMC. Only six involved traditional shipping conferences (i.e., cartels). Another thirty-six involved “rate discussion” agreements. These agreements are varied as to participants and objectives. Some agreements appear to be aimed largely at coordinating prices or other practices among competitors,⁶³ but others seems to involve the development of shared facilities, ships, or coordinated services.⁶⁴ The dominant type of agreement, however, involved capacity allocation plans, granting rights to use capacity on another company’s ship, or an agreement between two shipping companies to coordinate their sailings between two or more destinations. Both of these activities fit the joint venture mold because, by working together, the parties can better fit capacity to demand either by sharing use of a ship or by coordinating ship operations to ensure more efficient operation. Of course, merely coordinating sailing dates is also very much like a naked allocation of the market. Without more detail than

References throughout this Article are made to specific documents organized within folders separated by industry type. This Article also makes observations based on the number of filings made and the outcome of those filings. The data on which those calculations were made are also available from the author.

⁶³ For example, the one agreement challenged by the FMC involved a discussion agreement between Long Beach and Los Angeles on implementing rules to reduce air pollution resulting from trucks hauling containers from the harbor to other locations. *See* Fed. Mar. Comm’n v. City of Los Angeles, California, 607 F. Supp. 2d 192 (D.D.C. 2009). Others involve conduct that would appear blatantly illegal. *Compare* The Credit Agreement, FMC Agreement No. 202-011353-028 (Fed. Mar. Comm’n June 8, 1999) (on file with author) (“The purpose of the Agreement is to enable the parties to develop and implement uniform credit rules, practices, procedures and policies in the trade.”), *with* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (per curiam) (finding it is per se illegal for competitors to agree on credit terms).

⁶⁴ *See, e.g.*, NYK/WWL/NSCSA Cooperative Working Agreement, FMC No. 203-011584-006 (Fed. Mar. Comm’n Jan. 24, 2006) (on file with author) (arguably an effort to develop a joint venture to serve the eastern Mediterranean and other Middle Eastern ports).

the documents provide, it is not feasible to tell whether, in some cases, there is more than an agreement to limit competition by staggering sailing times, which would lead to reduced shipper choices.

The data set shows that the FMC reported (recall that the FMC has no power to reject proposals) 150 vessel-sharing agreements.⁶⁵ Such agreements often involve commitments to share space on container ships that are operated by two or more companies serving the same set of routes. Another twenty-seven agreements involved greater coordination (e.g., alliances) or other kinds of joint service or equipment sharing.⁶⁶ What the agreements do not reveal is the scope or extent of competition remaining on the routes affected by these agreements. Many of the same major ship lines recur as participants in the agreements. There is, however, no analysis showing the impact on shipper choices resulting from the combinations.

Another illustrative example is that several marine terminals created “chassis pools” for the chassis on which containers were

⁶⁵ See, e.g., Grand Alliance/Zim Transpacific Vessel Sharing Agreement, FMC Agreement No. 012063-001 (Fed. Mar. Comm’n Apr. 15, 2009) (on file with author); “K” Line/Abou Merhi Space Charter and Coop. Working Agreement, FMC No. 012066 (Fed. Mar. Comm’n Mar. 26, 2009) (on file with author); YMUK/CSCL Cross Slot Charter Agreement, FMC Agreement No. 012065 (Fed. Mar. Comm’n Mar. 17, 2009) (on file with author); “K” Line, PIL and WHS Transpacific Charter Agreement, FMC No. 012062 (Fed. Mar. Comm’n Feb. 20, 2009) (on file with author); CSAV Grp. Coop. Working Agreement, FMC Agreement No. 011672-005 (Fed. Mar. Comm’n Oct. 31, 2006) (on file with author); U.S. Flag Roll-on Roll-off Carriers Vessel Schedule Discussion and Voluntary Adherence Agreement, FMC No. 011949 (Fed. Mar. Comm’n Apr. 15, 2006) (cooperative working agreement) (on file with author); Space Charter and Coop. Working Agreement Between NYK and WWL, FMC No. 232-011443-004 (Fed. Mar. Comm’n Dec. 30, 2005) (on file with author); Agreement Between CSAV and Mitsui, FMC Agreement No. 217-011545-001 (Fed. Mar. Comm’n Mar. 26, 2000) (on file with author).

⁶⁶ See, e.g., Maersk Line/CMA CGM Coop. Working Agreement, FMC Agreement No. 012055 (Fed. Mar. Comm’n Oct. 31, 2008) (on file with author); The Höegh/Maersk Ancillary Agreement, FMC Agreement No. 012027 (Fed. Mar. Comm’n Mar. 17, 2008) (on file with author); The Grand Alliance Agreement II, FMC Agreement No. 203-011602-011 (Fed. Mar. Comm’n Dec. 17, 2007) (on file with author); Evergreen Line Joint Serv. Agreement, FMC No. 011982 (Fed. Mar. Comm’n Jan. 14, 2007) (on file with author); S. Atl. Chassis Pool Agreement, FMC Agreement No. 011980 (Fed. Mar. Comm’n Dec. 20, 2006) (on file with author); BBC Chartering & Logistic—Caytrans Project Servs. (Ams.) Joint Serv. Agreement, FMC Agreement No. 011970 (Fed. Mar. Comm’n Sept. 18, 2006) (on file with author); Consol. Chassis Mgmt. Pool Agreement, FMC Agreement No. 011962 (Fed. Mar. Comm’n June 30, 2006) (on file with author); The New World Alliance Agreement, FMC Agreement No. 011960 (Fed. Mar. Comm’n June 30, 2006) (on file with author).

placed.⁶⁷ By pooling these interchangeable components, marine terminals presumably achieved real efficiencies. The unexplored question is whether the pools engaged in exclusionary or exploitative practices beyond what was essential to sharing resources.

Thus, at least eighty percent of the agreements filed in the period from 2000 to 2009 involve prima facie joint ventures. This is not entirely surprising because the 1998 revisions in the underlying statute effectively discouraged conventional conference-type cartels.⁶⁸ At the same time, the substantial number of “discussion” agreements, which immunize discussion by shipping companies on prices for shipping as well as ancillary services and intermodal operations, suggests that the industry leaders still see gains from cartelistic coordination even if the coordination has to be on a voluntary basis with clearly articulated limits on the use of coercive practices. Moreover, large shippers can (and most do) enter into separate agreements with shipping lines regarding the prices the large shippers will pay for service. Thus, the tariff prices are, for the bulk of the business, the starting point for such negotiations. Given a moderately competitive market, volume buyers are likely to have substantial negotiating power as long as capacity is at or above the level of demand.⁶⁹ Indeed, the FMC has estimated that over eighty percent of general cargo is now shipped under individual contracts outside the conference rate system.⁷⁰

Several factors are troublesome from an efficiency- and workable competition-promoting perspective. First, the statutory scheme denies the FMC any capacity to review critically and reject or restrict agreements when they are filed. This invites shipping companies to seek to maximize their market exploitation and cartelization even if

⁶⁷ See, e.g., Consol. Chassis Mgmt. Pool Agreement, FMC Agreement No. 011962 (Fed. Mar. Comm’n June 30, 2006) (on file with author).

⁶⁸ See Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (1998) (codified as amended at 46 U.S.C. app. §§ 1701–1719 (2006)). For a fuller discussion of the reforms in the ocean shipping industry, see generally ABA MONOGRAPH, *supra* note 1, at 161–89.

⁶⁹ For a discussion of buyer power and its competitive effects, see Peter C. Carstensen, *Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 WM. & MARY BUS. L. REV. 1 (2010); Peter C. Carstensen, *Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination Among Suppliers*, 53 ANTITRUST BULL. 271 (2008). See generally ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY IN LAW AND ECONOMICS* (2010).

⁷⁰ FED. MAR. COMM’N, *THE IMPACT OF THE OCEAN SHIPPING REFORM ACT OF 1998*, at 2 (2001), available at http://www.fmc.gov/assets/1/Page/OSRA_Study.pdf; see also ABA MONOGRAPH, *supra* note 1, at 171.

much of the business has moved out from under the aegis of the conference system. Second, the discussion agreements and other coordinating devices can facilitate the voluntary avoidance of vigorous price and service competition. There are data that suggest that prices have not declined as much as the efficiency gains in the container business would have suggested if the markets were more competitive.⁷¹ Third, as fixed investments in both vessels and terminals have increased, the resulting barriers to entry make it easier for coordination to work as the risk of entry is much reduced. The changing nature of entry conditions probably explains in substantial part why, despite a downturn in demand for container service in 2009, prices did not decline radically and then increased in 2010 with the revival of demand. Interestingly, the major companies have not added capacity, which exists in mothballed container ships, in step with growing demand. As a result, by the middle of 2010, there was a serious problem of access to container capacity.⁷²

At the same time, it appears likely that some liner service involves markets with high levels of concentration because of the specific nature of the point-to-point service involved. Hence, any joint venture may well raise competitive concerns. Thus, if the risks of costly litigation loom large, they may be a substantial disincentive to engage in efficiency-enhancing joint ventures. In addition, some uniform standards are probably essential for intermodal service, in terms of both the physical characteristics and in the contractual arrangements. Discussion agreements aimed at proposing standards would, therefore, have potential merit.

2. *The STB*

Three types of transportation are eligible for the immunizations provided by the STB: rail, intercity bus, and truck services. The agency's record is mixed. It has shown great concern for enhancing competition in trucking and, to a somewhat lesser degree, for intercity bus service. On the other hand, the agency has approved, with immunity, a massive consolidation of railroads, and even more troubling, it has allowed the sale by major rail companies of short lines and low traffic lines on terms that severely restrict the access of shippers on those short lines to competing carriers.

⁷¹ ABA MONOGRAPH, *supra* note 1, at 182–83.

⁷² See Miller, *supra* note 13.

a. Rail Transactions

While the STB has approved a massive consolidation of railroads in the past, no major mergers have occurred in the past ten years. This is in part a consequence of the STB's revised merger policy, which it adopted in 2001, that imposed a much stronger competitive effect analysis.⁷³ Under that policy, none of the surviving major railroads are likely to be allowed to merge with any other such rail line. Since 2000, the STB has, however, approved five minor rail mergers and acquisitions.⁷⁴

Since 2000, the STB has not had occasion to review and approve the sale of a short line by a major railroad. It has, however, been obliged to consider its policy on paper barriers. Paper barriers are the barriers that a seller imposes on the buyer or lessee of a short line that restrict the operator's ability to deliver traffic to any other railroad with which the short line connects.

In 1998, the STB began a reconsideration of paper barriers, but it did not prove very successful.⁷⁵ In response to renewed demands by shippers that they have greater freedom to select the carriers that would transport their goods, the STB issued a major decision in 2007 that also adopted new regulations.⁷⁶

From a competitive policy perspective, the most striking aspect of the 2007 decision was the implicit admission that, up to that point, the STB had not bothered to ask about or review the merits of any of the paper barriers included in the sale or lease of rail lines. As a result, some barriers require that, if the buyer or lessee sends any traffic to any other line, that short line immediately reverts to its prior owner. Other agreements impose increased lease or post-sale payment requirements, and many imposed costs disproportionate to any

⁷³ Railroad Acquisition, Control, Merger, Consolidation Project, Trackage Rights, and Lease Procedures, 49 C.F.R. § 1180.1 (2010).

⁷⁴ Canadian Pac. Ry. Co., STB Fin. Docket No. 35081, 2008 WL 4415850 (Surface Transp. Bd. Sept. 30, 2008); Norfolk S. Corp., STB Fin. 34839, 2007 WL 482682 (Surface Transp. Bd. Feb. 15, 2007); Canadian Nat'l Ry. Co., STB Fin. Docket No. 34424, 2004 WL 761305 (Surface Transp. Bd. Apr. 9, 2004); CSX Corp., STB Fin. Docket No. 33388, 2001 WL 92978 (Surface Transp. Bd. Feb. 2, 2001); Canadian Nat'l Ry. Co., STB Fin. Docket No. 34000, 2001 WL 1021920 (Surface Transp. Bd. Sept. 7, 2001); CSX Corp., STB Fin. Docket No. 33388, 2001 WL 1586968 (Surface Transp. Bd. Dec. 13, 2001); Railamerica, Inc.—Control Exemption—Railtex, Inc., 4 S.T.B. 479 (2000).

⁷⁵ See Review of Rail Access and Competition Issues, 3 S.T.B. 92 (1998).

⁷⁶ Review of Rail Access and Competition Issues, STB Ex Parte No. 575 (Surface Transp. Bd. Oct. 29, 2007), available at <http://www.stb.dot.gov/decisions/readingroom.nsf/WebDecisionID/36758?OpenDocument>.

reasonable measure of value. Moreover, many of these restraints continue indefinitely!

The STB decided, however, not to undo or restrict existing agreements, even though many had been in place for fifteen or twenty years. It did belatedly decide to require that any future transaction reveal any such restraints.⁷⁷ In addition, the STB authorized expedited discovery of existing barriers by any shipper claiming adverse effects. But it did not require that all existing barriers be disclosed to the agency, nor did it adopt a view that some barriers (e.g., the use of forfeitures) would be inherently unreasonable. Instead, invoking the spirit of an old saying by Bill Cosby (“I brought you in this world, and I can take you out.”⁷⁸), the STB argued that, because the major line could have retained ownership and control, any restrictions on the use of the line by the buyer or lessee, however long or onerous, had no adverse effect on competition. This analysis ignored the fact that rail lines are affected with a duty to serve the public interest, and rights of ownership were always subject to administrative constraints.⁷⁹ Had the STB required disclosure of the paper barriers at the time of the transactions, it could have (and certainly should have) imposed limits on the duration and scope of such limits on the freedom of action of the buyer or lessee of the short line.⁸⁰

The STB’s refusal to adopt any general policies that would impose forward-looking constraints on the use of existing paper barriers is troublesome. Had it identified both time limits for such barriers (e.g., five or ten years following the initial sale or lease) and imposed some presumptions of invalidity on the most excessive barriers, it is likely

⁷⁷ See 49 C.F.R. § 1150.43(h) (2010).

⁷⁸ *Memorable Quotes for Bill Cosby: Himself*, IMDB, <http://www.imdb.com/title/tt0083652/quotes> (last visited Mar. 15, 2011).

⁷⁹ Public interest concerns also have not kept the STB from showing continued support for paper barriers. See, e.g., *Northern Plains Railroad, Inc.—Lease Exemption—Soo Line Railroad Company*, 75 Fed. Reg. 47,678 (Aug. 6, 2010) (proposing a twenty-year lease, which renewed a prior lease, to retain the prohibition on a lessee’s delivery of traffic to any of three other railroads it connects with and slating the notice of exemption for expedited review over the dissent of one commissioner).

⁸⁰ See ABA MONOGRAPH, *supra* note 1, at 207–08; see also Salvatore Massa, *A Tale of Two Monopolies: Why Removing Paper Barriers Is a Good Idea*, TRANSP. J., Winter/Spring 2001, at 47. For another strategy to deal with the problem of paper barriers, see Reply for Entergy Arkansas, Inc., Docket No. 42104, (July 21, 2010) (on file with author); Entergy Arkansas, Inc., STB Docket No. 42104 (Surface Transp. Bd. Sept. 8, 2009) (on file with author) (challenging the paper barrier that kept short line from interchanging traffic with railroads other than the Union Pacific Railroad).

that the short lines would have been better positioned to negotiate modifications or terminations of long-standing barriers. The case of paper barriers is, therefore, an example of how agency action and associated antitrust immunity results in excessive protection of incumbent market dominance to the detriment of shippers seeking the most efficient and least costly transportation. Transferring short lines or low volume lines to specialized operators can enhance efficiency, and there are plausible reasons why the seller might legitimately seek to retain some or all of the volume of traffic generated on that line for a reasonable transition period. The problem is that the STB did not critically review the justifications for continued imposition of anticompetitive restraints on the operators of these independent rail lines.

b. Trucks and Buses

With respect to trucks and buses, there has been a clear change in STB policy. In 2001, 2002, and again in 2003, the STB approved, with reservations, the continuation of cartelistic rate bureaus for both industries.⁸¹ In the case of trucks, regional rate bureaus set “baseline” rates for hundreds of different commodities in conjunction with a commodity classification system administered by these same parties. The participating trucking companies, however, were not required to adhere to those rates, and most freight moved at substantial discounts from the posted rates.⁸² In reviewing this system, the STB expressed concern that it resulted in a few shippers paying excessive prices while the larger volume shippers got the benefit of significant discounts. In addition, the use of an excessively high posted price created a deceptive sense of cost savings. The pricing system in turn depended on a commodity classification system carried out by a

⁸¹ EC–Mac Motor Carriers Serv. Ass’n, STB Section 5a Application No. 118, 2003 WL 1565201 (Surface Transp. Bd. Mar. 21, 2003); Application of the Nat’l Bus Traffic Ass’n, Section 5a Application No. 9, 2002 WL 1046010 (Surface Transp. Bd. May 13, 2002); Nat’l Classification Comm., Section 5a Application No. 61, 2001 WL 1470074 (Surface Transp. Bd. Nov. 20, 2001); EC–Mac Motor Carriers Serv. Ass’n, STB Section 5a Application No. 118, 2001 WL 1470067 (Surface Transp. Bd. Nov. 19, 2001); *see also*, *e.g.*, Holland Am. Line Inc., STB Docket No. MC-F-21033, 2009 WL 891298 (Surface Transp. Bd. Apr. 3, 2009); Holland Am. Line Inc., STB Docket No. MC-F-21033 TA, 2009 WL 730341 (Surface Transp. Bd. Mar. 20, 2009); Averitt Express, Inc., STB Docket No. MC-F-21023, 2008 WL 258338 (Surface Transp. Bd. Jan. 31, 2008) (pooling agreement); Motor Carrier Bureaus–Periodic Review Proceeding, STB Ex Parte No. 656, 2007 WL 3121804 (Surface Transp. Bd. Oct. 25, 2007).

⁸² EC–Mac Motor Carriers Serv. Ass’n, STB Section 5a Application No. 118, 2001 WL 1470067 (Surface Transp. Bd. Nov. 19, 2001).

second bureau that operated largely to increase the rating (and consequent price) of various commodities when such changes were sought by trucking firms. Initially, the STB sought to control the abuses of this system with an order requiring disclosure to all shippers of the existence of discounts along with some data on the range of such discounts.⁸³ In 2001, the STB also imposed limits on the classification system, intending to increase access by shippers to the classification process, and it implemented an arbitration system for those who disputed a change in classification.⁸⁴ However, in 2007, on the second review of the rate bureau system, the STB determined that it lacked any legitimate business justification.⁸⁵ As a result, the STB withdrew prospectively its approval of all the bureaus governing trucking.⁸⁶ This had the effect of eliminating the antitrust immunity that these organizations had enjoyed.

Despite eliminating any antitrust immunity, the STB recognized that the bureaus served some useful functions. These functions included producing mileage books to help trucking firms determine the length of hauls, the rules, and the through rates.⁸⁷ The STB asserted that, by seeking review from the DOJ, the bureaus could obtain a business review clearance for activities of the bureaus that did not violate antitrust law.⁸⁸ This assertion appears inconsistent, however, with the DOJ regulations governing such reviews, which require, *inter alia*, that the activity be a new one. This part of the STB decision highlights the fact that some types of collaboration can enhance efficiency while raising antitrust concerns. The question is whether the current system of review and clearance from the DOJ is a sufficient response.

One might have expected that, after the STB terminated all trucking bureaus, it would end all grants of antitrust immunity. But to

⁸³ *Id.*; EC–Mac Motor Carriers Serv. Ass’n, STB Section 5a Application No. 118, 2003 WL 22357743 (Surface Transp. Bd. Mar. 21, 2003) (reaffirming the 2001 decision).

⁸⁴ Nat’l Classification Comm., Section 5a Application No. 61,2001 WL 1470074 (Surface Transp. Bd. Nov. 20, 2001).

⁸⁵ Motor Carriers Bureaus–Periodic Review Proceeding, STB Ex Parte No. 656, 2007 WL 2946673 (Surface Transp. Bd. May 7, 2007).

⁸⁶ The initial decision gave the bureaus ninety days before they lost their immunity. *Id.* at 28. This was later extended until January 1, 2008. Motor Carriers Bureaus–Periodic Review Proceeding, Section 5a Application No. 46, 2007 WL 1852195 (Surface Transp. Bd. June 28, 2007). Interestingly, the bureaus did not appeal the decision to the courts, which suggests that its logic was truly compelling.

⁸⁷ Periodic Review Proceeding, *supra* note 85, at 25–27.

⁸⁸ *Id.*

the contrary, in 2008, the STB conferred antitrust immunity on a proposed joint venture among a group of seven regional trucking companies to create an entity that provided a national service for small shipments.⁸⁹ This required agreements regarding territory, customers, and prices. As a result, the entity would have been susceptible to antitrust challenges from disgruntled participants, customers, competitors, or excluded would-be participants. At the same time, this entity faces substantial competition from integrated national firms. Hence, this venture, while likely to produce an efficient new competitor, is unlikely to reap major profits, even as it contributes to enhanced competition in this aspect of the market. Without some assurance that the risks of litigation would be minimal, the parties might well not have proceeded with this plan.

Interestingly, the joint venture participants felt it necessary to go to the DOJ to get a business review clearance as well.⁹⁰ Thus, an organization with antitrust immunity believed its immunity was sufficiently limited that it wanted the comfort of an antitrust review. There is a lack of congruence in this review system. The STB immunity lasts five years and must be reviewed and reapproved before that time expires, but the DOJ clearance lasts indefinitely unless expressly revoked.

Somewhat earlier, the STB had approved the revision of operating authority for a group of household goods movers who were working through a national entity to provide moving services for the Department of Defense.⁹¹ Here again, the proposal was essentially a joint venture that needed approval to satisfy statutory requirements, but of course, it also acquired antitrust immunity. Thus, the most recent grants of immunity in trucking have involved legitimate joint ventures that would seem to raise only limited antitrust concerns, even though the risk levels might have deterred the parties from creating the venture absent some protection from antitrust litigation.

Finally, the STB's bus regulation involves two statutory schemes. First, the STB approved a rate bureau that set up standards for

⁸⁹ *Averitt Express, Inc.*, STB Docket No. MC-F-21023, 2008 WL 258338 (Surface Transp. Bd. Jan. 31, 2008).

⁹⁰ Letter from Molly S. Boast, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to James R. Weiss (Sept. 8, 2009), *available at* <http://www.justice.gov/atr/public/busreview/249806.htm>. Notably, it took nearly nine months after the STB had approved for the DOJ to make its decision.

⁹¹ *Atlas Van Lines, Inc.*, STB Docket No. MC-F-21010, 2005 WL 420418 (Surface Transp. Bd. Feb. 23, 2005).

interline transfers, basic prices, and terms for luggage and package shipments. Second, under the intercity bus merger provision,⁹² the STB approves mergers and pooling agreements involving interstate business service.

The STB treated the bus rate bureau in the same way as the trucking bureaus. The STB initially allowed the bureau to continue.⁹³ The STB noted that the bureau had set standards and provided tariffs for only ancillary services but had not set prices for passenger service. Moreover, as had occurred in the trucking context, no bus company was required to follow these guidelines. However, when the bus bureau returned to renew its immunity, the STB decided that the bureau no longer needed antitrust immunity.⁹⁴ There were many other sources from which intercity bus companies could draw the necessary information to create tariffs and develop other components for their business. The opinion also stressed that interline transfers would remain useful, but it required the actual parties to work out their specific agreement.⁹⁵

Most of the mergers and pooling decisions appear to involve relatively minor combinations that would probably not have any competitive implications. The gain to the parties is that, once the STB has approved the merger, neither local nor national antitrust law will apply. A few mergers involved the two or three national groups that are emerging as the dominant firms in this segment of the industry. With respect to those acquisitions, there is nothing in the STB decisions that suggests any focus on the potential competitive issues that may arise, particularly if one were to assume that intercity bus service is a distinct product line. Indeed, some of the assertions

⁹² 49 U.S.C. § 14303 (2006).

⁹³ Application of the National Bus Traffic Association, Inc., Section 5a Application No. 9, 2002 WL 1046010 (Surface Transp. Bd. May 13, 2002).

⁹⁴ Periodic Review Proceeding, *supra* note 85, at 17–18.

⁹⁵ Intercity bus services are increasing with the emergence of a new generation of bus companies serving major cities with express bus connections. There appear to be two major companies providing such service, largely in the eastern part of the country. But, in addition, there are a number of smaller firms. Because these bus lines use “curb” pick-up of passengers (i.e., they do not invest in expensive terminal facilities) and employ the internet for ticket sales, this market has emerged as one of unregulated, competitive growth. See Susan Stellin, *The Humble Bus Takes Off*, N.Y. TIMES, July 25, 2010, at TR3; Joseph P. Schwieterman et al., *The Return of the Intercity Bus: The Decline and Recovery of Scheduled Service to American Cities, 1960–2007*, (Dec. 24, 2007) (unpublished manuscript), available at <http://las.depaul.edu/chaddick/docs/Docs/IntercityBusStudy.pdf>.

in the opinions about low barriers to entry and substitute competition appear somewhat naive.⁹⁶

There were relatively few pooling decisions. Such cases involve formal arrangements between two bus companies to combine service over a route and to coordinate their schedules. In one case from New Jersey, an existing bus company had failed, and another company had proposed to take its place and operate in concert with the state-owned bus company serving the same route.⁹⁷ This is a classic joint venture situation in which the loss of competition is arguably offset by better coordination among the venturers to serve the specific route. The STB analysis focused on whether the resulting unified service would have significant market power. Given the existence of other carriers—both commuter rail and bus—the STB concluded that there was little reason for concern.

In sum, the STB's position on protecting anticompetitive, cartelistic agreements changed in the course of the decade. The result has been a much greater freeing up of the truck and bus industries to facilitate competition. In the context of railroads, the STB has been unwilling to revisit its blanket acceptance of paper barriers (some of which are more than twenty years old), and that unwillingness reduces the potential for realizing the benefits of competition in rail freight service.

3. *The Department of Transportation*

There are no reported decisions concerning the use of the airport congestion agreement statute. The DOT appears to have addressed coordination of landing rights by other means.⁹⁸ It has, however, granted a large number of petitions for antitrust immunity with respect to international “code sharing” and “alliances.” Code sharing appears to be the process of creating a through ticket arrangement so that travelers can continue on a single ticket from their departure to their final destination. Alliances appear to be more general

⁹⁶ See, e.g., Peter Pan Bus Lines Trust, STB Docket No. MC-F-20995, 2002 WL 31876189 (Surface Transp. Bd. Dec. 27, 2002).

⁹⁷ New Jersey Transit Bus Operations, Inc., STB Docket No. MC-F-20994, 2003 WL 721657 (Surface Transp. Bd. Mar. 3, 2003).

⁹⁸ The DOT has the authority to impose limits on landing rights (slots) and has used this authority to control congestion at airports where such limits are required. See, e.g., 49 U.S.C. § 41714 (2006) (authorizing the secretary to reassign landing slots at congested airports to new entrants); 14 C.F.R. §§ 93.25–.32 (2010) (regulating the allocation of landing slots at Chicago O'Hare International Airport, a congested airport).

agreements among two or more airlines to coordinate services and flight schedules, including pooling of profits in some cases. Both kinds of transactions are *prima facie* joint ventures. An alliance involves more complete integration of the participants, while code sharing involves a much lower level of coordination. Both kinds of ventures regularly receive the blessings of antitrust law, provided that the parties do not have excessive market power and that they have avoided unnecessary restraints on competition.

The DOT records report fifty-seven code-sharing applications.⁹⁹ Of this fifty-seven, one matter involved all code-sharing international arrangements and established basic rules related to the responsibility of participants for luggage.¹⁰⁰ Of the fifty-six actual code-sharing proposals, the DOT approved fifty-one, with three applications pending at the time we collected data.

One application was withdrawn.¹⁰¹ This application sought approval for code sharing between United Airlines and Lufthansa for service to Bahrain and Kathmandu, based on United Airlines flights to Germany that connect with Lufthansa service to the final destinations. This particular code-sharing proposal, which was withdrawn for undisclosed reasons, illustrates the potential reasons for seeking approval and protection from antitrust law. The service may well be one of a limited number of services available to travelers. Hence, in a narrowly defined, point-to-point market, there may be a high market share. This in turn may cause a disgruntled traveler, travel agent, or competitor to bring an antitrust action. Even if the resulting code sharing were to result in significant cost savings on particular trips, it would be unlikely to generate very much overall revenue for the airlines. Hence, the transaction cost risks that are inherent in such a venture may be sufficient to deter the parties when those risks are unprotected from antitrust exposure. In fact, for whatever reasons, the parties did not pursue this code-sharing arrangement, and they ultimately withdrew the application.

⁹⁹ See, e.g., Joint Application of Gojet Airlines, LLC, Docket DOT-OST-2009-0131 (Dep't of Transp. May 27, 2009) (on file with author); Application of Eurowings Luftverkehrs AG, Docket DOT-OST-2009-0106 (Dep't of Transp. May 5, 2009) (on file with author); see also, e.g., Master List DOT-Airline-Code Shares (on file with author).

¹⁰⁰ Application of Eurowings Luftverkehrs AG, Docket DOT-OST-2009-0106 (Dep't of Transp. May 5, 2009) (on file with author).

¹⁰¹ Joint Application of United Air Lines, Inc. and Deutsche Lufthansa, A.G., Docket OST 96-1717-1 (Dep't of Transp. Sept. 18, 1996) (on file with author); Applications/Motions of Am. Airlines, Inc., Order 98-8-27 (Dep't of Transp. Aug. 21, 1998) (on file with author) (order dismissing applications).

Only one application was denied.¹⁰² The denial involved a proposal for international airmail service on a code-sharing basis that involved an American commuter airline and a foreign airline. Major American airlines objected, and the DOT held that the applicant did not qualify for the code sharing because it did not, in fact, operate any large planes. The fact that, out of fifty-seven proposals, the DOT turned down only one raises obvious questions about whether it is exercising appropriate oversight over these ventures. Certainly the brief approval statements do not provide much evidence of careful review of the market contexts.

With respect to alliances, the DOT received twenty-three applications (several were for the same basic group, either at different times or with somewhat different participation).¹⁰³ It approved, sometimes with limitations, seventeen of these applications despite opposition from the Antitrust Division in some cases. Two applications were expressly withdrawn. In one case, the withdrawal came after the filing of critical comments that asserted that adverse, competitive effects were likely to result.¹⁰⁴ In the other case, the DOT, in fact, rendered a preliminary decision rejecting the application on competitive grounds, but the parties then withdrew the alliance application.¹⁰⁵ However, it also appears that the parties had received further approval for code sharing. One proposal was

¹⁰² Application of TIE Aviation, Inc., Order 2000-9-20, 2000 WL 1505123 (Dep't of Transp. Sept. 20, 2000) (preliminary order); Application of TIE Aviation, Inc., Order 2000-11-13, 2000 WL 34227552 (Dep't of Transp. Nov. 17, 2000) (final order).

¹⁰³ See, e.g., Joint Application of Air Canada, Order 2009-4-5 (Dep't of Transp. Apr. 7, 2009) (on file with author) (show cause order); Joint Application of Am. Airlines, Inc., Order 2008-6-18, 2008 WL 5550452 (Dep't of Transp. June 16, 2008) (order granting motion to dismiss); see also Master List: DOT-Airlines-Alliances (on file with author).

¹⁰⁴ See Joint Application of Am. Airlines, Inc., OST-00-7088-27 (Dep't of Transp. May 30, 2001) (on file with author) (providing negative comments by opposing parties); Joint Motion of Am. Airlines, Inc., OST-2000-7088-28 (Dep't of Transp. Mar. 2, 2002) (on file with author) (withdrawing the application for alliance involving air travel between the United States and Central America).

¹⁰⁵ Joint Application of Alitalia-Linee Aeree Italiane-S.p.A., Order 2005-12-12, at 3 (Dep't of Transp. Dec. 22, 2005) (on file with author) (order to show cause) ("Joint Applicants have not persuaded us that, absent the requested immunity, they would be unable to provide many of the benefits cited in their pleadings. As the DOJ points out, the Joint Applicants have already engaged in a substantial amount of integration of their services to date, and are likely to integrate further without immunity, even though they may not coordinate their services and fares as much as they would with antitrust immunity."); Joint Application of Alitalia-Linee Aeree Italiane-S.p.A., Order 2006-2-1 (Dep't of Transp. Feb. 6, 2006) (on file with author) (final order) (proposing a combination of two competing alliances; the DOJ filed negative comments and the application was withdrawn).

formally pending. In addition, three other applications were inactive so far as appears from the record. However, the American Airlines-British Airways alliance¹⁰⁶ was subsequently approved in 2010 after the data set discussed here was completed.¹⁰⁷

The recent approval of the American Airlines-British Airways alliance provides an illustration of the tensions between competition policy and protective agency action. The DOJ had criticized the proposal as creating undue market power in a number of city pairs. Several competing airlines emphasized the same point. The DOJ was not, however, opposed to the venture itself. The DOJ simply wanted the DOT to impose more restrictions on the venture than the DOT had imposed. The decision authorizing and immunizing the alliance was in step with a comparable decision by the European Union's competition commission.¹⁰⁸ Basically, the partners were required to relinquish several landing slots at Heathrow Airport, a highly congested British Airways hub. The real issues were twofold: (1) how many slots with what designations (i.e., specific city pairs or generally useable slots for flights from the United States to the United Kingdom) and (2) the nature of the divestiture (i.e., must the slots be permanently transferred, or could British Airways lease them for a period of years?). On both issues, the DOJ wanted more slots and more durable rights than the DOT required. Ultimately, the decision in this matter was resolved at the White House with the President giving the parties the benefit of the more generous (i.e., competitively risky) authority. This case illustrates how the present system in air agreements weighs in favor of the interests of the parties and against a concern for preserving competition.

¹⁰⁶ Joint Application of Am. Airlines, Inc., OST-2001-10387-1 (Dep't of Transp. Aug. 10, 2001) (on file with author); Joint Application of Am. Airlines, Inc., OST-2001-10387-162 (Dep't of Transp. Nov. 25, 2001) (on file with author) (answer).

¹⁰⁷ See Joint Application of Am. Airlines, Inc., Order 2010-2-8 (Dep't of Transp. Feb. 13, 2010) (show cause order), *available* at <http://www.mainjustice.com/files/2010/02/DOT-BA-AA-Approval.pdf>.

¹⁰⁸ Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/39.596 – British Airways/American Airlines/Iberia, 2010 O.J. (C 58), 7 (EC), *available* at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:058:FULL:EN:PDF>.

B. Summary of the Results

1. Support for the First Hypothesis: Cartel Activity

This examination of several hundred decisions by the three transportation agencies reveals little explicit cartel activity. Moreover, the number of explicit cartel proposals declined over the period reviewed. The STB and FMC faced the largest number of explicit cartel requests. These requests reflected long-standing industry practice from the era of direct rate, route, and service regulation. The generally negative response of the STB is telling. After initially looking for potential middle ground and deferring to Congress for several years, the STB has affirmatively eliminated antitrust immunity for the vestigial rate bureau cartels in both trucking and intercity bus service. Basically, the STB rejected the long-run need for cartelistic policies for those industries. Such policies are contrary to congressional policy.

The FMC cases include explicit cartel arrangements that do not appear to serve any plausible public interest. To be sure, those cartels were open to all comers and did not preclude participants from cutting prices if they operated outside the cartel or used individual shipper contracts. The European Union's rejection of antitrust immunity for similar price-fixing conferences of ocean carriers supports the conclusion that these agreements do not serve any legitimate public interest. But unlike the STB, the FMC has yet to take an official position that old-style shipping conference agreements are no longer in the public interest. But even if it did, without legislative change, there is little the FMC can do. The statute requires the FMC to accept all filings in proper form, and the FMC can challenge only after the fact, with a significantly difficult burden of proof.

The continued statutory acceptance of conference agreements on prices in combination with the apparently open-ended information sharing agreements probably have the effect of retarding competition in ocean freight service. In particular, the conferences may facilitate broader understandings about prices and may have a more directly adverse impact on small shippers that are obliged to accept the posted prices and terms imposed by the conferences, rather than negotiating better terms. These considerations were central to the decision of the STB to terminate all antitrust immunity for rate bureaus. The empirical question of whether these effects actually occur merits more detailed examination than it has received. Certainly, the investigation of the industry-wide run-up of rates in the face of declining

demand¹⁰⁹ raises the question of whether the conference system is being used to facilitate or implement a global shipping cartel that would be outside the scope of authorized and immunized activity for any conference.

It is also apparent that there are multiple and overlapping joint venture agreements being filed with the FMC for ocean shipping and approved by the DOT for international air service. Without a complex grid to show exactly how the various major entities are interrelated, no clear conclusion can be drawn as to whether the web of agreements may serve as a means for coordinating competition and retarding the incentives to compete. In theory, at least, all three agencies should be attentive to these risks. Certainly, some of the STB and DOT decisions reflect explicit concerns for concentration and the risk of coordination among alternative service providers. There is no comparable record of concerns at the FMC, although a commissioner in 2009 asserted that the FMC did focus on the competitive implications of various proposed transactions.¹¹⁰

2. *Support for the Second Hypothesis—First Alternative: Legitimate Joint Ventures*

In ocean shipping and air service, the dominant type of agreement is a joint venture of some kind that involves two or more firms collaborating together to provide a joint service. The resulting agreement imposes restraints on the parties that could include market allocation, price setting, and express or implicit refusals to deal with competitors of the participants. As such, these agreements contain a variety of horizontal restraints on competition. But those restraints are prima facie ancillary to the collective enterprise. Indeed, as discussed in the context of the DOT and STB opinions, these agencies give some attention to the scope and justification of the resulting restraints in an effort to ensure that they are reasonably consistent with and no more restrictive than necessary to accomplish the primary legitimate goal of facilitating the underlying transaction.¹¹¹

¹⁰⁹ See Miller, *supra* note 13.

¹¹⁰ Rebecca Dye, Fed. Mar. Comm'r, Address at the Global Liner Shipping Conference (Apr. 2, 2009), available at <http://www.fmc.gov/news/default.aspx?CategoryId=3&Archive=y&ArticleId=996>.

¹¹¹ The FMC's actions, which consist of stamping applications with the date of acceptance, have no comparable competitive effect analysis, but a commissioner has asserted that the agency does consider that issue. *Id.* Moreover, in March 2010, the FMC initiated a proceeding to review the upward surge in ocean shipping prices. See Vessel

The current bulk of the STB immunity decisions involve mergers in the bus and rail markets.¹¹² In those contexts, the STB policies include a concern for competitive effects of the mergers. Nothing in these recent decisions suggests that the results would be different if the DOJ had reviewed the proposed combinations, which is unlike the situation prior to 2000 when the DOJ vigorously but unsuccessfully opposed the merger of major western railroads. Again, as noted, in the case of intercity bus mergers, there is a pattern of dominant firm acquisitions. The overall potential for an anticompetitive impact is not evident, and in any event, it would require a theory of why this form of travel is a unique market with significant barriers to entry. For present purposes, however, what is central is that, in both the bus and rail contexts, the STB is reviewing mergers that facially involve standard aspects of industry consolidation to achieve efficiency through increased scope and range of service. Thus, there seems no particular reason to insulate these transactions from standard antitrust review.

Two factors may weigh in favor of some constraints on a standard antitrust merger review. First, in some cases, the combination arguably may serve a public interest that outweighs the anticompetitive effects. Such an argument would be more credible if the STB had authority to review and control prices and service. Still, as in the case of bank mergers in which serving the “convenience and needs of the community” can trump an anticipated substantial anticompetitive effect, such cases may be hypothetically possible.¹¹³ The banking cases teach, however, that the first test for any such claim is whether the merger is a necessary step in achieving the public interest goal.¹¹⁴ If there is some way other than an anticompetitive merger to serve that identified goal, then there is no basis for the defense. In reviewing the STB’s rail and bus merger decisions, there is no clear evidence of any public interest served by the merger. In any event, the point is moot as to these mergers because none of them seem to raise any significant competitive concerns.

Capacity and Equipment Availability in the United States Export and Import Liner Trade, Fact Finding Investigation No. 26 (Fed. Mar. Comm’n Mar. 17, 2010) (order of investigation), *available at* <http://www.fmc.gov/userfiles/pages/file/FactfindingOrder26.pdf>.

¹¹² Once again demonstrating the inconsistency of the current regulatory system, the STB has no jurisdiction over mergers among trucking companies despite its authority to authorize their participation in cartels.

¹¹³ 12 U.S.C. § 1828(c)(5)(B) (2006).

¹¹⁴ *See* United States v. Third Nat’l Bank in Nashville, 390 U.S. 171 (1968).

In addition, there is a substantial procedural advantage to the present system from the perspective of the parties. The parties face only a single decision maker with respect to the merger. The statutory scheme gives exclusive authority to the STB and thus precludes both state intervention and direct challenges by national antitrust law enforcers. In contrast, mergers in electricity and natural gas must run the gauntlet of the Federal Energy Regulatory Commission (FERC), the Federal Trade Commission (FTC), or the DOJ, depending on the industry, as well as each state regulatory agency.¹¹⁵ Thus, STB approval creates a legal barrier to any simultaneous or subsequent challenge to the combination. Again, the contrast with the bank merger process is interesting. There, prior agency approval is necessary, but the DOJ then has thirty days to challenge the merger.¹¹⁶ If there is no challenge in that period, then there is repose, and the merger cannot be challenged in the future except on monopoly grounds.

The STB has also used its authority to give immunity to joint ventures in the trucking and intercity bus industries. Notably, in one of the trucking cases, this immunity did not fully protect the venture from antitrust liability in the eyes of its organizers because the organizers also sought business review clearance from the DOJ. This illustrates the problem with the present system of immunity; the system may not provide sufficient insulation for legitimate transactions that the agency favors.

The overall picture of approvals and filings suggests, however, that many of these ventures may include unnecessary, excessive restraints or may result in unnecessary concentration of control over transportation services in specific markets. Perhaps the most conspicuous failure is the STB's failure to undertake any effort to control the use of paper barriers, which defeats the most fundamental goals of rail deregulation. This is all the more striking given the same agency's recognition of the competitive harms resulting from rate bureaus. The airline cases also reflect a "pro-industry" bias, evidenced by the consistent pattern of approvals with only minimal constraints. Thus, a core problem with the transformed transportation industries is that the goal of workable competition is being frustrated,

¹¹⁵ See Richard Pierce, *Mergers in the Electric Power Industry*, in *COMPETITION POLICY AND MERGER ANALYSIS IN DEREGULATED AND NEWLY COMPETITIVE INDUSTRIES* (Peter C. Carstensen & Susan Beth Farmer eds., 2008).

¹¹⁶ 12 U.S.C. § 1828(c)(6). See generally ABA SECTION OF ANTITRUST LAW, *BANK MERGERS AND ACQUISITIONS HANDBOOK* (2007).

in part at least, by agency laxness in accepting too many pervasive joint enterprises.

3. Support for the Second Hypothesis—Second Alternative: Standard Setting

All three agencies have accepted or approved and conferred antitrust immunity on certain agreements that have the goal of regulating competition only by imposing standards of various kinds on the services that transportation companies provide. Based on the decisions reviewed to prepare this Article, this is clearer in the cases of the DOT and the FMC than in the case of the STB, which expressly changed its position on the need for such immunity in the truck and intercity bus industries. However, the STB has recognized that it can order the use of standard forms, for example. Such standards would be a substitute for the industry self-regulation that is provided by the rate bureaus. Indeed, the bureau regulations were subject to direct review by the Interstate Commerce Commission (ICC) and then the STB applying (nominally at least) a public interest standard. Standard-setting situations are ones with which antitrust law has traditionally been least comfortable, as such agreements are hard to differentiate from naked restraints on competition of a purely cartelistic character. Indeed, many cartels included standards as an important component of their restraints.¹¹⁷ However, the SSODA¹¹⁸ gives a template for an acceptable standard-setting organization and provides some protections against treble-damage liability for the organization, and by implication, it requires any challenge to satisfy some kind of a rule of reason. The existence of a route through antitrust law for standard setting and the potential for agency-mandated standards combine to eliminate the need for antitrust immunity.

4. Some Tentative Conclusions

The great bulk of agreements and combinations that benefit from antitrust immunity have no absolute need for such an entitlement. Despite the concerns about the specifics of a few ventures, a majority

¹¹⁷ *Fashion Originators' Guild of Am., Inc. v. Fed. Trade Comm'n*, 312 U.S. 457 (1941) (prohibiting restraints on dress marketing standards); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (prohibiting restraints on bathroom fixture standards).

¹¹⁸ See Pub. L. No. 108-237, 118 Stat. 661 (codified as amended at 15 U.S.C. § 4301–4305 (2006)).

of the joint venture agreements seem to present little risk of any antitrust liability. The relatively few standard-setting agreements are somewhat more problematic because they reflect a collective agreement among competitors that restricts the ways they compete. Because these agreements are subject to agency review and approval, the agreements could easily be transformed into formal agency orders based on an administrative proceeding in which all interested parties could participate as the STB has suggested. Thus, even if such agreements were characterized as unlawful under antitrust law, they can easily be converted into a formal regulatory requirement. With few exceptions, the current body of exempted agreements is not consistent with a clear cartel motivation.

Two more troubling observations point toward the need for reform. First, especially in ocean shipping, some explicit cartel agreements remain. There seems, however, to be little justification for such agreements. Indeed, as the STB has stated in connection with the trucking agreements, such agreements are now contrary to declared public policy. Second, the present systems for land and air transportation immunities fail to provide a sufficiently rigorous check on the potentially adverse competitive effects that can and do flow from unnecessarily restrictive or unduly inclusive ventures. Worse, the FMC lacks any authority even to review the merits of submitted agreements that result in immunity. Overall, then, the present system has a strong tendency to undermine competition. The results are diminished efficiency and a loss of dynamic innovation. Moreover, given the changes in the underlying market contexts that result from both technological and legal changes, there is no continuing policy reason for the current system of an agency's unilateral grant of immunity.

This is not to argue that the agencies serve no function. First, the agencies provide a forum for establishing rules and regulations to govern aspects of these markets that are beyond the capacity of antitrust law and courts' enforcing that law. Second, the agencies establish important reporting requirements to obtain information necessary in evaluating the services being offered by transportation providers. Third, the agencies provide continuing oversight, monitoring, and investigative capacity beyond the authorization or institutional capacity of the DOJ. Thus, the question is not whether the agencies should be removed from the process but whether agency approval *alone* should warrant immunity from antitrust law.

IV

CURRENT EXEMPTIONS DO NOT PROVIDE GOOD COVERAGE FOR
IMPORTANT AGREEMENTS

The current exemption process is one-sided—either the agency alone has sole decision-making power, or in the case of ocean shipping, the parties have the power. Yet the vast majority of agreements are traditionally of the sort that antitrust law reviews and evaluates. Hence, there are particular dangers of overreaching and weak analysis that arise from the de facto delegation of antitrust-type analysis to agencies or parties that do not possess significant expertise in the area. The Antitrust Division of the DOJ has participated in some of the agency proceedings. Most notably, the Antitrust Division has challenged some airline alliance agreements as well as some railroad mergers in the period prior to the agency decisions analyzed above.

The current situation results in several kinds of mismatches. First, the current DOJ business review process is for only new proposals, and a clearance lasts for the indefinite future. Second, various agencies' approvals involve different time lines. The STB can give five-year immunity periods but must review any immunized agreement after this period to reauthorize it. The DOT follows the same pattern for its approval of code sharing and alliances. While there is no time limit on FMC agreements, the agreements are subject to challenge if the agency has the resources and evidence to do that. Third, the immunity may not align with the full scope of the venture that requires review and approval. (The trucking joint venture illustrates this.) On the other hand, the STB has refused to provide any review of the merits of continuing bureau activities, and instead, it has remanded them to the DOJ review process. The problem with remanding is that the DOJ clearance will be permanent and will not involve a periodic reconsideration of the merits of the conduct or the effect on the market.

Substantively, the regulatory agencies bring greater expertise on the needs and interests of the industries that they oversee, but they do not bring the same level of expertise on the analysis of competitive issues. The DOJ and the FTC, on the other hand, have greater expertise in analyzing competition issues, but these agencies may lack a detailed understanding of the industry as well as the ongoing ability to monitor the results of the conduct.

If a non-expert agency or private party submission can grant immunity from antitrust, this creates a significant risk of opportunistic conduct by the parties to the agreement. The parties have no incentive to look for the least restrictive means to accomplish their legitimate goals. One illustration was the now defunct rate bureau system for trucking and intercity bus service. Both systems set high benchmark prices that failed to perform the potentially useful function of providing customers with relevant price and service information. Instead, the system produced a set of high “rack” prices that allowed the participants to exploit those customers who lacked the capacity to bargain effectively. The unsuccessful efforts of the STB to find ways to induce better conduct by the rate bureaus to fulfill the legitimate informational functions of the tariff system illustrate the nature of the problem. At the same time, it seems likely that, in some standard-setting, joint operating, alliance, or pooling arrangements, there will be a need for critical and well-informed competitive effects analysis to ensure that the agreement is no more restrictive than necessary.

The implication of the analysis of the actual submissions and the institutional context demonstrates that some other, better system should exist to provide whatever insulation from the transactional, venture-related risks may be desirable for collaboration efforts within the transportation industry.

V

THE PATH TO A ROBUST BUSINESS CLEARANCE SYSTEM

A. Sources for Suggestions

Although the current antitrust business review process provides a permanent clearance, there are examples of exemptions with limited duration that require periodical review and re-approval. The STB can give only a five-year immunity to trucking agreements. Similarly, the secretary of transportation provides only five-year exemptions, after which the parties must return for a renewal. Periodic review allows reconsideration of the need for particular restraints and allows third parties to have an opportunity to comment on and even challenge the continuation of the restraints in any agreement.

One of the most interesting examples of an immunity statute is in the Small Business Administration Act, which provides that joint ventures for research and development can have an antitrust exemption, provided that the Attorney General and the administrator

of the SBA both approve.¹¹⁹ The exemption is terminable if the Attorney General withdraws consent, but the conduct of the venture up to that point remains immune from antitrust liability.

Another equally important example is the Export Trading Company Act of 1982.¹²⁰ Under this legislation, joint ventures involving American businesses can get an exemption from antitrust law if the businesses convince the Department of Commerce and the DOJ that their plan would not violate antitrust law!¹²¹ As in the case of transportation industries, joint ventures with modest profit expectations in the best of circumstances may well rationally want to have the assurance that they will not have to bear the post-transaction costs associated with (successfully) defending an antitrust case.

B. The Proposal

First, all current antitrust exemptions for the transportation industries would be repealed. Second, transportation entities engaged in joint ventures or other legitimate transactions (e.g., standard-setting agreements that are lawful under SSODA) should continue to file notices of their proposed ventures, which would be subject to review and approval by the appropriate agency based on public interest criteria. In the case of the FMC, this would result in an important expansion of its authority, which would likely deter some overreaching agreements.

Third, parties concerned about potential antitrust liability could request a “Robust Business Review Clearance” from the relevant regulatory agency and the DOJ. The process would start with review by the relevant regulatory agency and its recommendation on the merits of the proposal (i.e., whether it was a legitimate venture and whether it would serve the public interest in transportation services). After that, in consultation with the agency, the DOJ would review the likely competitive merits of the proposal and potentially seek

¹¹⁹ 15 U.S.C. § 638(d) (2006). For a brief description, see ABA MONOGRAPH, *supra* note 1, at 46.

¹²⁰ 15 U.S.C. §§ 4001–4020.

¹²¹ A certificate will be granted only if, inter alia, the agreement will not result in “a substantial lessening of competition or restraint of trade,” *id.* § 4013(a), which results in antitrust immunity, *id.* § 4016(a) (“[No] criminal or civil action may be brought under the antitrust laws against a person to whom a certificate of review is issued . . .”).

modifications.¹²² If, after that review, the venture or proposal were found not to create serious competitive risks, the DOJ would issue a revocable robust clearance for a period of five years. During the period of the clearance, the parties would be immune from antitrust claims arising from conduct authorized by the clearance. Moreover, the clearance would be renewable on application using the same two-agency review process. The DOJ could revoke its clearance for cause at any time, but conduct occurring only after such revocation could be the subject of a private or public antitrust claim. Thus, those who object to a proposal could challenge it at its inception or could make a challenge at the DOJ after approval to get the venture stripped of its antitrust immunity. This would allow forward-looking relief of an injunctive sort but would protect the participants from liability for any damages occurring during the period of such a robust clearance.

The clearance would, therefore, provide a shield from antitrust claims during the period of the clearance.¹²³ No court could impose antitrust liability either for damages or injunctive relief based on conduct occurring during that period.¹²⁴ The primary forum in which a public record could be made would be at the agency that reviews the request and provides its recommendations to the DOJ. Thus, all stakeholders would have notice of the proposal. This is something that does not exist in the current clearance process, but the DOJ itself would not have to create its own notice and comment system.

In general, if the relevant agency recommends against clearance, that should end the process of seeking immunity. An agency could approve the venture but decide against a clearance if the competitive issues were problematic and the gains were minimal. Then the parties would have to decide whether the potential gains justified whatever litigation risks exist. If the agency recommends clearance, then the DOJ should review the proposal to determine whether it raises sufficient competitive concerns to deny a clearance. A central reason for DOJ oversight, review, and approval is the concern that the agency may not scrutinize the proposed restraints as strictly as would

¹²² This process is close to what the DOJ currently employs for dealing with clearance requests involving activities that also require agency approval. *See* DOJ Antitrust Division Business Review Procedure, 28 C.F.R. § 50.6(10) (2010).

¹²³ This means that, during the period of the clearance, the only remedy for a disaffected entity would be to provide evidence to the DOJ in order to convince it to revoke the clearance.

¹²⁴ Proof of an ongoing collusion to engage in unlawful conduct may rely in part on conduct during the clearance period, but it would be relevant only to support a claim for post-clearance liability.

the DOJ, which is focused on competition law and policy. This system would avoid too much overlap. Only those proposals that the agency approves and recommends for clearance—something that the parties themselves would have to request—would be subject to further review. Because the request for a clearance would be part of the initial filing, the DOJ review could proceed simultaneously with the agency review.

There remains the question of judicial review of the resulting clearance. While great deference ought to be paid to a decision that combines the expertise of two appropriate agencies, risks of either undue restrictiveness or excessive toleration of restrictive conduct remain. One plausible response is to insist that only the requesters of the clearance and parties who participated in the agency proceeding have standing to challenge a decision. The standard of review should be specified as a substantial abuse of discretion.

In sum, the concept is that temporary antitrust immunity would go with these robust clearances, but the clearance itself would be subject to regular review and reconsideration. Moreover, the conduct being authorized would have to be consistent with the substantive commands of antitrust law. Cartelistic conduct, except in the form of standard setting, would be inherently unacceptable. Thus, this process would simultaneously prohibit certain continuing kinds of conduct in the transportation industries and provide a stronger protection against litigation for lawful agreements.

The other component of this proposed immunity system is merger review. Here, a modest change would be to give the DOJ thirty days following approval to commence a lawsuit challenging the merger.¹²⁵ The thirty-day period could be framed as a statute of limitations, so that, after its expiration, the merger could not itself be challenged, but a structural challenge based on monopolization may remain available. As with the Bank Merger Act, on which this model is predicated, the agency finding of a public interest justification for an anticompetitive merger would provide an affirmative defense for an otherwise unlawful merger. But, again using the banking model, the defense would be viable only if the public interest gains are real and tangible, as well as achievable only by a merger having anticompetitive effect. This would result in a shared assessment of the competitive effects of

¹²⁵ This suggestion is based on the bank merger statute. *See* 12 U.S.C. § 1828(c)(6) (2006). Standing could be limited to the DOJ if there remains a valid concern that other potential litigants may behave too strategically and without regard to the competitive merits of the transaction.

the merger because anticompetitive effects are also relevant to the public interest standard. But it would provide an independent forum for assessing the competitive merits of the merger and balancing those effects against the non-efficient public service justifications believed to excuse the competitive harms.

VI

THE ARGUMENT AGAINST SPECIAL TREATMENT FOR TRANSPORTATION INDUSTRIES

Two objections to this proposal merit some attention before discussing in somewhat greater detail some of its specific features. The first issue is whether such a special antitrust treatment is necessary for transportation. The second issue is, if the arguments for a stronger form of clearance are persuasive in this context, why they should not apply generally.

A. Is a Robust Clearance System Necessary?

The analysis of the actual agreements approved by the various transportation agencies provides some evidence that there is merit in having agency review of the substance of the agreement even if it does not confer antitrust immunity. At the same time, the number and complexity of multiparty agreements among competitors in transportation suggests that the perceptions of litigation risks may be greater than in many other industries.¹²⁶ As a result, without some way of gaining stronger assurance that the conduct will be protected, some parties may not participate in joint ventures that improve the efficiency and coordination of shipments, flights, or services. Because there are potentially useful gains from integration in both physical and transactional aspects, the transportation industries offer a context in which greater assurance may be particularly relevant to achieving innovation and efficiency.¹²⁷

¹²⁶ See Greg P. Steffle, Chief Exec., Rail Delivery Servs., Inc., Address to the American Modernization Commission (Oct. 18, 2006) (arguing against the current immunity for maritime agreements but describing the complex web interrelationships involved in intermodal shipping). But telecommunications and Internet services may well involve an equally large number of interrelationships. The difference in seeking antitrust immunity may reflect historic experience and industry culture as much as any fundamental economic-organizational realities.

¹²⁷ In advancing this perspective, I am strongly influenced by a number of conversations with lawyers practicing in these industries who share a common perspective that the fears of antitrust litigation, even if the client is reasonably confident of eventually

B. Why Limit Transportation?

Transportation is an area where the record of agency actions makes clear that immunity is largely being bestowed on legitimate joint ventures and some arguably lawful standard-setting organizations. Thus, transportation provides the easiest set of examples in which the old statutory scheme of immunity could be replaced by a new, elective system that confers a reasonable degree of certainty but is not the old-style cartel protection system. If it works with transportation, it could be extended to other contexts where appropriate. However, as the *ABA Monograph*'s list of exemptions makes clear, there is no consistent pattern to the industries or immunities that Congress has created.¹²⁸ Hence, when the goal is protection of legitimate ventures, this is a better strategy. But if the goal is to protect cartels or if there is no regulatory agency—as is an increasingly common feature of antitrust immunity regimes—then other strategies will have to be found to replace the old-fashioned system with one more appropriate to contemporary policy.

VII

REFINING THE CONCEPT OF A ROBUST BUSINESS REVIEW CLEARANCE SYSTEM

A. *The Relative Role of the DOJ and Specialized Agencies*

The suggested system gives the DOJ the final call on the proposed conduct, subject, however, to judicial review. The contrary position is also plausible. The DOJ could express its views to the agency,¹²⁹ and the agency could factor those views into its decision, much as is done in airline code sharing and alliances currently. In that context, there should be a presumption against immunity for any agreement to which the DOJ objects on competitive grounds. The agency would then have the burden of defending its decision that the public interest justification outweighed the competitive risks. In this formulation, the DOJ should have standing to challenge any order authorizing such

prevailing, will cause clients not to pursue rational, efficiency-enhancing ventures. *See* Dye, *supra* note 110.

¹²⁸ *See* ABA MONOGRAPH, *supra* note 1.

¹²⁹ This is the way the process works in the Export Trading Companies Act. 15 U.S.C. §§ 4001–4020. But there, the DOJ has veto power over any proposal. In the bank merger process, DOJ advises the bank agencies only of its views on the competitive effects of proposed combinations, but it retains an independent authority to challenge the merger. *See* 12 U.S.C. § 1828(c)(6).

an agreement as an antitrust violation, much as it does in the case of bank mergers. Framing the process for voiding an authorization could be more difficult. Presumably, the DOJ would be the party to initiate such a challenge before the agency that had the initial decision authority (subject to judicial review).

From the perspective of promoting competition, giving the agency dominance may be counterproductive. The history of Civil Aeronautics Board, DOT, Federal Communications Commission, FERC, FMC, ICC, and STB decisions is that they have not taken very effective account of competitive issues, and worse, the courts have not been sufficiently strict in their review of these agencies' decisions overall. Hence, giving agencies dominance is likely to result in more sympathy for industry demands and less concern for competition and the overall interests of an efficient, dynamic economy.

B. The Possibility and Bases on Which a Clearance May Be Revoked

If the review process is conducted fairly and thoughtfully, the risks of revocation of an antitrust clearance should be minor. Challenges would occur only if there were significant, unanticipated changes to the industry or to the enterprises (e.g., significant changes in management and business strategy). The fact that a more open and formal review would occur every five years would further reduce the incentives to undertake any sustained challenge in the interim, absent some unusual and compelling set of circumstances.

However, in the event of a challenge, the process drawn from the SBA and international trade legislation and the analogous process used in the airport statute are informative. After all, the result of revocation of the clearance is only that the conduct is now open to an antitrust attack to be determined by the courts. Moreover, the challenge has to be forward-looking. It has to assert that continuation of some aspect of the joint activity violates antitrust law. The challenger in this context carries the burden of persuasion, though this burden is perhaps lightened by the agency's revocation of the clearance.

Given that the effect of revocation is only to open future conduct to antitrust risks, such decisions should remain discretionary with the DOJ and should not be subject to judicial review. There is a counter argument for transparency of decision-making and procedural legitimacy that may assert that these decisions should be reviewable. If reviewed, the standard should be an abuse of discretion requirement

on the merits. The greater concern would be judicial imposition of procedures that unduly delay and complicate the review of a challenge to the continuation of a clearance. The determinative factor seems to be that the parties participating in the initial decision and its review every five years would have standing to seek review at those times. Hence, it seems unnecessary to complicate the withdrawal of a clearance with a similar requirement given that the merits of the DOJ decision would be testable in any subsequent litigation about the validity of the agreement.

*C. The Continuing Need for and Role of the Transportation
Regulatory Agencies*

It is commonplace that the DOJ is not a regulatory agency. The Supreme Court has issued two major decisions involving the interface between regulation and antitrust on this insight.¹³⁰ The nature of transportation services, whether for cargo or passengers, requires some ongoing oversight to enforce various rules and regulations that are necessary for access and fairness. The agencies are well positioned to provide this supervision and to collect necessary data. Market-facilitating regulation is, in fact, an important part of what makes for efficient and fair markets. The Securities and Exchange Commission and the Commodity Futures Trading Commission are prime examples of agencies whose fundamental missions are to facilitate the market process with appropriate rules and oversight, including active enforcement. The three transportation agencies can and should provide a similar kind of essential public service with respect to rail, truck, bus, air, and ocean transportation.

Having seen the similar issues that currently confront the three agencies, however, it might be worth considering whether they could be consolidated into a single transportation regulatory agency, independent of the DOT. Such an agency might be less vulnerable to capture by the industries it regulates because of the diversity of economic interests these industries would have. But whether operating as one or three, a clear need remains for the expertise and institutional capacity of the regulatory agencies.

¹³⁰ *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007) (holding that the Securities and Exchange Commission is best suited to regulate price-fixing and market allocation among securities traders dealing in new issues of securities); *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (holding that, despite legislative protection of potential antitrust liability in telecommunications, the problems of access to monopoly networks is best left to the regulatory agencies).

CONCLUSION

It is time to rethink the function and role of exemptions from antitrust in light of the changing world—legally and economically—in which they operate. My suggestion is that, on balance, a system, akin to the European Union’s limited-duration clearances for specific kinds of agreements would be the best way to balance the need for cooperation and the tenet of antitrust that competition is the fundamental policy of this country.