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"The Intersection of Competition Policy and Surface Transportation Regulatory Policy: An Examination of S. 772, the Railroad Antitrust Enforcement Act"

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Introduction

Mr. Chairman, Ranking Member Senator Hatch from my home state of Utah, and other distinguished members of the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, I want to thank you for giving me the opportunity today to speak about regulation and competition policy in the context of the railroad industry. But more importantly, I would like to thank you for asking the hard questions about the direction of railroad policy in light of the United States' experiences with the railroad industry over the past several decades. My remarks here today are my own, as I do not represent anyone. I speak today based upon my experience as an Antitrust Division trial attorney focused on deregulated industries, as an economist, and as a law professor whose research and writing has focused on antitrust issues arising in the context of regulated/deregulated industries.

Antitrust Immunities and Exemptions in General

In consideration of the repeal of any statutory immunity from the antitrust laws, it is important to consider the realm of possible other immunities and exemptions that may give rise to unforeseen antitrust immunity.

To review some basics, an express antitrust immunity may be justified when a regulatory agency has been expressly empowered by Congress to displace competition in an industry. Congress may expressly confer upon the regulator the exclusive power to control competitive issues within that industry by providing the industry with antitrust immunity.

Traditionally, such grants of authority were for the purpose of displacing competition with rate and entry regulation while providing the firm with a monopoly, albeit a regulated one. The agency would confer upon the industry the right to some reasonable rate of return and an exclusive right to provide service within its territory in exchange for the provision of service to all comers, agency review of rates and costs associated with providing that service, and other hurdles that limited the ability of the firms within that industry to expand into other realms or charge higher rates.

In this realm, the common notion was that antitrust had little to say. Indeed, notions of competition were antithetical to this arrangement. After all, there was little ability to compete between franchises as entry was highly restricted. Moreover, the terms, conditions, and prices of the services offered in such industries were actively overseen by administrative agencies. Thus, with few exceptions, antitrust was required to remain silent.

However, current notions of regulation focus on market mechanisms that are not necessarily antithetical to the antitrust laws. "Regulated" industries today are typically regulated only in the parameters under which competition takes place. Agencies do not to the same degree restrict entry--they encourage it. They no longer to the same degree review rate schedules and tariffs--they allow the market constructed by administrative rules and statutes to determine the rates and prices charged. They also do not to the same degree guarantee a rate of return, instead allowing the market to winnow out losers and reward winners.

Thus, antitrust law and regulation may serve complementary purposes in industries subject to what my colleague Harry First and others have called "regulated deregulation." Under these "new" regulatory schemes common today, express exemptions from the antitrust laws generally will be inappropriate and, therefore, should be rare. In other words, the "default" rule should always be that competition and its enforcement agent, the antitrust laws, prevail.

Linked closely with the notion of express immunity is the doctrine of implied immunities, or claims that Congress "intended" to exempt regulatory conduct from antitrust even though it did not do so by express statutory language. Historically, courts have viewed implied immunities with extreme skepticism. As one group of commentators has stated:

[T]wo grounds--and only two grounds--will support an implied repeal: the first is irreconcilability and the second is an affirmative showing of legislative intent to repeal by implication. The latter criterion has only been satisfied in cases in which the repealing act contains a directive to the regulatory agency to police the interplay of competitive forces. The irreconcilability criterion requires, at a minimum, that the statutes [antitrust and regulatory] produce differing results. This finding alone is not sufficient however. Rather, to find 'irreconcilability' there must be a determination that repeal of the antitrust laws is necessary to make the regulatory act work. This requires an appreciation of the nature of the various regulatory acts.

Broad delegations of power to a regulatory agency may lead to instances where agency directives are in tension with antitrust law. As Judge Greene's opinion in an early phase of the Antitrust Division's suit against AT&T seeking dissolution of the company on the ground of unlawful monopolization points out, however, such instances are relatively narrow. In response to AT&T's motion to dismiss the suit claiming that Congress had committed regulation of the activity in question to the F.C.C. under the Communications Act of 1934, Judge Greene wrote:

Regulated conduct is . . .deemed to be immune by implication from the antitrust laws in two relatively narrow instances: (1) when a regulatory agency has, with congressional approval, exercised explicit authority over the challenged practice itself (as distinguished from the general subject matter) in such a way that antitrust enforcement would interfere with regulation . . . and (2) when regulation by an agency over an industry or some of its components or practices is so pervasive that Congress is assumed to have determined competition to be an inadequate means of vindicating the public interest.

Particularly in light of the current trend towards "regulated deregulation," it is increasingly unlikely that the roles of regulation and antitrust serve antithetical purposes. Rather, the creation and fostering of competition might indeed be best served by the complementary potential of regulation and antitrust.

However, the caselaw is going in the opposite direction. Even where there is no direct regulatory oversight, courts have found implied immunity merely due to potential regulatory oversight. What remains is a gap between regulation and antitrust, where neither serve to provide essential oversight to an industry.

One reason for the gap is that express immunities tend to "creep." That is, they not only protect the world they were designed to protect, but their shield extends to conduct which the express immunity was not seeking to protect. In other words, the existence of an express immunity providing protection from the antitrust laws for some particular conduct may actually provide immunity for other types of antitrust conduct.

The doctrine of primary jurisdiction also may play a crucial role where there is any regulatory oversight at all even in the absence of express or implied immunity. While primary jurisdiction is not a methodology by which to grant

immunity or exemption, but rather a method by which courts might rely on an agency's expertise in order to resolve a dispute before them, the doctrine has been misused as a grant of immunity in the past.

The doctrine of "primary jurisdiction" is not, as is sometimes thought, an implied immunity. "Primary jurisdiction" addresses the question of whether the antitrust court should suspend the resolution of some questions of fact or law over which it possesses antitrust jurisdiction, until passed upon by the regulatory authority whose jurisdiction encompasses the activity involved. Although infrequent, such initial deference can be the practice when (1) resolution of the case involves complex factual inquiries particularly within the province of the regulatory body's expertise; (2) interpretation of administrative rules is required; and (3) interpretation of the regulatory statute involves broad policy determination within the special ken of the regulatory agency. This deference to statutory interpretation extends even to questions of jurisdiction.

The effect of judicial reference of a question to an administrative agency should be agency action on the question referred and then further court action in the antitrust case, although agency action might be dispositive. Unlike a finding of express or implied immunity, however, where primary jurisdiction doctrine is applied, the trial court's action is reviewed and that review is on antitrust standards. However, primary jurisdiction is a doctrine that is typically applied at the discretion of the court. Thus, statutory language that suggests that a court shall "not be required to defer to the primary jurisdiction of the Surface Transportation Board" does nothing to prevent a court from doing so.

On the other hand, in instances in which the doctrines of express or implied immunity are applied, the agency's action is reviewed on the standards set forth in the regulatory statute, and usually with the judicial deference to the agency's fact finding. As a practical matter, the initial determination of which doctrine applies in a particular case is of great significance in deciding what law applies, the degree to which antitrust considerations may or may not be accorded weight, and whether the antitrust remedies of criminal sanctions or treble damages are available in a particular case. An express or implied exemption finding precludes the application of antirust standards and remedies; while an application of the primary jurisdiction doctrine does not necessarily preclude use of antitrust standards and remedies to adjudicate the dispute but may only defer the adjudication pending an initial decision by the agency.

A court may find none of these doctrines apply in a case involving activity by a regulated industry--even where the agency has some jurisdiction over the activity in question. As Judge Greene pointed out in the AT&T case, in such cases antitrust policy and regulatory policy are seen as compatible and not antagonistic.

I raise these issues to point out that repeal of express antitrust immunity is insufficient to eliminate the potential for judicially created immunities through the doctrines of implied immunity, primary jurisdiction, or limitations of antitrust law's applicability through the filed rate doctrine or other such exemptions. Careful consideration ought to be given to the potential exemptions and immunities that may exist even after repeal of express immunity. Such immunities and exemptions typically are a result of the statutory authority conferred upon the regulatory agency and the execution of that authority by the agency.

The Railroad Antitrust Immunities

I now turn more specifically to the substance of today's hearing. To discuss the impact of repealing express antitrust immunity upon surface transportation policy, it is necessary to bifurcate my discussion into impacts of repealing the transactional immunity and repealing immunities related to rates.

The Effect of Repeal of Transaction Immunity

A little history is in order to more fully understand how the railroad industry got where it is today. Transactional immunity (immunity for mergers, acquisitions, and related agreements) arose during the 1920s due to increasing concern over the financial health of the railroads and government experience at managing the railroads during World War I. Such experiences led Congress to believe that in order to enhance the financial returns of investors and to promote better service, it was necessary to promote consolidation within the industry with the help of the Interstate Commerce Commission (ICC), the predecessor to the Surface Transportation Board (STB). The ICC adopted a plan that balanced competition against other concerns that were sometimes inconsistent with competition policy.

Congress required that the ICC approve any agreement between railroads, including mergers and acquisitions. Law required that any merger application be in harmony with the policy of consolidating the industry. ICC approval of these transactions immunized the transactions from antitrust scrutiny.

There appears to have been little or no Congressional debate about the antitrust immunity at the time of its passage. Courts have thus taken the position of simply accepting the language as it stands without inquiring as to its purpose. The immunity itself has remained virtually unchanged, despite reforms in railroad legislation and the disbanding of the ICC.

Current merger review by the STB, by statutory design and by regulatory obedience to that design, has favored consolidation. The STB is required to determine whether a transaction is in the public interest. While competitive considerations are central to the analysis, they are only one of five factors which the STB is statutorily required to consider. The overall balancing of these factors means that a merger that is grossly anticompetitive should be permitted if the transaction on net yields greater benefits to the stakeholders in the merger (labor, the companies involved, etc.) than are lost by the public.

It is no surprise, therefore, that the STB has only rarely encountered a merger that it did not like. While the STB has imposed conditions upon many mergers, those conditions are not consistently about competitive effects arising from the transaction.

It is not at all clear that the move toward consolidation has yielded stability in service and the higher investor returns sought by Congress in the 1920s. Some recent mergers have created service disruptions and spawned shipper complaints. As a result, the STB created a 15 month moratorium on mergers and promulgated a detailed statement concerning its merger review policy that in part created a much higher hurdle for merging parties in demonstrating efficiencies from the transaction. In it, the STB requires that "substantial and demonstrable gains in important public benefit" outweigh any "anticompetitive effects, potential service disruptions, or other merger-related harms." It is unclear what this new standard will yield, if anything, as it has yet to be tested by a major railroad consolidation. And while the STB has declared that it will "consider the policies embodied in the antitrust laws," it is not clear what weight such policies will be afforded in the overall public interest calculus.

However, mergers are not the only transactional issues that arise in the context of railroads. One major issue is that of "paper barriers." In many sales of secondary trackage to smaller regional players who wished to interconnect with the seller's (a major trunk line operator) main lines, the seller, in exchange for interconnection, often demanded that the regional player only interchange its traffic from the divested line to the seller, foreclosing any opportunity for the buyer to interchange with other operators. These "paper barrier" restrains were often permanent.

The ICC historically approved such restraints, finding that they had no anticompetitive effect. And, despite complaints from smaller railroad firms, shippers, and labor organizations, the STB has not changed course with respect to these restraints.

Finally, I should point out that both the ICC and STB could authorize railroad interlocking directorates. Nothing has changed in this realm since the 1920s. The STB's rules establish a procedure for applying for such interlocking directorates, although smaller carriers are exempt from the application process.

To summarize: Under the STB, the railroad industry has been largely consolidated. Only four major domestic carriers existed after 2000, while two Canadian carriers operate subsidiaries in the U.S. that interconnect to their Canadian lines. In this realm of extreme consolidation, it can hardly be said that the railroads' financial stability has improved. It is unclear whether the mergers and the antitrust immunity have indeed improved the health of the merging parties. And the STB has continued to bless what are traditionally anticompetitive agreements without any clear justification for their existence.

Given this history, I wonder what would be lost if the antitrust laws would be able to come into play in the context of transactions. There appear three identifiable areas in which antitrust law might conflict with railroad regulation by the STB.

First, Section 7 of the Clayton Act does not have a statute of limitations. Thus, any repeal of antitrust immunity should be on a prospective basis only. Otherwise, private plaintiffs may sue to undo mergers long since passed. In most instances, operations have already been consolidated, and unscrambling the eggs would be next to impossible. In this instance alone does it make sense to defer to the prior findings of the STB and only make merger review prospective.

Second, the STB's position on paper barriers runs in contrast to the antitrust laws. There appears to be no justification for these restraints. Under antitrust law rule of reason analysis, permanent barriers associated with the sale of a business which are without a specific and reasonably short duration run afoul of Section 1 of the Sherman Act, and may be subject to Section 2 scrutiny as well. The position of the Sherman Act case law is reasonable here, as no company should have a permanent interest in assets it has sold.

Third, there is no justification for interlocking directorates which run afoul of the antitrust laws yet are approved by the STB. Coordination to the extent necessary to ensure reliability may take place in the railroad industry as it does in other industries, namely through arms length agreements. There is no demonstration that railroads are uniquely in need of interlocking directorates when compared to other industries such as electricity or natural gas.

To my knowledge, the repeal of the antitrust immunity raises no other transactional concerns.

The Effect of Repeal of Immunity Related to Rates

While deregulation has expanded the application of the antitrust laws in the context of the railroads, there is much room for debate as to the effect of deregulation on the willingness of courts to impose antitrust remedies. For example, the STB continues to have authority over the setting of maximum rates, which could preempt a shipper's monopolization claim for treble damages and force the shipper to seek remedies exclusively before the STB.

In contrast, much has already been opened to antitrust scrutiny. In 1995 Congress repealed the provisions that gave the ICC authority to review and remedy predatory rates, effectively opening such rates to antitrust attack. Congress also deregulated traffic moving between shippers and rail carriers under private contract. The ICC and STB have also moved to exempt many rates or other activities from regulation under the Staggers Rail Act of 1980. The effect of an order from the STB stating that certain conduct is no longer subject to regulation is to open that conduct to antitrust attack. However, because the STB has the option of re-regulating the conduct, courts have appeared reluctant to allow plaintiffs to challenge exempted conduct.

Moreover, while regulators still may immunize rate bureaus from antitrust scrutiny, statutory provisions have curtailed much of the rate bureaus' activities. Other provisions have foisted upon these bureaus other impediments, including substantial reporting requirements. Still, the Department of Justice is on record as being opposed to any antitrust immunity in this realm.

Thus, while regulation has drastically eliminated what is subject to antitrust immunity, several issues arise. If it is the case that much of railroad policy has moved away from regulation to market forces, then it is imperative that antitrust fill the gap left by regulators. Otherwise, we are left with the worst of all possible worlds--a business subject to neither competition policy nor regulation. As one of my coauthors on the ABA Monograph so firmly put it:

[R]egulatory policies regarding exemptions from regulation are fundamentally troublesome. They allow regulators to effectively walk away from reviewing the competitive effect of certain conduct, but leave uncertainty as to whether the exempted activity remains shield from the reach of antitrust law. If anything, activities exempted from regulation should become subject to antitrust scrutiny even if it is potentially subject to re-regulation by the agency. Finally in this late stage of deregulation, perhaps Congress should no longer delegate authority to the STB to decide what should and should not be regulated in the first place.

The Effect of Repeal on National Railroad Policy

It could be argued that the imposition of antitrust laws upon the railroad industry would create serious issues with respect to regulatory policy. For example, the potential for a private plaintiff challenge in federal court could expose the defendant to the full panoply of powers possessed by the court under Section 4 of the Sherman Act. The potential for such relief might have ripple effects throughout the national railroad system. In addition to these private civil suit

concerns, concern might be expressed about the potential for concurrent jurisdiction in the realm of merger review. I shall address the latter issue first.

As a threshold matter, I am on record that those proposing an immunity should have the burden to demonstrate its need. In the context of today's discussion, I find no reason to conclude that there is something so special in railroad regulation that should isolate it from other industries that exhibit similar issues, including potential natural monopoly conditions in some component of the industry, high coordination needs for purposes of providing service and protecting public safety, and where exists some modicum of competition. Absent such a showing, there appears little argument against concurrent jurisdiction.

Indeed, the STB argues that the Department of Justice and the STB have only been in disagreement on one particular case in the past. One wonders, then, why the STB would not think that past is prologue.

A more serious argument in favor of concurrent jurisdiction is that because the world of railroads is one of extreme levels of market concentration, the anticompetitive stakes are high. Any future merger could potentially yield strong and persistent anticompetitive effects. The consideration of these effects might be lost in the STB's calculus of total benefits to consumers, the railroads, labor, or other stakeholders to the transaction. The antitrust laws, in contrast, do not necessarily consider transfers from consumers to stakeholders to be a good thing. Moreover, the antitrust agencies more readily consider the full spectrum of competitive harms.

I find it similarly disingenuous to argue that courts will likely cause disruption of national railroad policy in the wake of an antitrust suit brought by a private plaintiff or by a state attorney general as parens patriae. Many agencies live with the potential of court action against a company subject to the agency's regulation. As before, unless there is something unique about railroads, there is little justification for granting immunity here while embracing competition policy elsewhere. In most instances, historically such choices between immunity and antitrust law application were not made due to industry idiosyncrasies, but rather due to industry lobbying and political pressure.

Finally, where regulatory action is in place, there are a plethora of potential antitrust exemptions at the defendant's disposal. As mentioned previously, the doctrines of implied immunity and primary jurisdiction might still come into play. And plaintiffs challenging any rates subject to STB authority would likely find that the filed rate doctrine is alive, well, and growing.

For these reasons, there appears to be little justification for the notion that courts handling antitrust litigation will somehow turn national railroad regulatory policy on its head.

Conclusion
The realm of railroad regulation does not generally appear to be at loggerheads with the realm of antitrust laws. Because the STB's role in the railroad industry has waned due to efforts to deregulate the industry, antitrust should step in to fill the void.

The difficulty is that the role the STB plays in the realm of railroads may send mixed signals to courts faced with railroad antitrust cases. Repeal of the express immunity addresses only part of the problem. Issues arise as to the scope of the repeal in a realm where the STB retains some regulatory jurisdiction. And, in a world with expanding judicially created antitrust exemptions, it is worthwhile for us to consider what a potential antitrust plaintiff, who the proposed legislation would purportedly seek to encourage in order to help foster and police competition policy, might gain in a post-express immunity world.

Rather than the dire predictions that the STB might have about such a world, I suggest that the bill might not change much if the courts continue on their current path of embracing broad and bold interpretations of judicially created exemptions such as implied immunity and the filed rate doctrine. On the other hand, I would welcome a full and true repeal of the antitrust immunity here, if carefully done. It is imperative that the gap created via deregulation of the railroads be filled. Where regulation gives way to markets, regulation must also give way to antitrust and competition policy. And where the old policies of regulation such as fostering of consolidation through merger are at odds with more recent policies seeking to foster competition via deregulation, it is the old policies that should yield. Otherwise, we are truly left with the worst of all possible worlds.

i The term "deregulation" is a bit of a misnomer. See Harry First, Regulated Deregulation: The New York Experience in Electric Utility Deregulation, 33 LOY. U. CHI. L. J. 911 (2002)(noting that New York's electricity market was not deregulated, but in fact replaced "one regulatory system with another.").

ii See generally Darren Bush, Mission Creep: Antitrust Exemptions and Immunities as Applied to (De)regulated Industries, 2006 UTAH L. REV. 613.

iii Darren Bush & Carrie Mayne, In (Reluctant) Defense of Enron: Why Bad Regulation Is to Blame for California's Power Woes (or Why Antitrust Law Fails to Protect against Market Power when the Market Rates Encourage Its Use), 83 OR. L. REV. 207, 207 (2004)(noting the historical perspective that regulation and antitrust are substitutes); see Richard D. Cudahy, The Wearing Away of Regulation: What Remains, PUB. UTIL. FORT., Oct. 12, 1989, at 9, 9?12; Consolidation in Telecommunications Industry--Senator Metzenbaum's Views, 7 TRADE REG. REP. (CCH) ¶ 50,126 ("[F]ederal and state regulation of the telecommunications industry has been and will continue to be a poor substitute for aggressive antitrust
review."); Leslie W. Jacobs et al., Panel Discussion, Deregulation and Expanding Antitrust Liability: A New Battleground for Private Antitrust Litigants, 53 ANTITRUST L. J. 221, 222 (1984) ("When I was involved with getting the airline industry deregulated, we were quite hopeful that competition would substitute for regulation and that much of the antitrust enforcement would be done by private litigation." (statement of Marvin S. Cohen, Member, D.C. Bar)); Alfred E. Kahn, Deregulatory Schizophrenia, 75 CAL. L. REV. 1059, 1059 (1987) ("I agree thoroughly with Judge Breyer that the antitrust laws are not just another form of regulation but an alternative to it--indeed, its very opposite." (footnote omitted)); cf. Peter C. Carstensen, Evaluating "Deregulation" of Commercial Air Travel: False Dichotomization, Untenable Theories, and Unimplemented Premises, 46 WASH. & LEE L. REV. 109, 116 (1989) (noting dichotomy of regulation/deregulation "is false with respect to analysis of regulation and deregulation of any industry, and is extremely so with respect to commercial air travel").

iv One notable exception was competition for larger industrial and commercial customers in the electricity industry.

v See Herbert Hovenkamp, Antitrust and the Regulatory Enterprise, 2004 COLUM. BUS. L. REV. 335, 341 (2003). Professor Hovenkamp states:
One consequence of regulation is a reduced role for the antitrust laws. When the government makes rules about price or output, market forces no longer govern. To that extent antitrust is shoved aside. A corollary is that as an industry undergoes deregulation, or removal from the regulatory process, antitrust re-enters as the residual regulator. Since our fundamental criterion for determining antitrust immunity in regulated industries is the extent of unsupervised private discretionary conduct, the natural result of deregulation is an increased role for the antitrust laws. In general, the more extreme the deregulation--that is, the more that the market is opened to ordinary competitive forces--the greater the role for antitrust. Id.

vi For a discussion of the complementary nature of regulation and antitrust, see Darren Bush & Carrie Mayne, In (Reluctant) Defense of Enron: Why Bad Regulation Is to Blame for California's Power Woes (or Why Antitrust Law Fails to Protect Us Against Market Power When the Market Rules Encourage Its Use), 83 OR. L. REV. 207 (2004).

vii See Harry First, Regulated Deregulation: The New York Experience in Electric Utility Deregulation, 33 LOY. U. CHI. L. J. 911, 924 (2002)(discussing "regulated deregulation" as the replacement of cost of service regulation with state and federal regulation of "the mechanism put into place to manage competitive markets.")

viii It follows that antitrust "savings clauses" should not be required. A savings clause, in contrast to establishing competition as the default rule, places the burden upon Congress to actively declare (and redeclare) that the antitrust laws apply. See, e.g., Telecommunications Act of 1996, sec. 601(b)(1), (c)(1), § 152 note, 110 Stat. 56, 143 (1996)("
SAVINGS CLAUSE ... nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.
NO IMPLIED EFFECT ... This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local laws unless expressly so provided in such Act or amendments.").

ix Robert Balter and Christian Day, Implied Antitrust Repeals: Principles for Analysis, 86 DICK. L. REV. 447 (1982). See also United States v. National Association of Security Dealers, 422 U.S. 694, 719 (1975)("Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system"); Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975).

x U.S. v. Amer. Tel. & Tel. Co., 461 F.Supp. 1314, 1322 (D.C.D.C. 1978)(emphasis supplied).

xi Similar arguments might be made in favor of a limited state action doctrine and the filed rate doctrine. The original state action doctrine arose out of principles of federalism and a concern that the federal government not intrude upon state created and sanctioned regulation. Again, the most common type of industry regulation was rate and entry regulation. However, "regulated deregulation" has come onto the state scene in many instances. In such instances, it is unlikely that the clearly articulated state policy seeks to displace competition with regulation. Rather the purpose of the policy would be that regulation creates competition. The creation of competition cannot be said to be in contradiction with the purposes of antitrust. See Darren Bush, Mission Creep, supra note 2. For examples of state policies creating competition in the context of traditionally regulated industries, see United States v. City of Stillwell, Oklahoma, Case No. CIV 96-196 B, government filings available at http://www.usdoj.gov/atr/cases/stilwe0.htm (Oklahoma statute allowed municipal electric cooperatives to compete with one another for new customers); United States v. Rochester Gas & Elec. Corp., 4 F.Supp.2d 172 (W.D. N.Y. 1998)(New York statute allowing retail sales of electricity by cogeneration plants) .

Similarly, the Keogh doctrine or filed rate doctrine was originally designed to preclude the bypassing of statutory damages granted under the Interstate Commerce Act. The Interstate Commerce Act provided for single damages as a remedy. The plaintiffs in Keogh sought to use antitrust to bypass statutorily conferred remedies. This approach was rejected by the Court. The case was not about the justness or reasonableness of rates, as has been increasingly the case with application of the Keogh doctrine. Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156, 162-163 (1922).

As has increasingly been the case, Keogh has been applied in the context of "regulated deregulation." However, the market clearing prices typically found in such industries bear no relation to the types of rates originally addressed by the Keogh progeny, namely, traditional cost of service rates set via tariff after review by an administrative agency. In contrast, market rates are only reviewed (in rare instances) and even then they are reviewed ex post. Courts nonetheless continue to hold that the filed rate doctrine applies to market based rates. See, e.g., Public Utility Dist. No. 1 of Grays Harbor County Wash. v. IDACORP Inc., 370 F.3d 641, 651 (9th Cir. 2004)("[W]hile market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine, we conclude that they do not fall outside of the purview of the doctrine."); Public Utility District No. 1 v. Dynegy Power Marketing, Inc., 384 F.3d 756 (9th Cir. 2004); Town of Norwood v. New England Power Co., 202 F.3d 408 (1st Cir. 2000).

xii Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007).

xiii See ABA, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 17 (2007)(noting that courts have sometimes adopted "expansive interpretations as to the scope of an exemption")(hereafter ABA Monograph).

xiv For a discussion of historical misuse of the doctrine, see Louis B. Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 HARV. L. REV. 436 (1954). See also Louis Jaffe, Primary Jurisdiction Reconsidered, 102 U. PA. L. REV. 577 (1954); JUDICIAL DOCTRINE OF PRIMARY JURISDICTION AS APPLIED IN ANTITRUST SUITS, STAFF REPORT TO THE ANTITRUST SUBCOMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY, 84TH CONG., 2D SESS. (1956).

xv Schwartz, supra note 11 at 470-471 ("The lesson taught by [the expansion of primary jurisdiction doctrine from a procedural rule to a judicial exemption] is this: if a primary jurisdiction does not already exist, it may be advisable for an industry to create one as a means of avoiding the compulsion to compete which is embodied in the antitrust laws as administered by the federal courts.")

xvi See Sourthern Railway Co. v. Combs, 484 F.2d. 145 (6th Cir. 1973). See also Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005)("The contours of primary jurisdiction are not fixed by a precise formula. Rather, the

applicability of the doctrine in any given case depends on "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application. . . . Among the reasons and purposes served are the promotion of consistency and uniformity within the areas of regulation and the use of agency expertise in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion.")(internal quotations and citations omitted).

xvii See supra note 12.

xviii ABA Monograph, supra note 13 at 196. See also THEODORE E. KEELER, RAILROADS, FREIGHT, AND PUBLIC POLICY 25 (1983)

xix See, e.g., Denver & Rio Grande W. R.R. Co. v. United States, 387 U.S. 485 (1967); In Re REA Express Private Treble Damage Antitrust Litig., 412 F. Supp. 1239, 1261-63 (E.D. Pa. 1976).

xx See ICC Termination Act of 1995, H.R. REP. NO. 104-311, at 83 (1995).

xxi See 49 U.S.C. § 11324.

xxii See Salvatore Massa, Injecting Competition in the Railroad Industry Through Access, 27 TRANSP. L.J. 1, 2 n. 5 (2000). Mr. Massa points out:
Furthermore, federal policy has favored railroad mergers for quite some time. As Surface Transportation Board Commissioner Gus Owen has observed "[s]ince 1920 it has been the public policy, as enunciated by Congress, to reduce the number of competing railroad systems." See Central Power & Light Co. v. Southern Pac. Transp. Co., Fin. Docket No. 31242 at 19 (Surface Transp. Bd. Dec. 27, 1996) (Comm'r Owen commenting) [hereinafter CP&L], aff'd sub. nom., No. 97-1081, 1999 WL 60501 (8th Cir. Feb. 10, 1999). During the period 1956 to 1971, regulatory authorities approved ten of fourteen merger applications. . . . Since 1980, regulatory agencies have approved twelve of thirteen merger applications. See Salvatore Massa, Are All Railroad Mergers in the Public Interest? An Analysis of the Union Pacific Merger with Southern Pacific, 24 TRANSP. L.J. 413, 431 n.96 (1997) (listing ten of eleven); CSX Corp.-- Control--Conrail Inc., Fin. Docket No. 33388, 1998 WL 456510 (Surface Transp. Bd. July 23, 1998) (approving the eleventh merger); Rip Watson, Deal Creates First Large Cross-Border Rail System, J. COM., Mar. 26, 1999, at A1 (announcing approval of twelfth merger). Id.

xxiii See Massa, supra note 22 at 12 (detailing service issues arising from the Union Pacific-Southern Pacific merger and the Union Pacific-Chicago & Northwestern Railway merger); Daniel Machalaba, CSX, Norfolk Southern Find Breaking Up is Hard to Do, WALL ST. J., June 28, 1999 at B4 (discussing issues with CSX and Norfolk Southern's acquisition and division of Conrail).

xxiv 49 C.F.R. § 1180.1(c).

xxv 49 C.F.R. § 1180.1(c)(2).

xxvi My former colleague and coauthor Salvatore Massa has excellently described the paper barriers issue. See Salvatore Massa, A Tale of Two Monopolies: Why Removing Paper Barriers Is A Good Idea, TRANSP. J. Winter/Spring 2001, at 47.

xxvii ABA Monograph, supra note 13 at 208.

xxviii ABA Monograph, supra note 13 at 215.

xxix Id. at 216.

xxx Id.

xxxi ABA Monograph, supra note 13 at 198. See also supra note 12 discussing the filed rate doctrine.

xxxii See 49 U.S.C. § 10701(c); H.R. REP. NO. 104-311, at 82-83 (1995).

xxxiii See 49 U.S.C. §§10709 (c), (g).

xxxiv See Staggers Rail Act § 213, 94 Stat. at 1912-13 (codified at 49 U.S.C. § 10502).

xxxv See, e.g., G. & T. Terminal Packaging Co. v. Consolidated Rail Corp., 830 F. 2d 1230 (3d Cir. 1987).

xxxvi ABA Monograph, supra note 13 at 202.

xxxvii See H.R. Rep. No. 96-145 at 431 (1979)(statement of Donald L. Flexner, Deputy Assistant Attorney General)("[A]ntitrust immunity is not needed for those rate bureau activities that might benefit the public interest.")

xxxviii ABA Monograph, supra note 13 at 210.

xxxix 15 U.S.C. § 4 states in part, "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

xl See Darren Bush, Gregory K. Leonard and Stephen Ross, A FRAMEWORK FOR POLICYMAKERS TO ANALYZE PROPOSED AND EXISTING ANTITRUST IMMUNITIES AND EXEMPTIONS: REPORT PREPARED BY CONSULTANTS TO THE ANTITRUST MODERNIZATION COMMISSION, available at http://www.amc.gov/commission_hearings/pdf/IE_Framework_Overview_Report.pdf. See also Darren Bush, Supplemental Written Testimony submitted to the Antitrust Modernization Commission, available at http://www.amc.gov/commission_hearings/pdf/Bush_Supplemental_Statement.pdf.

xli See 15 U.S.C. § 15c.

xlii See generally ABA Monograph, supra note 13. Moreover, courts should be credited for innovative actions that have brought revolutionary changes to regulated industries. As an example, the compulsion of wheeling in U.S. v. Otter Tail gave rise to a whole regulatory wave of open access, particularly in but not limited to the electricity industry. See Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Judge Greene's breakup of AT&T yielded remarkable changes in the telecomm industry as well. United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

xliii See supra note 12.