ANTITRUST POLICY AND COMMUNICATIONS REGULATION: MAY THE TWAIN MEET

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INTRODUCTION

In the realm of competition policy, antitrust[1] is king. And deservedly so. Modern antitrust has employed the concept of consumer welfare and the protection of competition (not competitors) to re-invigorate antitrust analysis. With the Supreme Court's 1977 decision in *Continental T.V., Inc., v. GTE Sylvania Inc.*[2] and Robert Bork's

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1. For these purposes, I include the prohibition on "unfair methods of competition" in Section 5 of the Federal Trade Commission ("FTC") Act within the scope of the term "antitrust," although, of course, Section 5 is not cabined by the antitrust laws enforced by the Department of Justice ("DOJ"). *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239–44 (1972) (Section 5 allows the FTC to "consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.").

2. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) and applying rule of reason analysis to non-price vertical restraints granting exclusive distribution franchises in defined geographic areas). Justice Powell, for whom I clerked, expressed considerable pride in the reasoning and impact of this opinion on antitrust law in the years after it was issued.

publication of *The Antitrust Paradox*[3] the following year, both of which built on earlier scholarship, the pursuit of modern antitrust analysis sparked a revolution whose legacy continues to be applied[4] and debated.[5]

And yet antitrust is not an absolute monarch—it never has been and never should be. That is because the four corners of antitrust do not necessarily capture every policy that serves competition. An obvious example is spectrum policy. Spectrum is a critical ingredient in the provision of wireless services and so, in making spectrum available, the Federal Communications Commission ("Commission") provides an essential input into wireless competition. Antitrust simply does not answer the question as to how government can best encourage the use of public resources for the public benefit.

This essay will examine the relationship between antitrust and regulatory oversight, with specific emphasis on the role of the Federal Communications Commission and the nature of the markets in which communications networks operate today. How regulation and antitrust interact is not a theoretical concern. Even as residential demand for high-speed broadband connections grows,[6] Americans face an increasingly limited number of choices. Almost 75% of American housing units in 2013 had either zero or only one choice of connection delivering speeds of 25 Mbps downstream and 3 Mbps upstream.[7] Even with encouraging

3. ROBERT H. BORK, THE ANTITRUST PARADOX (1st ed. 1978).

4. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (overruling Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) and applying traditional rule of reason analysis to vertical agreements to fix minimum resale prices).

5. *See*, *e.g.*, Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J. L. TECH. 85, 105–19 (2003); Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49 (2010); Carl Shapiro, *Competition Policy in the Information Economy*, *in* COMPETITION POLICY ANALYSIS 109 (Einar Hope ed., 2000), http://faculty.haas.berkeley.edu/shapiro/comppolicy.pdf; Philip J. Weiser, *Regulatory Challenges and Models of Regulation*, 2 J. ON TELECOMM. & HIGH TECH. L. 1 (2003); Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. L. REV. 41 (2003).

6. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Dkt. No. 14-126, Progress Report and Notice of Inquiry, 30 FCC Rcd. 1375, para. 28 & n.144 (2015) [hereinafter *2015 Broadband Progress Report*].

7. *Id*. at para. 83, Chart 2; *Protecting and Promoting the Open Internet*, GN Dkt. No. 14-28, Report & Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5633, para. 84, n.152 (2015) [hereinafter *2015 Open Internet Order*]. Whatever their future, current wireless broadband services do not supply a full substitute for those fixed broadband connections. *See 2015 Broadband Progress Report*, *supra* note 6, at para. 120 ("We recognize that many households subscribe to both fixed and mobile services because they use fixed and mobile services in fundamentally different ways, and, as such, view fixed and mobile services as distinct product offerings.").

signs of horizontal entry, current circumstances suggest that barriers to horizontal entry remain considerable and that new entry by competitive broadband providers will likely remain limited given current technologies.[8] The impact of limited availability to high-speed broadband is not uniformly distributed; although only about 8% of urban Americans lack such access, the number rises to 53% among rural Americans.[9]

Moreover, even assuming that consumers had universal access to at least one provider of high-speed broadband, the nature of the broadband provider's role as intermediary between consumers and the world of Internet applications, services and products threatens harm. This is the so-called "gatekeeper" problem: the ability of an Internet Service Provider to erect barriers that block or degrade the ability of consumers to access the goods and services offered over the Internet and vice versa. There is a growing consensus that broadband providers have the ability to act as gatekeepers, and the Commission concluded in 2010 that they have the incentive to do so as well.[10] The "gatekeeper problem" occurs because providers' short-term interests in maximizing profit or minimizing network demands may contradict the long-term health of the "virtuous circle," which unites the interests of consumers and purveyors of Internet products and services.[11] Even if the broadband market were fully competitive, providers would have "powerful incentives" to erect barriers, such as imposing fees for prioritized access or excluding competitors.[12] Moreover, the Commission has found that they have the ability to do so. Of particular significance to this essay is the D.C. Circuit's observation, in upholding the Commission's 2010 analysis, that "[b]roadband providers' ability to impose restrictions on edge providers does *not* depend on their benefitting from the sort of market concentration that would enable them to impose substantial price increases on end users . . . ."[13]

8. *See* Tom Wheeler, Chairman, Fed. Commc'ns Comm'n, Prepared Remarks at 1776: "The Facts and Future of Broadband Competition" at 3–4 (Sept. 4, 2014) [hereinafter Wheeler 1776 Remarks], https://apps.fcc.gov/edocs_public/attachmatch/DOC-329161A1.pdf.

9. *2015 Broadband Progress Report*, *supra* note 6, at para. 84, tbl. 7.

10. *Preserving the Open Internet; Broadband Industry Practices*, GN Dkt. No. 09-191, WC Dkt. No. 07-52, Report & Order, 25 FCC Rcd. 17905, 17915–25, paras. 20–34 (2010) [hereinafter *2010 Open Internet Order*] (finding broadband providers have incentives to block specific edge providers to benefit their own or affiliated services, to charge edge providers for access or prioritized access to end users, and to degrade the quality of service to non-prioritized traffic).

11. *Id.* The D.C. Circuit upheld these findings on appeal. *See* Verizon v. FCC, 740 F.3d 623, 645–46 (D.C. Cir. 2014) ("[T]he Commission has adequately supported and explained its conclusion that, absent rules such as those set out in the *Open Internet Order*, broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment.").

12. *Verizon*, 740 F.3d at 645–46.

13. *Id.* at 648 (emphasis added). After upholding the Commission's authority under

Thus the dilemma: Modern antitrust focuses on economic efficiency and therefore looks first and foremost to price effects.[14] Put another way, antitrust has the potential to undervalue certain strategic behavior that can harm competition.[15] But the Commission has found, and the D.C. Circuit has affirmed the conclusion,[16] that the power to influence price, the traditional focus of antitrust analysis, need not exist for broadband providers to be able to erect barriers that harm the virtuous circle and the very consumers to whom providers sell Internet access. Price effects are indisputably important, but so are considerations like switching costs, lack of access to competitive choices, and barriers between content providers and end users. The exercise of uncontrolled gatekeeper power is not in the public interest. Regulatory oversight in conjunction with antitrust enforcement enables the consideration of both price effects and non-price effects that may harm competition and the public interest.

This essay proceeds as follows. Part I reviews the role of regulatory oversight in competition policy, noting the policy concerns that reach beyond the scope of modern antitrust analysis, reviewing the administrative techniques available to the Commission to address those concerns, and identifying important issues of the day—including Open Internet—that connect to competition policy. Part II addresses the relationship between regulatory oversight and antitrust, including by considering traditional objections raised by antitrust theorists to

Section 706 of the Telecommunications Act of 1996 to impose Open Internet regulations, the Court went on to vacate the Commission's "no discrimination" and "no blocking" rules on the ground that they impermissibly applied common-carrier obligations on broadband services then classified as "information services." *Id.* at 655–58. In its 2015 Open Internet Order, the Commission has addressed this defect by re-classifying broadband internet access services as a "telecommunications service." *See 2015 Open Internet Order*, *supra* note 7, at 5743–5801, paras. 331–425.

14. "The promotion of competition in terms of efficiencies is the antitrust objective best suited to incorporating economic analysis within a competition review and, accordingly, is a fundamental and necessary competition law objective." SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, ANTITRUST POLICY OBJECTIVES § 6, ¶ 2 (2003), http://www.abanet.org/antitrust/at-comments/2003/reports/policyobjectives.pdf; *Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?: Hearing Before H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 4 (2014) (statement of Tim Wu, Professor of Law, Columbia Law School) [hereinafter *2014 Tim Wu Testimony*], http://judiciary.house.gov/_cache/files/bcecca84-4169-4a47-a202-5e90c83ae876/wu-testimony.pdf ("the tradition in competition practice has been to focus on price-related harms–such as, classically, price-fixing cartels, or exclusionary conduct designed to maintain monopoly prices.").

15. *See* Phil Weiser, *The Future of Internet Regulation*, 6–15 (Univ. of Colo. Law Sch. Legal Studies Working Paper No. 09-02, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344757 (discussing threats to competition resulting from strategic behavior).

16. *Verizon*, 740 F.3d at 645–46.

regulatory action,[17] and briefly noting the limited impact of the Supreme Court decisions in *Verizon v. Trinko*[18] and *Credit Suisse Securities*.[19] The essay concludes that, consistent with statute, the Commission looks beyond the boundaries of traditional antitrust law in order to serve the public interest. Antitrust principles do inform the use of the Commission's statutory authority, but in carrying out its Communications Act responsibilities, the Commission has focused on the enhancement, and not just the protection, of competition, including by ensuring the means for future innovation.

I. REGULATORY OVERSIGHT AS COMPETITION POLICY

A. The Bases for Competition Policy

The co-existence of regulation and antitrust is nothing new. Agriculture, energy, financial institutions, healthcare, and transportation are all industries functioning under a combination of antitrust review and some level of regulatory oversight. In agriculture, for example, the USDA regulates livestock, meat, and poultry industries under the Packers and Stockyards Act of 1921 ("PSA"),[20] while the DOJ[21] and the FTC[22] review mergers and acquisitions involving the agricultural industry. The electric power industry is regulated at both the state and federal levels. The Federal Energy Regulatory Commission ("FERC") regulates wholesale sales, wholesale and interstate transmission service, and mergers, pursuant to the Federal Power Act[23] and the Energy Policy Act of 2005.[24] The Federal Power Act requires FERC to consider antitrust implications and to apply a public interest standard to certain decisions, such as ratemaking.[25] Regulatory statutes such as the PSA

17. *See, e.g.*, *Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?: Hearing Before H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 1 (2014) (statement of Joshua D. Wright, Comm'r, Fed. Trade Comm'n), http://judiciary.house.gov/_cache/files/5a10dd44-17ac-4500-b88a-9f0d09b9ca05/wright-testimony.pdf.

18. Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

19. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007).

20. 7 U.S.C. §§ 181–231 (2014).

21. *See, e.g.*, United States v. Tyson Foods, No. 1:14-cv-01474-JEB (D.D.C. filed Nov. 20, 2014), http://www.justice.gov/atr/cases/f310000/310034.pdf (consent decree in meat company acquisition); United States v. Monsanto Co., No. 1:07-cv-00992 (D.D.C. filed Nov. 6, 2008), http://www.justice.gov/atr/cases/f239400/239476.htm (consent decree in cotton seed merger).

22. *See, e.g.*, *In re* Bayer AG, 134 F.T.C. 184, 197 (2002) (agricultural chemical merger).

23. 16 U.S.C. §§ 791(a)–828(c) (2013).

24. Energy Policy Act of 2005, Pub. L. No. 109-58 § 625, 119 Stat. 594 (2005).

25. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1377 (7th ed. 2012) (citing Gulf States Utils. v. Fed. Power Comm'n, 411 U.S. 747, 758–60 (1973) and

provide remedies in addition to those available under the antitrust statutes,[26] permitting the expert agency to apply its expertise in the industry to issues brought before it. Likewise, the antitrust agencies apply their expertise in antitrust law and policy as expressed in mergers, acquisitions, and joint-venture review. When harmonized, therefore, regulatory oversight through the regulatory agencies works in tandem with antitrust review conducted by the antitrust agencies, yielding advantages for consumers and competition.

The Commission is part and parcel of the same tradition. Indeed, the Commission's role in the creation and protection of competition is at the center of its congressionally-established mission.[27] For example, Title II of the Communications Act, especially as amended by the Telecommunications Act of 1996, has been constructed to provide multiple tools for the Commission's use in fostering competition among telecommunications carriers;[28] Title III, addressing wireless services, instructs the Commission in its oversight of mobile services to "encourage competition,"[29] authorizes the use of competitive bidding for the allocation of wireless spectrum[30] and specifically warns against transactions that would "substantially lessen competition or . . . restrain commerce";[31] Title VI is designed, in part, to "promote competition in cable communications,"[32] including by making it unlawful for a multichannel video programming distributor ("MVPD") "to engage in unfair methods of competition or unfair or deceptive acts or practices" that harm the ability of satellite providers to distribute programming.[33] Transfers of licenses, including television and radio licenses, are subject to Commission review under the traditional test of the "public interest, convenience, and necessity,"[34] and, as the Commission has explained, "there can be no doubt that competition is a relevant factor in weighing

Central Power & Light Co. v. FERC, 575 F.2d 937, 938–39 (D.C. Cir. 1978)).

26. *See, e.g.*, 7 U.S.C. § 209(b) (2014) (private right of action under PSA is "in addition to such remedies" existing under common law or other statutes); *id.* § 225 (providing that nothing in the PSA is intended to prevent or interfere with the enforcement of the Sherman Act or Clayton Act, among others).

27. *See, e.g.*, Wheeler 1776 Remarks, *supra* note 8, at 6–7 ("where competition exists, the Commission will protect it . . . . [W]here greater competition can exist, we will encourage it . . . . [W]here meaningful competition is not available, the Commission will work to create it.").

28. *See, e.g.*, 47 U.S.C. § 224 (2013) (Pole Attachments); *id.* § 251 (Interconnection); *id.* § 271 (Bell Operating Company Entry into InterLATA Services).

29. *Id.* § 332 (Mobile Services).

30. *See id.* § 309 (action upon applications; form of and conditions attached to licenses).

31. *Id.* § 314 (preservation of competition in commerce).

32. *Id.* § 521.

33. *Id.* § 548.

34. *Id.* § 310(d).

the public interest."[35] Indeed, antitrust agencies sometimes comment on the potential competitive impacts of proposed Commission actions.[36] As for broadband, specifically, Section 706 of the Telecommunications Act empowers the Commission to act to encourage and accelerate the deployment of broadband, including through actions that "promote competition in the local telecommunications market."[37]

The Commission has exercised these powers to both incent and protect competition. It does this understanding that its "role is to harness the power of modern communications to produce social and economic benefits."[38] One example comes from spectrum policy. In recognition of the importance of wireless spectrum in economic growth and consumer welfare, the Commission has taken several steps to make more spectrum available. It has revised its mobile spectrum holding rules and created a "reserve" in the upcoming Broadcast Incentive Auction to provide opportunities for wireless providers to gain access to important low-band spectrum in a manner that can increase competition.[39] The Commission also has taken steps to make additional spectrum available through the upcoming incentive auctions and through proposals to permit spectrum sharing.[40]

The Commission's work extends, of course, beyond the economic considerations that inform modern antitrust policy. Consider how Congress formulated its instruction to the Commission to examine market barriers for entry in telecommunications: "the Commission shall seek to promote the policies and purposes of this Act favoring diversity

35. *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Dkt. No. 97-211, Opinion & Order, 13 FCC Rcd. 18025, 18036, para. 12 (1998) (quoting FCC v. RCA Commc'ns, Inc., 346 U.S. 86, 93–95 (1953)). *See* United States v. FCC, 652 F.2d 72, 81–82, 87 (D.C. Cir. 1980) (en banc) (quoting N. Natural Gas Co. v. FPC, 399 F.2d 953, 961 (D.C. Cir. 1968) ("competitive considerations are an important element of the 'public interest' standard which governs federal agency decisions.").

36. *See, e.g.*, Ex Parte of the U.S. Dep't of Justice, *A National Broadband Plan for Our Future*, GN Dkt. No. 09-51 (filed Jan. 4, 2010), http://www.justice.gov/atr/ex-parte-submission-united-states-department-justice-matter-economic-issues-broadband (discussing economic issues relevant to the development of the FCC's National Broadband Plan).

37. 47 U.S.C. § 1302(a) (2013).

38. Tom Wheeler, Chairman, Fed. Commc'ns Comm'n, Remarks at the Brookings Institution "Wireless Spectrum and the Future of Innovation" Forum (Mar. 24, 2014), https://www.fcc.gov/document/chairman-wheeler-remarks-brookings-institution.

39. *Policies Regarding Mobile Spectrum Holdings and Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, WT Dkt. Nos. 12-268, 12-269, Report & Order, 29 FCC Rcd. 6133, 6135 (2014).

40. *Use of Spectrum Bands Above 24 GHz For Mobile Radio Services*, GN Dkt. No. 14-177, Notice of Inquiry, 29 FCC Rcd. 13020 (2014); *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, GN Dkt. No. 12-354, Report & Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd. 3959 (2015).

of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."[41] To put it another way, the Commission considers factors, including non-economic considerations, in applying its competition policy that would not ordinarily be within the ambit of antitrust enforcement.[42]

Start with interests of free expression. In the arena of media ownership in particular, the Commission has long followed Congress's command to consider the "diversity of media voices" identified in § 257.[43] For example, the Commission has a "longstanding commitment to advancing a diversity of viewpoints. The Commission noted that it 'has relied on its media ownership rules to ensure that diverse viewpoints and perspectives are available to the American people in the content they receive over the broadcast airwaves.'"[44] Reflecting that goal, the Commission's rules limit the number of television stations a single company may own, as well as restrict joint ownership of a newspaper and a television or radio station (cross-ownership). The precise limits have evolved over time from a more restrictive approach to a more lenient one, but always with these goals in mind.[45]

41. 47 U.S.C. § 257(b) (2013).

42. *Wrecking the Internet to Save It? The FCC's Net Neutrality Rule: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2015) (testimony of Comm'r Terrell McSweeny, Fed. Trade Comm'n), http://judiciary.house.gov/_cache/files/aba25bb0-47f7-47f7-8d78-b13747a91270/mcsweeny-testimony.pdf ("The open Internet raises a host of complicated issues, including public policy issues that go beyond the scope of antitrust and consumer protection enforcement.").

43. 47 U.S.C. § 257(b).

44. *See 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Dkt. No. 14-50 *et al.*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd. 4371, 4480, paras. 246, 284 (2014); *Promoting Diversification of Ownership in the Broadcasting Services*, MB Dkt. No. 07-294, Sixth Further Notice of Proposed Rulemaking, 28 FCC Rcd. 461, 463, para. 4 (2013).

45. Prior to the 1980s, FCC rules limited a single company to owning only one television station in a single market and not more than seven television stations nationwide. *Rules Governing Standard and High Frequency Broadcast Stations*, 6 Fed. Reg. 2282, 2284–85 (1941), *aff'd* United States v. Storer Broad. Co., 351 U.S. 192 (1956). The FCC also imposed a limit in the mid-1970s on a single company owning both a daily newspaper and a full-service television or radio station in a single community. *See, e.g.*, *Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Dkt. No. 18110, Second Report & Order, 50 F.C.C. 2d 1046 (1975). In the 1980s, the FCC loosened these restrictions. Congress then increased the number of stations that a single company could own, subject to the condition that its stations could reach no more than 25% of the combined national viewing audience. *See* Second Supplemental Appropriations Act, Pub. L. No. 98-396, § 304, 98 Stat. 1369 (1984); *Multiple Ownership of AM, FM, and Television Broadcast Stations*, Gen. Dkt. No. 83-1009, Opinion & Order, 100 F.C.C. 2d 74 (1984). The Commission also began permitting waivers of the cross-ownership restriction in certain circumstances. *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, MM Dkt. No. 87-7, Second Report & Order, 4 FCC Rcd. 1741, para. 76 (1988). In the

The importance of free expression and a diversity of views is, itself, an additional form of competition, in what has been famously called "the marketplace of ideas."[46] Free expression is always an important individual right. But the notion of a marketplace of ideas captures two other very important principles. First, that the best antidote to "bad" speech is more speech.[47] We believe in the instructive power of debate and civil discourse. Second, that the value of speech accrues not just to the speaker but also, as in the commercial marketplace itself, to the consumer of speech. In other words, a healthy debate of "clashing"[48] viewpoints not only provides an outlet for expression but also a means by which listeners have access to speech with which to inform their own views, whether they speak themselves or not.[49]

Of particular interest here is *Turner II*;[50] a decision that nicely

Telecommunications Act of 1996, Congress loosened the horizontal limit on television-station ownership, and the Commission subsequently revised its rules to permit a single company to own two television stations in a large market in certain circumstances. Between 2003 and 2008, the Commission further modified a number of its media ownership restrictions, basing its action on policy objectives of diversity, competition, and localism, and relying in part on the increasing diversity of media available to consumers, including via the Internet. *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 2020 of the Telecomm. Act of 1996*, MB Dkt. No. 02-277, Report & Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620, para. 17 (2003). The Commission's post-1996 actions have been the subject of multiple rounds of litigation and controversy. *See, e.g.*, Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004); Prometheus Radio Project v. FCC, 652 F.3d 431 (3d Cir. 2011), *cert. denied,* Media General, Inc. v. FCC, 133 S. Ct. 63 (2012); Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1044 (D.C. Cir. 2002); *see also* JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE 359–64 (2d ed. 2013) (describing the Commission's media ownership rules and proceedings).

46. United States v. Rumely, 345 U.S. 41, 56 (1953) (Douglas, J., concurring) ("Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market"). *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

47. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 461 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.").

48. *See* ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 102 (1941), http://archive.law.fsu.edu/library/admin/pdfdownload/apa1941.pdf (Agencies learn from the "frequently clashing viewpoints of those whom its regulations will affect.").

49. I have noted before the similarity between markets for commerce and for free speech. Jonathan B. Sallet, Technology and Democracy, Remarks at the Twelfth Annual Aspen Institute Conference on Telecommunications Policy (Aug. 11, 1997), http://www.econstrat.org/research/us-economic-policy/223-technology-and-democracy (suggesting that the creation of multiple vehicles by which individuals may discern the truth free from hierarchical restraints connect the creation of the Scientific Revolution, the creation of modern political democracy, the right to free speech, and the movement from mercantilism to capitalism).

50. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180 (1997).

recapitulates the use of economic and non-economic analysis to justify bright-line regulation. The case arose when cable television operators challenged the constitutionality of the Commission's requirement that cable systems carry local broadcast signals, the so-called "must-carry" requirement. The cable operators argued, in essence, that their own First Amendment rights were infringed by the requirement that they carry broadcast content not of their choosing. The majority, per Justice Kennedy, held that the requirement satisfied intermediate First Amendment scrutiny because it advanced the governmental interest in three inter-related goals: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."[51] The Court explained that cable operators exercise "control over most (if not all) of the television programming that is channeled into the subscriber's home [and] can thus silence the voice of competing speakers with a mere flick of the switch."[52]

The Court specifically dismissed a contention that antitrust law would necessarily do a better job at protecting broadcasters from anticompetitive cable conduct.[53] As the Court explained, "Congress could conclude . . . that the considerable expense and delay inherent in antitrust litigation, and the great disparities in wealth and sophistication between the average independent broadcast station and average cable system operator, would make these [antitrust] remedies inadequate substitutes for guaranteed carriage."[54]

In his concurrence, Justice Breyer focused closely on the interests of free expression and concluded that, without regard to the goal of stopping anti-competitive conduct, the must-carry requirement should be upheld because of the strength of its purpose of preserving the "widespread dissemination of information from a multiplicity of sources."[55] He explained that this "basic noneconomic purpose" had long been a foundational element of federal communications policy; a policy that "seeks to facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic

51. *Id.* at 189 (quoting Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 662 (1994)).

52. *Turner II,* 520 U.S. at 197 (quoting *Turner I*, 512 U.S. at 656).

53. *Turner II,* 520 U.S. at 222–23.

54. *Id.* Justice Kennedy's majority opinion went on to explain, "The record suggests independent broadcasters simply are not in a position to engage in complex antitrust litigation, which involves extensive discovery, significant motions practice, appeals and the payment of high legal fees throughout . . . . Those problems would be compounded if instead of proving entitlement under must-carry, the station had to prove facts establishing an antitrust violation." *Id.* at 223.

55. *Id.* at 226.

government presupposes and the First Amendment seeks to achieve."[56] Justice Breyer then turned to the question of whether the must-carry requirement could have been justified in a significantly less restrictive fashion. Concluding that it could not, he concurred in the Court's result. Key to his reasoning was the observation that

> a cable system, physically dependent upon the availability of space along city streets, at present (perhaps less in the future) typically faces little competition, that it therefore constitutes a kind of bottleneck that controls the range of viewer choice (whether or not it uses any consequent economic power for economically predatory purposes).[57]

Justice Breyer's opinion is important, therefore, because it adds an additional basis for the creation of competition policy, namely the use of free expression and diversity of views as a ground, in and of itself, justifying governmental action. And free expression can be linked to other non-economic values in this context. Tim Wu, for example, has argued for recognition of additional non-quantifiable values he views as an "inherent part of the media and communications industry" but that are "not actually trade in goods or services."[58] These are "transactions whose value cannot be easily measured," such as "an extended family that shares pictures over email or Instagram," and that, therefore, may not fit easily within the ambit of antitrust laws.[59] Such transactions sometimes reflect ongoing innovations in goods and services.

When confronting questions of innovation, even within the sphere of economic considerations, the Commission can bring to bear its specific expertise in the operation and societal impact of communications networks. Antitrust law does, of course, consider innovation—perhaps most frequently in the merger context—which is a notable exception to the general tendency of antitrust adjudication to concentrate on historical findings. Section 7 of the Clayton Act expressly requires antitrust

56. *Id.* at 226–27 (citing Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring)).

57. *Turner II,* 520 U.S. at 227–28.

58. *2014 Tim Wu Testimony*, *supra* note 14, at 3.

59. *Id.* Although vigorously disputing any factual basis for such a conclusion in the context of Open Internet rules, FTC Commissioner Joshua Wright has recognized that "[a]n argument that the broadband market ought to be regulated because of externalities not captured in the bargains between broadband providers and content companies may be economically coherent." *Wrecking the Internet to Save It? The FCC's Net Neutrality Rule: Hearing Before the Comm. on the Judiciary H.R.*, 114 Cong. 1 (2015) (statement of Comm'r Joshua D Wright, Fed. Trade Comm'n), http://judiciary.house.gov/_cache/files/00518940-aa9d-4e85-b77a-b7337261f1d3/wright-testimony.pdf. The existence of positive externalities not fully captured by a private market but whose existence justifies governmental action beyond the scope of antitrust is familiar to anyone who has attended a public school or mailed a letter.

agencies to consider whether "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[60] As a general matter, however, "[i]f there is a lack of innovation in an industry, an antitrust authority typically cannot mandate its direction or amount, even if these choices have a large effect on social welfare."[61]

The Commission has, however, looked closely at innovation, and not just that form of innovation labeled "technological advancement" in § 257.[62] Innovation should be understood to include business models and other means of creating consumer surplus, including service and product design.[63] The Commission's *Carterfone*[64] decision is a good example of looking to the future, and deciding that innovation and competition would be best served if non-harmful devices could be connected to a monopoly network. Prior to *Carterfone*, consumers could not buy and connect their own telephones to the telephone network; rather, they were required to rent a phone from AT&T. The Commission, however, rightly understood that market power in telecommunications need not eliminate innovation in the complementary, but distinct, market of telephony equipment.[65] The *Carterfone* decision allowed consumers to attach third-party devices to their phone line, and in many ways paved the way for later innovations like answering machines, fax machines, and computer modems.[66]

The same reasoning supported the Commission's ground-breaking decisions in the *Computer Inquiries*, particularly *Computer II,* in which the Commission separated the underlying market in telecommunications

60. 15 U.S.C. § 18 (2014). As the Supreme Court has explained, "Congress used the words '*may be* substantially to lessen competition', to indicate that its concern was with probabilities, not certainties." Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) (emphasis added by the Court). For a discussion of theories of innovation considered in merger analysis, see Shapiro, *The 2010 Horizontal Merger Guidelines*, *supra* note 5. The creation of antitrust remedies in Sherman Act litigation offers another opportunity for forward-looking analysis.

61. Fiona Scott Morton, *Are a Competition Authority and an Industry Regulator Equivalent?*, 14 COLO. TECH. L.J. 9, 18–19 (2015).

62. 47 U.S.C. § 257 (2013).

63. I once worked at MCI, the long-distance company, which created a new form of telecommunications service with its "Friends and Family" discount structure. The genesis of this, if recollection serves, came in the form of the discovery that software would permit "on-net" discounts to be offered to a "circle" of users. For an example of the advertising of this service, see Retrorocker, *The MCI Friends And Family 40 Percent Discount*, YOUTUBE (July 3, 2013), https://youtu.be/3kCDTvWSO8o. For an example of product design as innovation, see iPhone (Apple 2007-2015). *See, e.g.*, Tim Bajarin, *6 Reasons Apple is So Successful*, TIME (May 7, 2012), http://ti.me/J6GSLt.

64. *Use of the Carterfone Device in Message Toll Service*, Dkt. Nos. 16942, 17073, Decision, 13 F.C.C. 2d 420 (1968) [hereinafter *Carterfone*], *recon. denied*, 14 F.C.C. 2d 571 (1968).

65. *Carterfone, supra* note 64 at 424.

66. *See, e.g.*, David Brodwin, Opinion, *Carterfone Case Showed How Regulations Promote Competition*, U.S. NEWS (June 28, 2012), http://t.usnews.com/bBC96.

services (or "basic" services) from the market for the supply of data services (or "enhanced" services).[67] The resulting competition ended the era "when consumers could choose any color phone they wanted, as long as it was black."[68] In the wake of the privatization of the Internet in 1995 and the first mass-market discovery of the World Wide Web at about the same time,[69] consumers' ability to plug modems into their telephone jacks, to use ISPs of their choice, and to choose among, or reach beyond, walled gardens, provided a vital spark to increased Internet usage. This increased usage led to the creation of consumer demand that was able to be satisfied by new forms of innovation, some of which, as in any competitive market, succeeded[70] and some of which did not.[71]

The history of the Commission's support for an Open Internet offers an additional example of its focus on creating the conditions for innovation. Here the procedural history is more complex, but the durability of the policy demonstrates the same approach to ensuring that conditions in one market—here for the supply of broadband Internet access—do not close off innovation in complementary markets. In 2004, then-Chairman Powell gave an important speech at the University of Colorado Law School in which he explained that "ensuring that consumers can obtain and use the content, applications and devices they

67. Specifically, the Commission in *Computer II* defined "basic" services as "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information," *Second Computer Inquiry*, Dkt. No. 20828, Final Decision, 77 F.C.C. 2d 384, 420 para. 96 (1980) [hereinafter *Computer II*], and "enhanced" services as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information," 47 C.F.R. § 64.702(a) (2014). The *Computer Inquiries* also created the rules that subsequently allowed the modern modem industry to emerge.

68. *See, e.g.*, Jon Sallet, Gen. Counsel, Fed. Commc'ns Comm'n, Remarks at FCBA Year in Review CLE: The Jurisprudence of Innovation, 2 (June 23, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-327844A1.pdf.

69. Susan R. Harris & Elise Gerich, *Retiring the NSFNET Backbone Service: Chronicling the End of an Era*, 10 CONNEXIONS (1996), *reprinted at NSFNET*, MERIT http://merit.edu/research/nsfnet_article.php (last visited Nov. 15, 2015). NSFNET turned the Internet over to the private networks in April, 1995. At about the same time, I gave a presentation on the Internet that was widely successful because, with the aid of special network connections, I was able to demonstrate how to traverse the Internet in order to reach web pages.

70. Yahoo! had received one million hits by the end of 1994 and went public in 1996. *See* David Rapp, *Inventing Yahoo!*, AMERICANHERITAGE.COM (April 12, 2006, 10:10 AM), http://web.archive.org/web/20100716081021/http://www.americanheritage.com/events/articles/web/20060412-yahoo-internet-search-engine-jerry-yang-david-filo-america-online-google-ipo-email.shtml. Other early examples of enhanced services included "dial-a-joke" lines, voicemail providers, and database services like Lexis-Nexis and Westlaw. NUECHTERLEIN & WEISER, *supra* note 45, at 189.

71. *See* Mike Tarsala, *Pets.com Killed by Sock Puppet*, MARKETWATCH (Nov. 8, 2000, 3:32 AM), http://www.marketwatch.com/story/sock-puppet-kills-petscom.

want . . . is critical to unlocking the vast potential of the broadband Internet,"[72] and the next year, the Commission adopted its Internet Policy Statement containing four principles to "preserve and promote the open and interconnected nature of the Internet."[73]

This formulation of core policy principles was followed in short order by specific Commission actions, both retrospective and, more importantly in this context, prospective.[74] In 2005, both the SBC/AT&T and Verizon/MCI mergers were conditioned on future compliance with the Internet Policy Statement[75] and in 2007, the Commission adopted similar openness requirements to govern the 700 MHz C-block auction, spectrum rights which Verizon purchased for $4.7 billion and which provided the technical platform for the nation's first widespread deployment of 4G LTE wireless service.[76] In the wake of its adoption of Open Internet Rules in 2010, the Commission again made compliance with such principles a prerequisite for the future, this time through incorporation of the rules as conditions to approval of the Comcast/NBC Universal transaction.[77] During this period, rapid innovation at the edge has become the norm, sparking explosive growth in the digital app economy, over the top video markets, and mobile e-commerce.[78] In upholding the Commission's authority to create Open Internet rules

72. Michael K. Powell, Chairman, Fed. Commnc'ns Comm'n, *Preserving Internet Freedom: Guiding Principles for the Industry*, Address at the Silicon Flatirons Symposium on The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age, 3 (Feb. 8, 2004), https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

73. *2015 Open Internet Order*, *supra* note 7, at para. 64 (quoting the FCC's 2005 Internet Policy Statement).

74. *See Madison River Commc'ns*, File No. EB-05-IH-0110, Order, 20 FCC Rcd. 4295 (2005); Formal Complaint of Free Press and Public Knowledge to Marlene H. Dortsch, Secretary, Fed. Commc'ns Comm'n (filed Nov. 1, 2007), https://www.publicknowledge.org/pdf/fp_pk_comcast_complaint.pdf (arguing that Comcast was secretly degrading peer-to-peer applications); *Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Pol'y Statement and Does Not Meet an Exception for "Reasonable Network Mgmt.*," WC Dkt. No. 07-52, Memorandum Opinion & Order, 23 FCC Rcd. 13,028 (2008).

75. *SBC Commc'ns, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Dkt. No. 05-65, Memorandum Opinion & Order, 20 FCC Rcd. 18,290 (2005); *Verizon Commc'ns, Inc. and MCI, Inc. Applications for Transfer of Control*, WC Dkt. No. 05-75, Memorandum Opinion & Order, 20 FCC Rcd. 18,433 (2005).

76. *Service Rules for the 698–746, 747–762 and 777–792 MHz Bands*, WT Dkt. Nos. 06-150 et al., Second Report & Order, 22 FCC Rcd. 15,289, 15,364, paras. 203–204 (2007) (open access requirements); Fed. Commc'ns Comm'n, *FCC 700 MHz Band Auction, Auction ID: 73, Attachment A (Winning Bids)* 62–63 (Mar. 19, 2008), https://apps.fcc.gov/edocs_public/attachmatch/DA-08-595A2.pdf.

77. *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, MB Dkt. No. 10-56, Memorandum Opinion & Order, 26 FCC Rcd. 4239, 4275, para. 94 & n.213 (2011).

78. *See 2015 Open Internet Order*, *supra* note 7, at para. 76 (noting online video viewership increasing from 7.2 billion videos viewed per month in January 2007 to 52.4 billion in December 2013, among other signs of a vibrant and innovative edge market).

under Section 706 of the Telecommunications Act (codified at 47 U.S.C. § 1302), the D.C. Circuit expressly stated that traditional market power analysis is not required for the Commission to act.[79]

B. The Administrative Tools of Competition Policy

Closely joined to the substantive analysis used by the Commission are the procedural tools—namely, adjudication and rulemaking—available to effectuate policy. As noted above, antitrust law tends to ask whether past conduct has caused consumer harm. The Commission's traditional use of its public interest (or similar statutory standards) has, however, been to look into the future. This is not surprising. Adjudication, which is the primary form of antitrust decision-making, tends to be a historical inquiry—in torts, for example, the question of who hit whom (and what standard of fault should apply).

The rulemaking ability, in contrast, enhances the Commission's ability to make forward-looking competition policy. Congress has provided the Commission, like other regulatory agencies, with the power to construct rules more akin to legislative standards establishing new norms of conduct than to traditional adjudication. Rulemaking can be understood, in the Supreme Court's words, as "the ability to make new law" in order to "formulate new standards of conduct within the framework" of relevant Congressional legislation.[80] In this manner, an administrative agency's power "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[81]

The ability to make rules includes the ability to un-make them.[82] Indeed, Congress directed the Commission to regularly review its regulations and to repeal or modify any that are "no longer necessary in the public interest."[83] The Commission also receives requests from stakeholders to repeal or modify rules that stakeholders believe no longer serve their purpose. One example is USTelecom's 2014 petition

79. Verizon v. FCC, 740 F.3d 623, 637–42, 647–48 (D.C. Cir. 2014). The court struck down two Open Internet rules on the ground that they impermissibly imposed common carriage rules on a service not classified as common carriage. *Id.* at 650–59.

80. SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 202 (1947).

81. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

82. The D.C. Circuit recently suggested that the process of forbearing from regulation is an informal rulemaking. *See Verizon*, 770 F.3d at 966–67 (suggesting that forbearance is informal rulemaking). *But see Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Dkt. No. 07-267, Report & Order, 24 FCC Rcd. 9543, 9554, para. 20 (2009) (suggesting that forbearance may appear to be a rulemaking, but declining to conclusively decide the issue).

83. 47 U.S.C. § 161 (2013).

requesting that the Commission forbear from enforcing "various outdated regulatory requirements applicable to incumbent local exchange carriers," claiming that the relief requested would "promote the deployment of next-generation high-speed networks . . . expanding infrastructure investment and increasing competition for services that have become central to Americans' daily lives."[84]

Adjudication, of course, has its place at the Commission—and an important one at that. Transaction reviews are a form of informal adjudication. Moreover, in the right circumstances, adjudication can allow the Commission to create competition policy carefully, one step at a time, an approach of particular importance when facts are unclear and circumstances subject to rapid change. As I have suggested before, a jurisprudence of innovation should include use of case-by-case analysis "permitting the Commission to respond to and learn from the rapid pace of change in the communications market."[85] In this respect, the Commission's Open Internet rules may be understood as a means of accommodating both certainty and flexibility. Where the record demonstrates a high likelihood of harm resulting from a particular practice, the Commission has adopted a bright-line rule. Where the evidence is unclear, the Commission has adopted a case-by-case approach. To put it another way, the Commission's rules provide the greatest certainty where analysis is most certain; the Commission's rules rely most on the common-law process of case-by-case analysis where the record does not provide a clear path to an outcome.[86] This differential approach rests on Congress' wise decision to entrust administrative agencies with both rulemaking and adjudicatory authority.[87]

The importance of a process that encourages learning also supports a less traditional means of understanding the potential for market and policy outcomes, namely the conscious use of experiments. As Commissioner Rosenworcel has explained, the term "sandbox" derives from software development; it "provides an opportunity to experiment

84. *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, WC Dkt. No. 14-192, 1–2 (filed Oct. 6, 2014), http://apps.fcc.gov/ecfs/document/view?id=60000978918, granted in part and otherwise left pending by *Connect America Fund*, WC Dkt. Nos. 10-90, 14-58, 14-192, Report & Order, 29 FCC Rcd. 15644 (2014); *see also* AT&T, Inc. v. FCC, No. 15-1038 (D.C. Cir. 2015).

85. Sallet, *supra* note 68.

86. *See infra* Part II.

87. *Chenery II*, 332 U.S. 194, 202 (1947) ("Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.").

within the program, minimizing risk before introducing ideas on a broader scale," and thus provides an important mechanism for "testing big ideas on a small scale . . . to understand the consequences of important policy choices before unleashing them in the world at large."[88] Experiments can be used to test technologies, as when television stations learn to share spectrum or temporary mobile licensing. They can also directly inform the Commission's understanding of competition policies, as with the proposed service experiments to test the impact on consumers and competition of a transition from copper to all-IP networks or the Commission's rural broadband experiments,[89] which can help communities and the Commission understand the economics of rural broadband development.

C. The Application of Regulatory Competition Policy

A further understanding of the Commission's application of competition policy can be seen through the brief examination of three current issues: (1) the 2015 Open Internet Order, (2) the adjudication of preemption petitions concerning municipal broadband, and (3) the developing market for over-the-top ("OTT") video programming (i.e., delivered over a broadband connection).

The Commission's Open Internet Order rests on the foundation established by the D.C. Circuit in the portion of its *Verizon* decision upholding the Commission's determination that its 2010 rules would promote broadband deployment:

- First, the Court described the Internet as a general purpose technology that, like the light bulb, "create[s] a need for infrastructure investment . . . that complement[s] and further drive[s] the development of the initial innovation and ultimately the growth of the economy as a whole."[90] The Court used streaming video as an illustration: higher speed Internet connections stimulate the development of streaming video that, in turn, encourages broadband providers to increase network speeds.
- Second, "[c]ontinued innovation at the edge . . . 'depends on low barriers to innovation and entry by edge providers,' and thus restrictions on edge providers' 'ability to reach end users . . . reduce the rate of innovation.'"[91]
- Third, the Commission adequately explained that "broadband

88. Jessica Rosenworcel, *Sandbox Thinking*, 34 DEMOCRACY: A J. OF IDEAS 10, 10–11 (2014), http://www.democracyjournal.org/pdf/34/sandbox_thinking.pdf.

89. *See id.*

90. Verizon v. FCC, 740 F.3d 623, 644 (D.C. Cir. 2014).

91. *Id.* at 644–645.

providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment."[92] In other words, broadband providers have both the incentive and the ability to interpose themselves between consumers and edge providers.

- Fourth, the Commission need not find "market power" because, as the Court explained "[b]roadband providers' ability to impose restrictions on edge providers does not depend on their benefiting from the sort of market concentration that would enable them to impose substantial price increases on end users."[93] Rather, the exercise of such power "simply depends on end users not being fully responsive to the imposition of such restrictions,"[94] which the D.C. Circuit found to be a reasonable conclusion of the Commission, given the significant "switching costs" that impact consumer decision-making.

The D.C. Circuit's analysis is important precisely because it does not mirror the requirements of traditional antitrust analysis. Not surprisingly, the Commission adopted the D.C. Circuit's analysis in its 2015 Open Internet Order, stressing that its conclusions were not founded on the identification of market power or its abuse.[95] At the same time, the Commission detailed the reasons why consumer behavior could not be expected to discipline the acts of broadband providers, chief among them the limited nature of broadband competition, especially at high speeds, and the switching costs that impact consumer behavior.[96] As in the *Turner II* decision, the Commission confronted last-mile providers whose networks "constitute[] a kind of bottleneck that controls the range of viewer choice (whether or not it uses [or could use] any consequent economic power for economically predatory purposes)."[97]

To confront the ability and incentive of broadband providers to interpose themselves between consumers and edge providers, the

92. *Id.* at 645.

93. *Id.* at 648. The reference to price increases is important because one traditional antitrust means of defining a relevant product market is to ask whether a firm would be able unilaterally to impose a small but significant increase in prices on consumers without having to lower the new, higher prices in the face of competition. U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4.1 (2010).

94. *Verizon*, 740 F.3d at 648.

95. Section 2 of the Sherman Act, which bars monopolization and attempted monopolization, requires a showing both of market power and its abuse. *See* Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 878–79 (2004) ("It is settled law that . . . [Section 2] requires, in addition to the possession of monopoly power in the relevant market, 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'") (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)).

96. *2015 Open Internet Order*, *supra* note 7, paras. 79–84.

97. *Turner II*, 520 U.S. 180, 227–28 (1997) (Breyer, J., concurring).

Commission deployed two different kinds of tools. First, as in the *Turner* cases, the Commission constructed bright-line rules: No blocking, no throttling, and no paid prioritization.[98] Second, to consider the nature of additional last-mile practices or other practices that could threaten an Open Internet, the Commission adopted a case-by-case approach to enforcing its no unreasonable interference or disadvantage standard.[99] Although not directly based on antitrust principles, this duality rests on a concept similar to the evolution of the Sherman Act's rule of reason. Where the Commission concluded that the threat of harm was clearly evident, it constructed a bright line rule.[100] Where the Commission concluded that the state of knowledge was uncertain and could anticipate either positive or negative outcomes from a practice, it announced that it would rely on a case-by-case approach.[101]

The petitions for preemption of state law lodged by the Electric Power Board ("EPB") in Chattanooga, Tennessee, and the City of Wilson, North Carolina, illustrate another facet of the Commission's approach to competition policy, namely the importance of lowering artificial barriers to entry.[102] Both the EPB and Wilson have been authorized by their respective state laws to operate municipal broadband systems and both are now supplying their citizens with broadband, voice, and video service operating at up to one gigabit per second.[103] In Chattanooga, for example, the entry of the EPB not only offered very high-speed Internet connections but also created a dynamic leading the incumbent cable operator to lower its prices and improve its service, thus illustrating a familiar pattern: successful entry by an insurgent leads to competitive outcomes that flow to customers of the incumbent as well as to those of the insurgent.[104]

But, in both instances, restrictions in the state laws prohibited the municipalities from extending the geographic reach of their broadband networks to adjacent areas, including places that had no access to broadband at all. The Commission concluded that these state restrictions

98. *2015 Open Internet Order*, *supra* note 7, paras. 110–32.

99. *Id.* at para. 138.

100. Sallet, *supra* note 68 (describing a common law approach to administrative proceedings).

101. *Id.*

102. The Commission's Order granting the petitions rests on important analysis of preemption doctrines that are, however, beyond the scope of this essay. *See City of Wilson, North Carolina, Petition for Preemption of North Carolina General Statute Sections 160A-340* et seq.*; The Electric Power Board of Chattanooga, Tennessee, Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, WC Dkt. Nos. 14-115, 14-116, Memorandum Opinion & Order, 30 FCC Rcd. 2408, paras. 130–150 (2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-25A1.pdf.

103. *Id.* at paras. 22, 33.

104. *Id*. at paras. 50–51.

frustrated federal policies, including the promotion of competition.[105] As the Commission explained, "the territorial restriction serves only to effectuate state communications policy regarding the competitive landscape for broadband."[106]

One impact of the entry of the municipally owned networks in Chattanooga and Wilson is additional video competition.[107] Another form of video competition comes "over-the-top" from companies like Amazon, Apple, and Netflix, and services such as CBS All Access, DISH's SlingTV, and HBO Now. This is business model innovation. Of course, the Commission does not root for one business model over another. But it does, as it should, look to ensure that its rules and actions facilitate innovation that is occurring in the marketplace. For example, the Commission has been considering in a rulemaking context and in large transaction reviews whether such innovation is being hindered or promoted.[108]

Think for a moment about the critical inputs for a business that wants to use the Internet to deliver linear channels of video programming in competition with traditional cable systems. The over-the-top ("OTT") provider must be able to reach its customers over broadband transmission. That is an issue that was relevant to the Open Internet proceeding. Such a business also must obtain video programming. As a general matter, that is resolved via private negotiations in the marketplace. But Congress, in Title VI of the Communications Act, recognized that cable companies that own programming might refuse to supply that programming to competitors.[109] The theory was that when cable companies own content, they may raise artificial barriers to entry by refusing to let their video competitors have access to the programming they own. In doing so, they could harm satellite providers. Do OTT providers using broadband transmission face the same threat today? Is there value in the Commission considering how it might

105. *Id.* at para. 75.

106. *Id.* at para. 169 (discussing Tennessee law); *see also id.* at para. 174 (finding, with respect to North Carolina law, that its "effect is to constrain a city-owned provider's ability to compete in the broadband market while not similarly constraining any other category of provider").

107. This discussion of video competition and the discussion of transaction reviews below are updated versions of portions of a presentation I delivered in 2014 to the Duke Law Center for Innovation Policy Conference. Jonathan Sallet, General Counsel, Fed. Commc'ns Comm'n, Remarks at Duke Law Center for Innovation Policy Conference (Oct. 17, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-330010A1.pdf.

108. *See, e.g.*, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Dkt. No. 14-261, Notice of Proposed Rulemaking, 29 FCC Rcd. 15,995 (2014); *Applications of AT&T/DIRECTV*, MB Dkt. No. 14-90, Memorandum Opinion & Order, 30 FCC Rcd. 9131 (2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-94A1.pdf.

109. *See, e.g.*, 47 U.S.C. §§ 521–73 (2013).

examine any artificial barriers to the acquisition of licensing rights to cable and broadcast programming by entrants using a new technology—the Internet—just as has occurred in the past with cable, then satellite, then telco video?

The prospect here with this generation of OTT offerings is not just that consumers would have more individual choices. But, as in other technology sectors, they would be able to mix-and-match those choices in order to create individualized packages—think broadband, various slices of video programming, different mobile and fixed devices—of their own making, enabled by the technological ability to stream anywhere, anytime.

Another question is how to foster horizontal competition in the deployment of broadband networks. The Commission continues to hear about the importance of video programming to broadband deployment. Consumers increasingly consume video content over the Internet, which, in turn, drives greater demand for broadband—the demand for video and broadband go hand in glove. Could promoting the availability of video programming for OTT providers help to stimulate broadband deployment by giving new and growing broadband networks the boost in demand that will make that deployment feasible? For example, demand for broadband might increase if consumers knew they could use broadband connections to access desired video services regardless of whether the broadband network provider itself offered video programming services. Municipalities, for example, might find it attractive to offer broadband access without video programming if their customers had ready access to a set of OTT providers.

Thus, the Commission's efforts on the video competition and broadband front illustrate its unique role in promoting innovation in communications markets by lowering artificial barriers to entry. This serves broad regulatory goals of promoting competition and diversity—and technological advancement—in a way that serves the public interest.

II. THE RELATIONSHIP BETWEEN REGULATORY OVERSIGHT AND THE WORK OF THE ANTITRUST AGENCIES

The previous section explained how the Commission applies and implements competition policy. Here, I discuss three important aspects of the relationship between such Commission action and the principles of antitrust, first, by addressing concerns with regulation raised by antitrust scholars, second, by addressing the impact of Commission action on

antitrust in the wake of *Trinko*[110] and *Credit Suisse*,[111] and, third, by discussing how the Commission works with antitrust agencies in joint merger reviews.

A. Traditional Concerns With Regulation

It is fair to say that some antitrust scholars are skeptical of the use of regulatory authority. Traditional concerns include fear that regulatory agencies will use their powers to pick winners, thus burdening the outcomes of a competitive market; that they lack regulatory humility; and that they are subject to regulatory capture that leads them to protect well-entrenched industries at the expense of competitive challenge. In my view, all are important cautions that should be kept in the front of a regulator's mind. The Commission's current policies, however, are designed to avoid each of these pitfalls.

A fundamental doctrine of modern antitrust law is that we are to protect competition, not competitors. This oft-repeated statement, as expounded in the Supreme Court's seminal decision in *Brown Shoe*,[112] represents the profoundly important understanding that harm to a competitor is not necessarily harm to consumers. After all, vigorous competition naturally results in harm to competitors, but, if they survive, competition improves their performance and thus benefits consumers. The touchstone of competition policy, by contrast, is harm to consumers. And that is the Commission's approach in the matters discussed herein. The central premise of the Commission's orders in enacting Open Internet rules, or preempting state laws restricting municipal broadband, or looking towards the encouragement of competition from OTT services or from new horizontal broadband competitors is that regulatory action will promote the interests of consumers. It is true, as explained above, that the scope of consumer harm is not limited to the current version of consumer welfare under the antitrust laws, but the focus on improving the lot of consumers is the same. Even when, as in the Open Internet Order, the Commission protects edge providers, it does so because, as the *Verizon* court recognized, harm to edge providers translates into harm to consumers and suppression of consumer demand.[113] In other words, permission-less innovation yields consumer benefit, including through the traditional mechanisms of lower prices and increased output.

In a similar vein, it is sometimes said that regulators lack the

110. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

111. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007).

112. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

113. This is the virtuous circle in which the interests of edge providers and consumers are aligned.

requisite humility to render pro-competitive judgments (except when they follow traditional antitrust precepts). Regulatory humility is important given that no one can precisely predict the course of competition and innovation and that regulatory intervention holds the potential for imposing deadweight losses on markets.[114] But at the same time, two important corollary principles must be recognized. First, that the absence of regulation is not the absence of a rule, it is simply adoption of a different legal rule. If, without Open Internet regulations, individual consumers and small innovators must wage Brobdingnagian battles against big broadband providers, that outcome is not a law of nature, it is a result of the conscious policy decision to put the greater litigation burden on the smaller parties.[115] Second, regulatory humility that results in unwillingness to act would incur its own costs, not only from the inaction suggested by the previous sentence, but from the unnecessary lack of regulatory guidance.

In fact, the Commission's decisions in both the Open Internet[116] and Municipal Broadband orders demonstrate regulatory humility—if that term is understood to mean studied decision-making. As explained above, the Commission's decision to apply bright-line rules to long-identified threats to the use of last-mile facilities while applying a case-by-case approach elsewhere rests exactly upon notions of regulatory humility.[117] For example, the Commission decided to exercise jurisdiction over interconnection arrangements on the ground that they could conceivably have the same impact as prohibited last-mile practices but eschewed the creation of a regulation to establish standards of behavior for interconnection agreements because:

> [I]t would be premature to adopt prescriptive rules to address any problems that have arisen or may arise. It is also premature to draw policy conclusions concerning new paid Internet traffic exchange arrangements between broadband Internet access service providers and edge providers, CDNs, or backbone services. While the substantial experience the Commission has had over the last decade with "last-mile" conduct gives us the understanding necessary to craft specific rules based on assessments of potential harms, we lack that

114. A good example is the Commission's unfortunate decision in the Hush-A-Phone decision, *Hush-a-Phone Corp. and Harry C. Tuttle (Complainants) v. AT&T Co. (Defendants)*, Dkt. No. 9189, Decision, 20 F.C.C. 391 (adopted Dec. 21, 1955), which the D.C. Circuit, hearing oral argument from my former partner Jack Miller, thankfully reversed. Hush-a-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956).

115. *See Turner II*, 520 U.S. 180, 222–23 (1997) (upholding a bright line must-carry obligation and noting that "great disparities in wealth and sophistication between the average independent broadcast station and average cable system operator, would make these [antitrust] remedies inadequate substitutes for guaranteed carriage").

116. *2015 Open Internet Order*, *supra* note 7.

117. *See id.* at paras. 41–50.

> background in practices addressing Internet traffic exchange. For this reason, we adopt a case-by-case approach, which will provide the Commission with greater experience . . . . Given the constantly evolving market for Internet traffic exchange, we conclude that at this time it would be difficult to predict what new arrangements will arise to serve consumers' and edge providers' needs going forward, as usage patterns, content offerings, and capacity requirements continue to evolve.[118]

To employ a quotation oft-wielded by my colleague Phil Verveer, argument against regulatory action, even when coupled with the cautious approach described above, seems to rest on the assumption, as uttered by Dr. Pangloss in Voltaire's *Candide* that, surely, "this is the best of all possible worlds.'"[119] But, contrary to this suggestion, there is work to be done, including by regulatory agencies.

Finally is the concern about regulatory capture, which occurs, as explained by James Q. Wilson "when most or all of the benefits of a program go to some single, reasonably small interest (an industry, profession, or locality) but most or all of the costs will be borne by a large number of people (for example, all taxpayers)."[120] Alfred Kahn similarly stated that as a regulatory commission is "[r]esponsible for the continued provision and improvement of service, it comes increasingly and understandably to identify the interest of the public with that of the existing companies on whom it must rely to deliver these goods."[121]

Whatever may have been the case in the past, the Internet has fundamentally changed the predicted dynamic. Today, consumers have deep, abiding, and personal connections with their communications networks. If no two snowflakes are alike, is there any less distinctiveness in the combination of device, network, content (both commercial and user-generated) and applications that is crafted by each user of a smartphone? Aided by Congress's wise decision to require administrative agencies to provide the public the opportunity to opine on proposed Commission action, the process of adopting the Open Internet Order yielded almost four million comments, in addition to many multi-page substantive comments. Whether one agrees or disagrees with the Commission's Order, it is difficult to conclude that the Open Internet

118. *Id.* at paras. 202–03.

119. In addition to serving as Chairman Wheeler's Senior Counselor, Phil is a past chief of three Commission bureaus. As a Department of Justice Attorney, he signed the complaint in United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), which led to the breakup of the AT&T regulatory monopoly. The book, of course, is VOLTAIRE, CANDIDE (T. Cuffe trans., Penguin Classics 2009) (1759).

120. JAMES Q. WILSON, BUREAUCRACY 76 (1989).

121. ALFRED E. KAHN, 2 THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 12 (1st ed. 1971).

Order (or the Municipal Broadband Order, for that matter) represents nothing more than "identify[ing] the interest of the public with that of the existing companies on [which the regulatory entity] must rely to deliver" continued provision and improvement of service.[122] The presence of so many clashing views improves the Commission's understanding, bolsters its expertise, and better equips it to play the role of referee where necessary.

B. Operation of the Antitrust Laws in the Context of Regulation

On occasion, a separate legal question is inserted into the discussion, namely whether the Commission's actions will usurp the action of antitrust agencies. They do not.

In the Telecommunications Act of 1996, Congress made plain that the Commission's regulatory judgments are completely compatible with antitrust action by including a savings clause, which provides that, "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."[123] Thus, "[t]he Commission's regulatory and enforcement oversight, including over common carriers, is complementary to vigorous antitrust enforcement."[124] Indeed, given the reasoning of the Commission explained above, it is not surprising that the Open Internet Order goes on to emphasize that "these rules do not address, and are not designed to deal with, the acquisition or maintenance of market power or its abuse, real or potential."[125]

The Supreme Court's decisions in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*[126] and *Credit Suisse Securities (USA) LLC v. Billing*[127] are not to the contrary. In *Trinko,* the plaintiff class alleged, in essence, that violation of Commission regulations opening the local telephony markets to competition would, by itself constitute a violation of Section 2 of the Sherman Act.[128] The Court quickly resolved two questions: First, the antitrust savings clause quoted above preserves antitrust claims and, second, the regulatory obligation imposed on incumbent local telephone companies was not itself a "recognized antitrust claim."[129] The Court then went on to determine that the facts of the case did not justify recognizing a new form of Section 2 claim and, in

122. *Id.*

123. Telecommunications Act of 1996, Pub. L. 104-104, § 601(b)(3), 110 Stat. 56 (1996).

124. *2015 Open Internet Order*, *supra* note 7, at para. 203.

125. *Id.* at para. 11, n.12.

126. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

127. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007).

128. *Trinko*, 540 U.S. at 404–05.

129. *Id.* at 410.

that context, recognized as one factor counseling against recognition of a claim that "[t]he regulatory framework that exists in this case demonstrates how, in certain circumstances, 'regulation significantly diminishes the likelihood of major antitrust harm.'"[130] In *Credit Suisse* where, unlike *Trinko*, the Court examined a regulatory scheme that lacked an express antitrust savings clause, it concluded that applicable securities laws were "clearly incompatible" with antitrust laws such that antitrust claims were implicitly barred.[131]

These are important decisions but they do not contradict the basic harmony of Commission regulation and application of antitrust laws. In fact, *Trinko* stands for just the opposite conclusion—that the Commission can aid competitive outcomes where its "regulation significantly diminishes the likelihood of major antitrust harm,"[132] and indeed that Congress expects it to do so. In *Trinko*, the Supreme Court held that Section 2 monopolization claims under the essential facilities doctrine are generally not available in sectors of the economy (such as communications) that are comprehensively regulated to protect against anti-competitive harm.[133] But this simply spells the limits of antitrust law. In fact, the *Trinko* court takes very seriously the idea that access problems can be remedied by comprehensive regulation and that, in many sectors, Congress has actually mandated agency involvement to do so.[134] This seems particularly salient where the government controls a critical input to the industry, such as spectrum. In this respect, the relevant provisions of the Telecommunications Act represent the conscious decision of Congress to replace the operation of the antitrust decree entered after the AT&T break-up with reliance on Commission regulation as an effective form of antitrust enforcement[135]—while simultaneously safeguarding the ability of the Department of Justice to bring established antitrust claims.

C. Transaction Reviews

An obvious circumstance where the Commission works with antitrust agencies is in the review of transactions. The Communications Act instructs the Commission to review transactions involving licenses and authorizations and to determine whether such a transaction would serve "the public interest, convenience, and necessity."[136] This FCC

130. *Id.* at 412 (quoting Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990)).

131. *Credit Suisse*, 551 U.S. at 279.

132. *Trinko*, 540 U.S. at 412 (quoting *Concord*, 915 F.2d at 25).

133. *Trinko*, 540 U.S. at 410–12.

134. *Id.* at 411–15.

135. *See* REED E. HUNDT, YOU SAY YOU WANT A REVOLUTION: A STORY OF INFORMATION AGE POLITICS (2000).

136. 47 U.S.C. § 310(d) (2013).

standard complements, while being different from and broader than, the antitrust agencies' standard. That said, the Commission analyzes competition much like the Department of Justice and the Federal Trade Commission. Like the antitrust agencies, the Commission considers a transaction's competitive effects and its potential to harm consumers, and the Commission staff bases its recommendations on market-related facts and economic data.[137]

Thus, in assessing the proposed Comcast-Time Warner Cable transaction, the FCC staff "informed the companies of their serious concerns that the merger risks outweighed the benefits to the public interest," and Chairman Wheeler, supporting the staff view, explained that "[t]he proposed merger would have posed an unacceptable risk to competition and innovation especially given the growing importance of high-speed broadband to online video and innovative new services."[138] The full Commission approved the AT&T/DIRECTV transaction, while imposing conditions designed to ensure the benefits of the transaction and guard against risks of competitive harms, perhaps most notably a legally-binding requirement that AT&T deploy fiber-to-the-premise of 12.5 million customer locations.[139]

In judging transactions, including the recent reviews of the proposed Comcast-Time Warner Cable and the AT&T/DIRECTV transactions, the Commission takes care to move in close cooperation with antitrust agencies. At the close of the Comcast review, for example, Renata Hesse, Acting Assistant Attorney General of the Department of Justice's Antitrust Division, emphasized that "[t]he collective expertise of the career staff at both agencies enabled us to analyze the complex issues . . . and to deliver a consistent message regarding the impact of the transaction on competition and the broader public interest."[140]

Indeed, it was the Commission's public interest standard that supported the imposition of pro-competitive conditions in the AT&T/DIRECTV transaction; another example of the ability of the Commission to address potential anticompetitive harms that may have been outside the reach of the Department of Justice.[141]

137. *See id.*

138. Press Release, Statement From FCC Chairman Tom Wheeler on the Comcast-Time Warner Cable Merger (Apr. 24, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-333175A1.pdf. The Applicants withdrew their request that the Commission approve the transaction. *Id.*

139. *See Applications of AT&T/DIRECTV*, MB Dkt. No. 14-90, Memorandum Opinion & Order, 30 FCC Rcd. 9131 (2015).

140. Press Release, Department of Justice, Comcast Corp. Abandons Proposed Acquisition of Time Warner Cable After Justice Dep't and the Fed. Commc'ns Comm'n Informed Parties of Concerns (Apr. 24, 2015), http://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department.

141. *See* Jonathan Baker, *Antitrust Enforcement and Sectoral Regulation: The Competition*

CONCLUSION

The Federal Communications Commission is statutorily empowered to look beyond the boundaries of traditional antitrust law in order to serve the public interest and that expanded approach implicates both the substance of policy (such as through protection for diversity of views) and the use of process (such as through rulemaking proceedings). Antitrust principles, of course, inform the use of the Commission's statutory authority. In the review of transactions and otherwise, the Commission has focused on the enhancement, and not just the protection, of competition, including through additional innovation. The Commission's work with antitrust agencies also forms a critical part of its competition work, as recent transaction reviews demonstrate.

Policy Benefits of Concurrent Enforcement in the Communications Sector, 9 COMPETITION POL. INT'L. 1, 3 (2013).