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**Antitrust Oversight of an Antitrust Dispute:  
An Institutional Perspective on the Net Neutrality Debate**

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## Executive Summary

The term “net neutrality” describes various proposals for regulatory intervention in the Internet marketplace. For example, under one type of proposal embodied in pending legislation, regulators would ban a broadband Internet access provider (such as Comcast or Verizon) from reaching commercial agreements with particular applications and content providers to provide the sophisticated quality-of-service techniques needed to support unusually performance-sensitive applications and content, such as real-time video streaming or multiplayer online videogames. Such proposals will likely be, one way or the other, a principal focus of telecommunications policy for the next decade. They have captured the attention of Congress, where several bills on the topic have been introduced; of legal, economic, and technology scholars across the ideological spectrum; and—of principal interest here—two key federal agencies: the Federal Communications Commission and the Federal Trade Commission.

Most discussions of net neutrality focus on the merits of the debate: on the substantive costs and benefits of government intervention in the broadband market. This paper focuses instead on the comparatively neglected *institutional* dimension of the debate: an inquiry into which federal agencies are best positioned to resolve net neutrality disputes when they arise. As the paper argues, the net neutrality controversy is best understood as a classic antitrust dispute about “vertical leveraging,” and the institutions most likely to appreciate the economic complexities of that dispute are the nation’s specialized antitrust agencies: the Justice Department and the FTC. Because these agencies regulate the economy at large rather than a single industry, they are less vulnerable than the FCC to capture by industry factions; they are less likely to develop industry-specific bureaucracies with incentives to keep themselves relevant through over-regulation; and, because of their firm grounding in antitrust enforcement, they are more likely to resolve competition-oriented disputes dispassionately and on their economic merits. The paper thus argues for reviving in this context the competition-policy model that prevailed for much of the final quarter of the last century: a regime in which antitrust authorities, rather than industry-specific regulators, take the lead in addressing vertical-leveraging claims against providers of telecommunications transmission platforms.

**Antitrust Oversight of an Antitrust Dispute:  
An Institutional Perspective on the Net Neutrality Debate**

Jonathan E. Nuechterlein<sup>1</sup>

Several years after its first appearance in the telecommunications lexicon, the term “net neutrality” remains elusive, in part because its meaning varies with the speaker and the speaker’s agenda. But at the highest level of generality, the term describes two distinct types of proposed regulation of broadband Internet access providers. Under one type of proposal, regulators would draw and enforce a line between acceptable network management practices and unacceptable “blocking” or “degradation” of disfavored Internet applications and content. Under the other, regulators would ban a broadband Internet access provider from reaching commercial agreements with particular applications and content providers to provide the sophisticated performance-enhancement techniques—over and beyond best-efforts Internet access—needed to support unusually performance-sensitive applications and content, such as real-time video streaming or multiplayer online videogames. (In a variation on this second theme, regulators would permit such agreements but subject them to “nondiscrimination” requirements.) These two types of proposals are distinct but complementary: net neutrality proponents typically advocate *both* the anti-blocking rule *and* a ban on (or close regulation of) business-to-business relationships between broadband networks and applications or content providers.

Such proposals will likely be, one way or the other, a principal focus of telecommunications policy for the next decade. They have captured the attention of Congress, where several bills on the topic have been introduced;<sup>2</sup> of Senators Barack Obama and Hillary Clinton, who both advocate strong forms of net neutrality regulation;<sup>3</sup> of legal, economic, and

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<sup>1</sup>Partner, Wilmer Cutler Pickering Hale & Dorr LLP; B.A., Yale College (1986), J.D., Yale Law School (1990). I am grateful to Lynn Charytan, Bob Hahn, Bill Lake, Paul Larkin, and Phil Weiser for their helpful comments on earlier drafts of this paper, to Mary Beth Caswell for her expert research assistance, and to participants in the February 2008 Silicon Flatirons “Digital Broadband Migration” conference in Boulder, Colorado, where this paper was presented. Although I have represented broadband companies on net neutrality issues, the views expressed here are my own.

<sup>2</sup>*See, e.g.*, S. 215, 110th Cong. § 12(a)(4)(C), (5) (2007); H.R. 5273, 109th Cong. § 4(a)(6), (7) (2006); H.R. 5417, 109th Cong. § 3 (2006).

<sup>3</sup>*See, e.g.*, Roy Mark, *Clinton Defends Net Neutrality Position*, eWeek, Nov. 14, 2007 (<http://www.freepress.net/news/28178>) (“Sen. Hillary Clinton’s campaign said Nov. 15 her long silence on network neutrality should not be interpreted as waning support for the idea of mandating that broadband providers treat all network use in a nondiscriminatory manner. . . . ‘Hillary Clinton has been and continues to be a strong supporter of net neutrality,’ Jin Chon, a spokesperson for the Clinton campaign, told eWEEK. . . . Clinton’s silence was the subject of a Nov. 15 teleconference involving several top-ranking Obama campaign officials. The conference came the day after Obama told a large crowd at Google’s California headquarters, ‘I will take a backseat to no one in my

technology scholars across the ideological spectrum;<sup>4</sup> and—of principal interest here—two key federal agencies: the Federal Communications Commission and the Federal Trade Commission.

Most discussions of net neutrality focus on the merits of the debate: on the substantive costs and benefits of government intervention in the broadband market. This paper focuses instead on the comparatively neglected *institutional* dimension of the debate: an inquiry into which federal agencies are best positioned to resolve net neutrality disputes when they arise. As I argue below, the net neutrality controversy is best understood as a classic antitrust dispute about “vertical leveraging,” and the institutions most likely to appreciate the economic complexities of that dispute are the nation’s specialized antitrust agencies: the Justice Department and the FTC. Because these agencies regulate the economy at large rather than a single industry, they are less vulnerable than the FCC to capture by industry factions, they are less likely to develop industry-specific bureaucracies with incentives to keep themselves relevant through over-regulation, and, because of their firm grounding in antitrust enforcement, they are more likely to resolve competition-oriented disputes dispassionately and on their economic merits. I would thus revive in this context the competition-policy model that prevailed for much of the final quarter of the last century: a regime in which antitrust authorities, rather than industry-specific regulators, take the lead in addressing vertical-leveraging claims against providers of telecommunications transmission platforms.

This paper is divided into three main parts. Part I gives a brief primer on the contours of the net neutrality dispute and explains why, at bottom, net neutrality proposals could make sense only as claims about the proper application of antitrust-oriented concepts to the broadband marketplace. Part II then addresses the present institutional arrangements for addressing the net

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commitment to network neutrality.”). Senators Clinton and Obama have both cosponsored net neutrality legislation that contains what I describe, in Part I.B below, as the “strong” form of access-tiering restrictions.

<sup>4</sup>For representative treatments, see Philip J. Weiser, *The Next Frontier for Net Neutrality*, 60 Admin. L. Rev. \_\_\_\_ (forthcoming 2008) ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1080672#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1080672#PaperDownload)); *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 Fed. Commun. L.J. 575 (2007); Edward W. Felten, *Nuts and Bolts of Network Neutrality* (July 6, 2006) (<http://itpolicy.princeton.edu/pub/neutrality.pdf>); J. Gregory Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, 2 J. Competition L. & Econ. 349 (2006); Timothy Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. Telecomm. & High Tech. L. 15 (2006); Robert W. Hahn and Scott Wallsten, *The Economics of Net Neutrality*, Economists’ Voice (Apr. 2006) (<http://ssrn.com/abstract=943757>); Robert D. Atkinson and Philip J. Weiser, *A “Third Way” on Network Neutrality*, Information Tech. & Innovation Foundation (May 3, 2006) (<http://www.itif.org/files/netneutrality.pdf>); Benjamin E. Hermalin and Michael L. Katz, *The Economics of Product-Line Restrictions With an Application to the Network Neutrality Debate*, Competition Policy Center (July 28, 2006) (<http://repositories.cdlib.org/iber/cpc/CPC06-059>); Christopher S. Yoo, *Beyond Network Neutrality*, 19 Harv. J. L. & Tech. 1 (2005).

neutrality dispute, why those arrangements are redundant, and why such redundancy is problematic. Parts II.A and II.B discuss the parallel inquiries that the FCC and the FTC have initiated on net neutrality and describes the complex jurisdictional questions those inquiries raise. Part II.C then explains why permitting two peer federal agencies to address net neutrality disputes in parallel would systematically skew broadband policy towards inefficient over-regulation. Among other concerns, each agency would have an effective veto only over the other agency's judgments that intervention is *inappropriate* and not over the other agency's judgments that intervention is *appropriate*. Part II thus concludes that one, not two, federal agencies should be assigned exclusive jurisdiction to resolve net neutrality issues.

Finally, Part III proposes a long-term institutional solution for oversight of the broadband industry. Under the arrangement proposed here, competition issues would be addressed by one of the two antitrust agencies (DoJ or the FTC); consumer-protection issues would be addressed by the FTC's Bureau of Consumer Protection; and the FCC would maintain jurisdiction over residual, non-competition-related issues within its peculiar expertise.

## **I. What People Are Arguing About When They Argue About Net Neutrality**

One of the main challenges for students of the net neutrality debate is the difficulty of pinning down exactly what that debate is *about*. Before addressing that issue, I first review the technological context in which this debate arises.<sup>5</sup>

### **A. A taxonomy of IP networks**

The first step is to define “the Internet,” the central subject of all net neutrality proposals. What we call “the Internet” is not a unitary, centrally managed network, but an interconnected set of many thousands of constituent networks. What joins these networks together into the Internet is that each has voluntarily adopted a common protocol and addressing scheme—the Internet Protocol (“IP”)—that enables its end users to communicate with end users connected to other networks for purposes of exchanging higher-layer applications and content.<sup>6</sup> Most of these

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<sup>5</sup>For a more detailed background, see Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age* 128-46 (2007 ed.).

<sup>6</sup>See Resolution of the Federal Networking Council, Oct. 24, 1995 (quoted in <http://www.isoc.org/internet/history/brief.shtml>) (“‘Internet’ refers to the global information system that—(i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) is able to support communications using the Transmission Control Protocol/Internet

IP networks are privately owned and operated, and—significantly—their IP infrastructure is often used to provide “managed” IP services unrelated to communications with other IP networks over the publicly accessible Internet. For example, a global IP network provider might allocate some capacity on its network for the routing and transmission of Internet traffic but set aside additional capacity on the same network infrastructure for the provision of high-quality videoconferencing over a closed IP network devoted to a multinational corporate customer.

Very roughly speaking, the constituent networks of the Internet fall into three basic categories. First, *Internet backbone networks*—such as AT&T, Level 3, Global Crossing, and SAVVIS—use long-distance fiber-optic cable to connect other, geographically dispersed networks, including the networks of large businesses, Internet access providers, and other backbone providers. Second, although large businesses often contract directly with a backbone network provider, most end users rely on an *access network* to bridge the “last mile” gap between them and an Internet backbone network (which in turn connects them to the rest of the Internet). Today, most residential consumers, and essentially all businesses with more than a few employees, obtain Internet access through a high-speed broadband connection. As discussed below, there is much controversy about how competitive the broadband marketplace is now and is likely to become. That controversy lies at the heart of the net neutrality debate.

Finally, the third category of IP networks that participate in the Internet are so-called *edge networks*. These fall into two subcategories. The first consists of “end user” networks, which range from home WiFi networks to corporate LANs (“local area networks”). The second—of greater relevance here—consists of the networks operated by providers of Internet applications and content. In the commercial Internet’s early years, the stereotypical “edge” provider was an entrepreneur who ran a start-up website from a server in his garage. Today, the most prominent “edge” networks feature enormous “server farms” and caching facilities built by companies as diverse as service-providers Akamai and Level 3, on-line retailers Amazon.com and eBay, and Internet superpower Google.

The largest of these edge networks are sometimes known as *overlay networks* because they resemble Internet backbones in their global reach. They operate by storing (or “caching”) copies of Web content on servers throughout the Internet, close to end users in many different

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Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.”).

locations, and deploying high-speed fiber-optic links connecting those servers to central databases. By circumventing points of traffic congestion on the Internet, these overlay networks give end users faster and more reliable access to a given company's Web content. Although Google and a number of other large Internet companies have built proprietary overlay networks for their own use, many applications and content providers hire third-party providers such as Akamai and Limelight to perform this function. Applications and content providers that pay the substantial costs of this function have long enjoyed a commercial advantage over rivals that do not (or cannot) pay those costs—because, all else held equal, their consumers receive faster and more reliable access to applications and content. As discussed in Section I.B.2 below, the Internet has never been “neutral” among providers in this regard.

## **B. A taxonomy of net neutrality proposals**

Until the late 1990s, almost all residential consumers obtained access to the Internet through dial-up connections over the conventional telephone network. Independent Internet service providers, such as AOL and Earthlink, provided the critical gateway function linking the telephone network with the Internet. Customers would call a telephone number associated with their ISP's facilities (“modem banks”); those calls would be routed through the telephone company's circuit-switched network en route to those ISP facilities; and, at the receiving end, the ISP would provide the “protocol conversion” functions needed for communications between the subscriber's computer and the servers that provide Internet applications and content.<sup>7</sup>

The telephone company was a more or less passive participant in this arrangement. As a common carrier, it routed calls to different ISPs' modem banks in essentially the same manner as it routed calls to anyone else. As a legal matter, moreover, the telephone companies were subject to longstanding FCC rules known as the *Computer Inquiry* requirements. Very roughly speaking, these rules enforced common carrier norms by requiring telephone companies to provide the same transmission capabilities to unaffiliated ISPs (and other information service providers) as they provided to their own information service affiliates.<sup>8</sup>

This technological landscape began to change in the late 1990s as residential consumers began bypassing the circuit-switched telephone network by using the local cable company's

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<sup>7</sup>See Nuechterlein & Weiser, *Digital Crossroads*, *supra* note 5, at 134-35.

<sup>8</sup>See *id.* at 151-55; Robert Cannon, *Where ISPs and Telephone Companies Compete: A Guide to the Computer Inquiries*, 9 *CommLaw Conspectus* 49 (2001).

facilities—and the ISP affiliated with that cable company—for high-speed access to the Internet. And with that technological change came a lively policy debate: should cable operators, like telephone companies, be required to “open” their broadband transmission networks to unaffiliated Internet service providers? This “open access” debate persisted on several fronts until 2005, when, after several years of litigation, the Supreme Court finally upheld the FCC’s conclusion that such regulatory intervention would be both unnecessary (because competition among rival broadband providers would protect consumer interests) and harmful (because excessive regulation would dampen incentives for investing in new broadband facilities for underserved residential communities).<sup>9</sup> Meanwhile, telephone companies had begun to offer residential broadband connections themselves (through “digital subscriber line” technology) in competition with the cable companies. In 2005, the FCC followed through on its victory in the *Brand X* case by extending its deregulatory regime to telephone companies—specifically, by eliminating the *Computer Inquiry* requirements to the extent they applied to a telephone company’s provision of broadband Internet access.<sup>10</sup>

By then, the “open access” debate had begun to seem almost antiquated. That debate had focused on the rights of independent ISPs such as AOL and Earthlink. It had become clear by the early 2000s, however, that broadband technology makes such ISPs, if not irrelevant, at least much less central to a user’s Internet experience.<sup>11</sup> In a dial-up world, you paid a monthly subscription fee to the ISP, not to the telephone company that carried your “local” call to that ISP, and you blamed your ISP if your Internet connection was slow. In most cases, you could hardly blame the telephone company for poor performance, because it was treating a dial-up call like any other call and was thus dedicating fixed capacity (a voice-grade circuit) for the duration of an Internet connection. Today, however, you pay monthly fees directly to your broadband provider, and if your broadband connection is fast or slow, you assign credit or blame to that same provider; you are unlikely to know or care which ISP entity is connecting that provider’s local broadband network to the broader Internet. And as Timothy Wu points out, “[c]ompetition

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<sup>9</sup>*National Cable & Telecomm’n Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), *aff’g Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) (“*Cable Broadband Order*”).

<sup>10</sup>Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 44 (2005) (“*Wireline Broadband Order*”), *aff’d*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

<sup>11</sup>See Nuechterlein & Weiser, *Digital Crossroads*, *supra* note 5, at 155, 161-62.

among ISPs”—the goal of open access mandates—“does not necessarily mean that broadband operators will simply retreat to acting as passive carriers in the last mile.”<sup>12</sup>

But when the air goes out of one telecommunications policy dispute, the vacuum is soon filled by another. Here, the regulatory energy that used to fuel the “open access” debate is now spent on a similar but distinct debate: “net neutrality.” Whereas open access proposals would have granted *ISPs* like Earthlink rights of “nondiscriminatory” access to the broadband transmission platform, net neutrality proposals would grant such rights to *applications and content providers* like Joost and BitTorrent. Beyond that generality, the term “net neutrality” means different things to different people, and the parties to this debate can be vague in defining what exactly they are talking about. As former FTC Chairman Timothy Muris recently observed (paraphrasing Phillip Areeda’s famous remark about the “essential facilities” doctrine), “‘net neutrality’ has become an epithet devoid of any analytical content.”<sup>13</sup> Our first task, therefore, is to pin down the content of that term by identifying the major species of net neutrality proposals.

### 1. *The anti-blocking principle*

At the highest level of generality, net neutrality advocates propose two different types of requirements: a ban on “blocking” or “degrading” of disfavored content or applications over an Internet access platform, and a ban on (or at least close regulation of) contractual deals between broadband networks and content or applications providers for the terms of access to that platform.<sup>14</sup> As discussed below, these two types of proposed requirements are analytically distinct, although they are often blurred together.

The first type of requirement—which I will call “anti-blocking” rules—would address efforts by a broadband provider to impede its subscribers’ access to particular Internet content or

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<sup>12</sup>Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. Telecomm. & High Tech. L. 141, 149 (2003).

<sup>13</sup>Statement of Timothy J. Muris, Foundation Professor, The George Mason University School of Law, Before the Workshop on Broadband Connectivity Competition Policy, U.S. Federal Trade Commission, Feb. 28, 2007, at 18; cf. Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1989).

<sup>14</sup>Significantly, net neutrality proposals address the terms on which broadband providers offer *Internet access service* to consumers. Few net neutrality advocates seriously propose that the government disqualify the operator of an IP network from by devoting a portion of its bandwidth to particular applications *other than* connectivity with other IP networks, such as cable television service or secure teleconferencing networks. See Testimony of Timothy Wu before the House Comm. on the Judiciary, Telecom & Antitrust Task Force, at 7 (Apr. 25, 2006) (<http://judiciary.house.gov/media/pdfs/wu042506.pdf>) (asserting that “[t]he best proposals for network neutrality rules . . . leave open legitimate network services that the Bells and Cable operators want to provide, such as offering cable television services and voice services along with a neutral internet offering”). Instead, the net neutrality debate concerns whether, and in what ways, broadband companies may treat different types of data differently in connection with the retail service it provides to consumers in the form of “Internet access.”

applications for reasons that a regulatory authority deems impermissible. In February 2004, FCC Chairman Michael Powell became the first major federal policymaker to address that issue when he “challenge[d] the broadband network industry” to honor several “Internet Freedoms” for consumers, including “access to their choice of legal content,” subject to “reasonable limits . . . placed in service contracts,” and a right “to run applications of their choice,” except where “they exceed service plan limitations or harm the provider’s network.”<sup>15</sup> The next year, after Powell had left the FCC, the Commission followed Powell’s lead by issuing a non-binding *Policy Statement* that, in substance, embraced his “Internet Freedoms.”<sup>16</sup> The *Policy Statement* provides, among other things, that consumers are “entitled to run applications and use services of their choice,” such as VoIP or video, “subject to reasonable network management” and “the needs of law enforcement.”<sup>17</sup> At the time, the only documented violation of these principles had occurred in 2005, when a small rural telephone company named Madison River Communications blocked its subscribers’ access to VoIP services. It was alleged, and the FCC apparently concluded, that Madison River had blocked these services not for any legitimate network-management purpose, but simply to protect the lucrative access charges it earned for handling long-distance calls over the conventional telephone network. Madison River quickly suppressed the ensuing controversy by paying a small fine and pledging to stop this practice.<sup>18</sup>

The FCC stressed in its *Policy Statement* that it was “not adopting rules.” Curiously, though, it did not hesitate to suggest that it would crack down on any violations of these non-rules. And soon after adopting the *Policy Statement*, it forced two of the nation’s largest broadband providers—SBC (now AT&T Inc.) and Verizon—to accept the *Statement’s* principles as binding (though temporary) conditions on the Commission’s approval of their pending mergers with, respectively, AT&T Corp. and MCI.<sup>19</sup> For the ensuing two years, however, the

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<sup>15</sup>Remarks of Michael K. Powell, Preserving Internet Freedom: Guiding Principles for the Industry, at 5, Feb. 8, 2004 ([http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-243556A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf)).

<sup>16</sup>Policy Statement, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14,986, ¶¶ 4–5 & n.15 (2005) (“*FCC Broadband Policy Statement*”).

<sup>17</sup>*Id.*

<sup>18</sup>See Order, *Madison River Communications LLC*, 20 FCC Rcd 4295 (2005). For an analysis of the *Madison River* case and its implications for the broader net neutrality debate, see Sidak, *Consumer-Welfare Approach*, *supra* note 4, at 416-22.

<sup>19</sup>*E.g.*, Mem. Op. and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18,290 (2005). More recently, in connection with approving the AT&T-BellSouth merger, the FCC extracted from the combined company a further commitment not to enter into certain arrangements with Internet content, applications, or service providers for two years. See Mem. Op. and Order, *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, 22 FCC Rcd 5662, Appx. F, at 5814-15 (2007) (“*AT&T-*

debate about whether the FCC should convert its anti-blocking “principles” into industry-wide rules remained quiescent. The major broadband providers claimed that rules were unnecessary because they had no intention of violating the principles in the first place. And few broadband providers expressed any theoretical opposition to the Commission’s antiblocking principles in the abstract, at least to the extent they are applied to conventional cable or wireline broadband networks.<sup>20</sup>

That period of regulatory quiescence ended when, in late 2007, independent tests suggested that Comcast had manipulated Internet packet headers to suppress its customers’ use of BitTorrent, a peer-to-peer file-sharing application.<sup>21</sup> The ensuing controversy vaulted the antiblocking principle once more to the forefront of the FCC’s policy agenda, as the Commission accepted invitations to open inquiries into whether it should enforce the antiblocking principles into binding rules—and, if so, how it should distinguish between “reasonable network management” and the unjustified suppression of disfavored applications.<sup>22</sup>

That distinction is likely to prove elusive, and the Comcast case shows why. No one argues that Comcast or other broadband providers can take *no* steps to ensure adequate network capacity for most subscribers by constraining its subscribers’ use of bandwidth-intensive applications. Indeed, the FCC’s *Policy Statement* conditions a consumer’s right “to run applications and use services of their choice” on a broadband provider’s prerogative to engage in “reasonable network management.”<sup>23</sup> Defining that “reasonable network management” qualifier, however, is no easy task.

All broadband networks contain potential bottlenecks of shared capacity. During peak usage periods, congestion in these bottlenecks can degrade basic Internet access for all subscribers. Such congestion poses an escalating challenge for network engineers, who must

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*BellSouth Merger Order*”). This latter commitment bears a close resemblance to the proposed “access tiering” ban discussed below.

<sup>20</sup>The issue is somewhat more complicated with respect to wireless broadband platforms, given the more extreme scarcity of network bandwidth (*i.e.*, licensed spectrum). See generally Robert W. Hahn, Robert E. Litan, and Hal J. Singer, *The Economics of Wireless Net Neutrality*, AEI-Brookings Joint Center Working Paper No. RP07-10 (Apr. 2007) ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=983111](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=983111)). In this article, I focus on the net neutrality debate as it applies to wired broadband platforms, including cable and wireline platforms.

<sup>21</sup>See, e.g., Jacqui Cheng, *Evidence mounts that Comcast is targeting BitTorrent traffic*, Ars Technica, Oct. 19, 2007 (<http://arstechnica.com/news.ars/post/20071019-evidence-mounts-that-comcast-is-targeting-bittorrent-traffic.html>).

<sup>22</sup>See Public Notice, *Comment Sought on Petition [of Free Press et al.] for Declaratory Ruling Regarding Internet Management Policies*, WC Dkt. No. 07-52 (Jan. 14, 2008); Public Notice, *Comment Sought on Petition [of Vuze, Inc.] for Rulemaking to Establish Rules Governing Network Management Practices by Broadband Network Providers*, WC Dkt. No. 07-52 (Jan. 14, 2008).

<sup>23</sup>FCC *Broadband Policy Statement*, *supra* note 16, at ¶¶ 4-5 & n.15.

cope with the rapidly growing popularity of high-bandwidth Internet applications such as high-definition video-streaming and peer-to-peer video file-sharing while conserving on costly capital investments.<sup>24</sup> Complicating that engineering challenge is an economic peculiarity about the retail market for Internet access. Most Internet access plans today include “all you can eat” connectivity; consumers pay a flat fee for a particular level of bandwidth but do not pay any incremental per-bit price for causing extra data traffic to cross shared network facilities. They pay the same for a 3 Mbps connection whether they use that connection once a day, to download a static webpage, or all day, to download and upload high-definition video files. There are thus no price signals to deter a minority of subscribers from overconsuming network capacity at the expense of the majority.

The question in the FCC’s current proceedings is whether it is “reasonable” for a broadband provider like Comcast to treat the use of certain applications (such as BitTorrent) as a proxy for undue consumption of finite and shared network resources and thus limit the bandwidth consumed by those applications to ensure adequate network capacity for the majority of its subscribers. Net neutrality advocates argue that the government should ban network providers from making such judgments and should force them instead either to increase their capacity network-wide (and presumably pass at least a portion of that cost on to its customer base in the form of higher broadband rates) or to impose “metered pricing” for Internet access—a fixed fee for each quantum of Internet traffic for which a subscriber is responsible. In early 2008, Time Warner became the first major broadband provider to adopt a form of metered pricing by announced that it would offer, on a trial basis, a new tiered pricing scheme under which customers would pay a flat fee for a designated level of Internet traffic per month and usage-sensitive fees for all traffic beyond that level.<sup>25</sup> Time will tell whether this rate structure

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<sup>24</sup>See, e.g., William B. Norton, *Video Internet: The Next Wave of Massive Disruption to the U.S. Peering Ecosystem*, v1.3, at 2 (Equinix 2007); David Vorhaus, *Confronting the Albatross of P2P*, Yankee Group (May 31, 2007); Deloitte Touche Tohmatsu, *Telecommunications Predictions: TMT Trends 2007*, at 6 (2007) ([http://www.deloitte.com/dtt/cda/doc/content/dtt\\_TelecomPredictions011107.pdf](http://www.deloitte.com/dtt/cda/doc/content/dtt_TelecomPredictions011107.pdf)); Yankee Group, *2006 Internet Video Forecast: Broadband Emerges as an Alternative Channel for Video Distribution* 6-7 (Dec. 2006).

<sup>25</sup>See Catherine Holahan, *Time Warner’s Pricing Paradox*, BusinessWeek, Jan. 18, 2008 ([http://www.businessweek.com/technology/content/jan2008/tc20080118\\_598544.htm?chan=top+news\\_top+news+index\\_businessweek+exclusives](http://www.businessweek.com/technology/content/jan2008/tc20080118_598544.htm?chan=top+news_top+news+index_businessweek+exclusives)). Net neutrality advocates responded by expressing serious reservations about any “metered pricing” regime for Internet access. See, e.g., Fred von Lohmann, *Time Warner Puts a Meter on the Internet*, Electronic Freedom Foundation, Jan. 22, 2008 (<http://www.eff.org/deeplinks/2008/01/time-warners-puts-meter-internet>) (expressing concern that metered pricing “could be used as a cover for price increases on existing customers (bad),” and insisting that “the pricing for ‘overages’ should bear some relation to costs”); Marvin Ammori, *Time Warner Goes Back to the Future*, Jan. 25, 2008 (<http://www.savetheinternet.com/blog/2008/01>

will appeal to U.S. consumers—or whether they will continue to expect and prefer the all-you-can-eat fees they have paid for Internet access since the early days of the Internet.

In all events, government intervention in this area is probably just beginning, and will probably involve highly fact-specific inquiries into the case-by-case “reasonableness” of particular network management practices from an engineering perspective. The problem is that regulators are hardly equipped to second-guess, in real time, the decisions of actual network engineers about optimal network design in this esoteric and rapidly changing technological environment. Regulators may thus hesitate to invalidate the engineers’ network-management decisions—except when they believe that those decisions are mere pretexts for anticompetitive behavior. For example, Comcast’s adversaries claim that it suppressed the use of BitTorrent not for any genuine engineering reason, but because Comcast wished to preclude the threat that this file-sharing application poses to Comcast’s underlying video-distribution business, for which Comcast is said to earn supracompetitive profits.<sup>26</sup> I have no basis for either endorsing or rebutting these claims about Comcast’s motives. My point is simply that enforcement proceedings about the propriety of network-management decisions should ultimately boil down to disputes about whether a given broadband provider has market power and is engaged in anticompetitive behavior. Like the “nondiscrimination” rules addressed below, these are classic disputes for the traditional antitrust authorities.

## 2. *Proposals for restrictions on access tiering*

So far, I have addressed net neutrality only from the perspective of the four principles laid out in the FCC’s *Policy Statement*, which focus mainly on the *blocking or degradation* of disfavored applications and content. A theoretically more interesting net neutrality debate concerns proposals to restrict commercial deals concerning *superior* access to a broadband platform for performance-sensitive applications and content. For example, the provider of a high-definition video-streaming service may wish to pay broadband operators to provide various

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/25/back-to-the-future-time-warner-broadband-plan-recalls-aols-walled-garden/) (arguing that metered pricing “raises Net Neutrality issues,” because Time Warner is unlikely “to apply its new high-bandwidth surcharges to its own product,” and “favoring its own content over other channels or programs like BitTorrent would be discriminatory”); Press Release, *Time Warner Metering Exposes America’s Bigger Broadband Problems*, Free Press, Jan. 17, 2008 (quoting policy director Ben Scott: “telling consumers they must choose between blocking and metered pricing is a worrying development”) (<http://www.freepress.net/press/release.php?id=328>).

<sup>26</sup>See, e.g., Pet. For Declaratory Ruling of Free Press, et al., WC Dkt. 07-52, at 24-25 (Nov. 1, 2007) (“Free Press Pet.”).

performance-enhancement techniques (such as packet prioritization) needed to avoid the latency and jitter problems associated with traditional best-efforts Internet connections. Or the provider of an online videogame application might wish to pay broadband operators for the performance-enhancement techniques needed to run graphics-intensive, real-time gaming applications involving the simultaneous participation of game participants across the globe. The policy question is whether the government should prohibit or closely regulate such “access tiering” agreements.

Here one must draw an important distinction. Properly understood, any proposal for regulation of access-tiering arrangements is distinct from, and indeed assumes compliance with, the anti-blocking principle discussed above. The question is *not* whether the government needs to preclude a broadband provider from acting as a “gatekeeper,” blocking all data from passing to end users unless and until it receives a “toll” from each content or applications provider that wishes to send packets over the broadband provider’s pipes. To my knowledge, no significant broadband provider has seriously suggested that it would try to reorient Internet economics this way, and any such provider would probably fail if it tried. Instead, under the much more likely scenario, broadband providers would go on providing at least the same bandwidth as they do now for most Internet traffic, *without* any “toll” charge to applications or content providers. And they would charge a fee only to those providers that *wish* to purchase the special performance enhancements needed to run applications that are unusually sensitive to “jitter” or “latency.”

Various net neutrality advocates have articulated three alternative proposals for restricting such “access-tiering” arrangements. The least plausible of these, a “dumb pipes” proposal, would flatly ban broadband providers from differentiating at all among the various types of traffic traversing the broadband platform. In the words of its popular exponents, this approach would be designed preserve “[t]he fundamental idea on the Internet since its inception . . . that every Web site, every feature, and every service should be treated *exactly the same*.”<sup>27</sup> If taken seriously, this approach would thus preclude a broadband provider from giving any priority to real-time applications that *need* such priority in order to function properly (such as voice and video) over other applications that have no similar need.

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<sup>27</sup>SavetheInternet.com Coalition, *Net Neutrality 101* (<http://www.savetheinternet.com/=101>) (visited Jan. 12, 2008) (emphasis added) (on file with author). In February 2008, shortly after this paper was first delivered, the website replaced the words “exactly the same” with “without discrimination.”

Although the “dumb pipes” proposal suffuses much of the popular rhetoric in favor of net neutrality regulation, no one familiar with the nuances of this debate actually supports it, because it makes no sense in a broadband environment characterized by shared network resources with finite capacity. As Tim Wu observes, “certain classes of applications will never function properly unless bandwidth and quality of service are guaranteed,” and depriving broadband providers of network management tools could thus “interfere with application development and competition.”<sup>28</sup> For example, no one would suggest—in the words of David Farber and Michael Katz—that the government should forbid a broadband provider “to favor traffic from, say, a patient’s heart monitor over traffic delivering a music download.”<sup>29</sup>

This leaves the other two types of proposals for the regulation of access tiering, which I will call, respectively, the “strong” and “weak” forms. The “strong” form would permit broadband providers to give preferential treatment to certain broad classes of traffic, such as video or VoIP, but would ban broadband networks from entering into commercial contracts with applications and content providers and charging them for such performance-enhancing services; instead, broadband providers could impose incremental charges only on their own subscribers. This flat ban on commercial agreements has been a central feature of the best-known net neutrality bills proposed in Congress.<sup>30</sup> It has also become a plank in Senator Barack Obama’s presidential campaign platform: he “supports the basic principle that network providers should not be allowed to charge fees to privilege the content or applications of some web sites and Internet applications over others.”<sup>31</sup>

In contrast, the “weak” form of access-tiering regulation would permit broadband networks to strike business-to-business deals with given applications or content providers for the paid provision of performance enhancements, but subject to kind of “common carrier” rule: any given deal would need to be filed as a sort of “contract tariff,” and the broadband network would be required to offer the same deal on the same contractual terms to *other* willing buyers. This nondiscrimination principle would probably not involve full-blown price regulation, but it would

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<sup>28</sup> Wu, *Network Neutrality, Broadband Discrimination*, *supra* note 12, at 154.

<sup>29</sup>David Farber & Michael Katz, *Hold Off On Net Neutrality*, Wash. Post, Jan. 19, 2007, at A19 (<http://www.washingtonpost.com/wp-dyn/content/article/2007/01/18/AR2007011801508.html>).

<sup>30</sup>*See, e.g.*, S. 215, 110th Cong. § 12(a)(4)(C), (5) (2007); H.R. 5273, 109th Cong. § 4(a)(6), (7) (2006); H.R. 5417, 109th Cong. § 3 (2006).

<sup>31</sup>*Obama '08: Technology* (Policy Statement) (<http://www.barackobama.com/issues/technology/#open-internet>).

very closely track the “nondiscrimination” obligations imposed on ordinary common carriers under Title II of the Communications Act.<sup>32</sup>

Advocates of “nondiscrimination” rules are sometimes unclear about whether they are proposing the “strong” or “weak” version. For example, it has been reported that, at a major conference on the issue, a leading proponent of regulatory intervention first “advocated a strong ban on access tiering in his presentation but, when answering a question from the audience, conceded that he would accept a weak ban on access tiering in which a network operator would be allowed to charge content providers for prioritization under the condition that the network operator did not price discriminate within a category of similar content providers.”<sup>33</sup> Of course, both sides of the debate can be fairly accused of rhetorical imprecision.

### **C. The antitrust underpinnings of the net neutrality debate**

Much has been written for and against proposals for government-imposed net neutrality rules. From a high-level perspective, the main question is whether the purported need for net neutrality rules outweighs the risks inherent in any government intervention in the economy, including the risks of deterred investment and other unintended consequences.

Reduced to its economic essentials, most net neutrality advocacy argues that there is inadequate competition in the market for broadband Internet access and that the government should step in to prevent abuses of the resulting market power. If each American consumer had a choice of ten broadband Internet access providers, there would be no credible basis for such rules, because competition would ensure each provider’s responsiveness to consumer choice.<sup>34</sup>

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<sup>32</sup>See 47 U.S.C. §§ 202, 211; see generally Report & Order, *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880 (1991). For an example of a proposal in this category, see John Windhausen, Jr., *Good Fences Make Bad Broadband: Preserving an Open Internet Through Net Neutrality*, Public Knowledge, at 40-45 (Feb. 6, 2006) (<http://www.publicknowledge.org/pdf/pk-net-neutrality-whitep-20060206.pdf>).

<sup>33</sup>See, e.g., Sidak, *Consumer-Welfare Approach*, *supra* note 4, at 426-27 (describing remarks of Lawrence Lessig).

<sup>34</sup>A few net neutrality advocates have contended that, even if a world of perfect competition, regulatory intervention would still be needed to address the “terminating access monopoly.” As an example of this concern, they cite the Commission’s need to intervene in 2001 to curb the ability of even the smallest local telephone startups to charge supracompetitive “access charges” for the termination of the largest long distance carriers’ traffic. E.g., Comments of Google in FCC WC Dkt. No. 07-52, at 19-20 (June 15, 2007) ([http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519529458](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519529458)) (“Google Net Neutrality Comments”); see also Concurring Statement of Commissioner Jon Leibowitz to FTC Staff Report, *Broadband Connectivity Competition Policy*, at 2-3 (June 27, 2007) (<http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf>); see generally Nuechterlein & Weiser, *Digital Crossroads*, *supra* note 5, at 310-24 (discussing terminating access monopoly). That concern is misconceived. First, this phenomenon does not arise in an unregulated market; it arises only when regulators impose interconnection obligations, authorize providers to file tariffs for termination “services,” and permit those providers to impose legally binding charges under those tariffs. See Seventh Report and Order, *Access*

Instead, the root fear is that the Internet access market is in essence a duopoly dominated by cable and telephone companies; that it will remain so indefinitely; and that each provider has an incentive to abuse its market power in ways that harm the Internet. Net neutrality advocates are particularly concerned about the risk that any given broadband provider, to the extent it vertically integrates broadband transmission with the provision of particular applications (such as voice or video), will leverage its power in the broadband market to discriminate anticompetitively against unaffiliated applications providers.<sup>35</sup> As discussed below, such “vertical leveraging” claims are familiar to antitrust lawyers, and antitrust law and scholarship has developed sophisticated tools for evaluating them.

Before I describe the *economic* components of the net neutrality debate, it is worth pausing to consider efforts to justify net neutrality rules *without relying on* competition-related concerns. As I discuss below, those efforts rest either on a basic misapprehension about the way the Internet operates or on speculative First Amendment concerns that are problematic on the merits and, in any event, could not begin to justify the massive economic regulation that net neutrality advocates propose.

### 1. *Answering the critics of an economic approach to net neutrality analysis*

Some net neutrality advocates would impose net neutrality rules not to avoid any *market failure*, as antitrust practitioners use that term, but to preserve one particular view of the way the Internet should operate. This view holds, in essence, that the Internet should provide as equal an opportunity as possible for any given provider to reach end users effectively. For example, Senator Obama argues that the strong form of the nondiscrimination rule is necessary to avoid “a two-tier Internet in which websites with the best relationships with network providers can get the fastest access to consumers, while all competing websites remain in a slower lane,” and to “ensure that the new competitors [at the edge], especially small or non-profit speakers, have the

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*Charge Reform*, 16 FCC Rcd 9923, ¶ 2 (2001) (“[W]e limit the application of our tariff rules to CLEC access services in order to prevent use of the regulatory process to impose excessive access charges on IXCs and their customers.”). In any event, as noted above, no one is contending that broadband providers could or should impose the equivalent of access charges on applications or content providers in the first place—*i.e.*, fees for terminating ordinary data traffic over a best-efforts broadband connection. *See* Part I.B.2, *supra*.

<sup>35</sup>*See, e.g.*, Free Press Pet., *supra* note 26, at ii (identifying “[t]he paradigmatic fear of network neutrality defenders” as the possibility “that network providers who compete[] (or [seek] to compete) with independent applications [will] secretly degrade those applications in ways prompting consumers to abandon those degraded applications, undermining consumer choice, innovation, and a competitive market”).

same opportunity as incumbents to innovate on the Internet and to reach large audiences.”<sup>36</sup> Similarly, a key Senate sponsor of “strong” Net neutrality legislation, Oregon Senator Ron Wyden, has argued that business-to-business deals concerning access to the broadband platform would have a “chilling effect on small mom and pop businesses that can’t afford the priority lane, leaving these smaller businesses no hope of competing against the Wal-Marts of the world,” and that a ban on such deals would beneficently “allow[] folks to start small and dream big[.]”<sup>37</sup>

This populist vision of the Internet as a massive leveler of economic inequality—as a sort of digital Small Business Administration—is problematic as a matter of both technology and history. The Internet has never been “neutral” among applications and content providers,<sup>38</sup> and net neutrality rules, standing alone, could not make it so anyway. For example, certain applications and content providers have long succeeded precisely because they have built—or have purchased the services of—massive content-delivery networks, which, as noted, circumvent points of congestion on the Internet to bring the privileged providers’ data as close as possible to the physical locations of their end users. These CDNs are designed to, and do in fact, enable applications and content providers to out-compete rival providers that do not make use of such networks. As Akamai, a leading CDN, explains:

Let’s assume someone has ten minutes to spend at your Web site: some are able to access 10+ pages, while some can’t stand the wait and give up after two requests. If page speed were to be increased by as little as five times, these visitors would have the ability to view 50+ pages during the same short session, ensuring a better user experience—critical to your efforts to acquire and retain customers and partners. Increasing page performance reduces the likelihood of bailout, boosts the likelihood of multiple page views and purchases, increases cross-sell conversion opportunities and leaves impressions that are worthy of return visits.<sup>39</sup>

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<sup>36</sup>See <http://www.barackobama.com/issues/technology>.

<sup>37</sup>News Release, *Wyden Moves to Ensure Fairness of Internet Usage with New Net Neutrality Bill*, (Mar. 2, 2006) (<http://wyden.senate.gov/newsroom/record.cfm?id=266467>).

<sup>38</sup>See, e.g., Robert W. Hahn and Robert E. Litan, *The Myth of Network Neutrality and the Threat to Internet Innovation* (2007) ([http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/RP\\_06-33-repost1-24-07.pdf](http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/RP_06-33-repost1-24-07.pdf)); Google Net Neutrality Comments, *supra* note 34, at 4 n.6 (noting that “the Internet today is not an absolutely ‘neutral’ place” in that “the various servers, routers, and content delivery networks that comprise [the Internet] can and do distinguish routinely between various forms of traffic”).

<sup>39</sup>Akamai White Paper, *Why Performance Matters*, at 1 (2002) ([http://www.akamai.com/dl/whitepapers/Akamai\\_Why\\_Performance\\_Matters\\_Whitepaper.pdf](http://www.akamai.com/dl/whitepapers/Akamai_Why_Performance_Matters_Whitepaper.pdf)). Akamai’s website contains an interactive illustration of how much its CDN can improve an applications provider’s performance along specified routes. See <http://www.akamai.com/html/technology/dataviz2.html>.

In other words, those who can afford the services of Akamai or other CDNs—or who, like Google, can make the multi-billion dollar investments needed to build such networks themselves—will have a marked competitive advantage over the “mom and pop” sites and other Internet companies that lack such resources. This does not mean that mom and pop sites cannot *obtain* such resources through the capital markets if their business plans are promising enough to attract the interest of venture capitalists. At least in theory, the genius of the free-market system is that innovators with valuable ideas can obtain the capital they need to knock off larger, more established incumbents. But if your business plan does *not* attract the interest of the capital markets, the Internet will by all means “discriminate” in favor of Wal-Mart and Google and against your on-line retail website or fledgling search engine, because your data will reach end users less quickly and efficiently than theirs. And the Internet will discriminate against you in those circumstances no matter how “neutrally” broadband providers treat the packets flowing across their last-mile networks.

Here is the key point: no one contends that this differential treatment is even a problem, let alone a problem that the government should resolve through “neutrality” mandates. When this is pointed out, net neutrality advocates typically answer that, although CDNs require massive capital investments, the market for CDN services is inherently more competitive than the market for last-mile broadband services. Whether or not that is true, the central point is that this is an empirical argument about market power and the potential for market failures—traditional antitrust concepts; it is not an argument about whether the government should conform the Internet to some utopian vision of an electronic town hall where anyone is guaranteed the right to speak as loudly as anyone else.

That point likewise answers the related argument that net neutrality regulation is needed to preserve values of *free expression* as the Internet increasingly encompasses the mass media. This strain of net neutrality advocacy, which is often quite vague in its articulation, would apparently impose a loose sort of “fairness doctrine” on broadband networks: a mandate to ensure that broadband providers facilitate equal access to the broadband platform by anyone with ideas to share. As we have seen, the government could not ensure equal access unless it started issuing vouchers to all Internet start-ups for subsidized CDN services. Even apart from that fact, moreover, there are two main problems with the “free expression” justification for net neutrality rules.

First, the American marketplace of ideas has prospered for centuries even though the government has rarely given anyone an enforceable right to speak as loudly as anyone else or through exactly the same channels of expression. Indeed, First Amendment jurisprudence may weigh against, rather than for, government intervention in this context. In *Miami Herald Publishing Co. v. Tornillo*,<sup>40</sup> the Supreme Court held that the First Amendment invalidated a state law that required newspapers to give political candidates an opportunity to reply to unfavorable editorials, reasoning that the marketplace of ideas will prosper best if the government does *not* act as a referee of “fair” access to privately owned means of public expression.<sup>41</sup>

Second, and just as important, there is a radical mismatch between the speculative free-expression concerns raised by net neutrality advocates and the ambitiously interventionist “solutions” they would impose today. So far, no one has identified a concrete “problem” to be fixed in the marketplace of ideas. For example, even if Free Press’s complaints about Comcast’s treatment of the BitTorrent P2P technology were valid on the merits, Comcast’s actions still would have been completely content-neutral: Comcast would not have “discriminated” against *viewpoints* at all, much less in ways that could threaten the marketplace of ideas, much less in ways that could justify government intervention to protect that marketplace. If a discernible problem does arise, there will be time enough to contemplate appropriately tailored solutions to it. And even then, such problems, whatever they may be, would be exceedingly unlikely by themselves to support the full-blown scheme of economic regulation proposed by net neutrality advocates.

## 2. *The economic elements of the net neutrality debate*

As noted, the basic premise of net neutrality rules is that cable and telephone companies have formed a “cozy duopoly”; that they have excessive power in the broadband Internet access

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<sup>40</sup>418 U.S. 241 (1974).

<sup>41</sup>The notable exception to this rule involved conventional television and radio broadcasting. In its controversial (and now highly suspect) *Red Lion* decision in 1969, the Supreme Court rejected a First Amendment challenge to the original fairness doctrine: a requirement that broadcasters give equal time to opposing viewpoints. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969). But the Court upheld that rule only because the broadcast spectrum, long considered a public resource, was viewed as so inherently “scarce” that the government *had to* grant limited rights of private access to it in order to ensure genuine public debate. The contrast here is instructive: no one would seriously argue that Internet has any of the “scarcity” properties that underlay the *Red Lion* decision. Any Internet connection allows end users to reach millions of information sources worldwide, not the three or four broadcast television channels available locally when *Red Lion* was decided.

market; and that, if unchecked by the government, they will abuse that power by harming competition in the adjacent markets for applications and content. Opponents of net neutrality rules respond with a number of independent arguments, which I will briefly sketch here. It is not my purpose to take sides on any of these issues; my main objective is simply to underscore the inherently antitrust-oriented character of the net neutrality debate.

*First*, the opponents claim that the retail Internet access market is more competitive and dynamic than net neutrality advocates contend, and that the potential for further intermodal competition keeps all providers in check. The FCC has essentially accepted this claim as the basis for a string of orders since 2002 deregulating broadband service providers.<sup>42</sup> Nonetheless, this claim remains controversial as an empirical matter, given the still-large share of the broadband market occupied by conventional cable and telephone companies.<sup>43</sup> Relatedly, advocates and opponents argue about whether net neutrality regulation would worsen the prospects for additional broadband competition. For example, Chris Yoo argues that, if the root problem is an undersupply of broadband access providers, the proper solution is to maintain deregulatory policies that encourage new entry into the broadband market by allowing each broadband provider to differentiate itself from others.<sup>44</sup> Net neutrality rules, he claims, would stifle such differentiation, deter new entry, and perversely solidify the competitive problem that gave rise to net neutrality proposals in the first place. In contrast, Tim Wu argues that the broadband market will remain a duopoly for the foreseeable future no matter what regulatory steps are taken, and that regulators must therefore focus on preventing the duopolists from harming innovation at the “edge” of the Internet.<sup>45</sup>

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<sup>42</sup>See, e.g., *Wireline Broadband Order*, *supra* note 10; *Cable Broadband Order*, *supra* note 9.

<sup>43</sup>Some opponents of “nondiscrimination” regulation further argue that, in assessing the competitive forces that would keep anticompetitive conduct at bay, one must look not just at competition for end users in the *retail* market, but also at competition for the provision of performance enhancements to applications and content providers. For example, could a broadband provider that observes the basic antilocking principle succeed in harming unaffiliated applications and content providers by withholding performance-enhancing services if *independent CDNs* can help those providers connect just as efficiently with end users? This issue remains largely unexplored.

<sup>44</sup>See, e.g., Christopher Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-to-End Debate*, 3 J. Telecomm. & High Tech. L. 23 (2004); *Tim Wu and Christopher Yoo Debate*, *supra* note 4, at 587-90.

<sup>45</sup>*Tim Wu and Christopher Yoo Debate*, *supra* note 4, at 590-92. In an important twist on this debate, some economists argue that, because of the unique characteristics of the broadband market, even competition between only two rivals may suffice to protect consumer interests as effectively as competition among several rivals protects consumer interests in other markets. They reason that the high fixed costs and negligible marginal costs in the broadband market give providers unusual incentives to keep and recruit as many customers as possible—and thus to accommodate any significant consumer concerns—because each customer represents almost pure profit, in that no costs are avoided if any customer defects to the alternative provider. See generally Timothy J. Tardiff, *Changes in*

*Second*, the opponents of net neutrality rules claim that, even if any given broadband provider faces minimal competition in its geographic service areas, no broadband provider occupies a large enough share of the *national* broadband market to harm competition in the inherently national (and international) markets for content and applications.<sup>46</sup> Net neutrality advocates respond that, although this market characteristic may protect the largest global content or applications providers from anticompetitive conduct by individual broadband companies, it would not necessarily protect smaller innovators at the edge of the Internet.

*Third*, opponents of net neutrality rules argue that, even if a broadband provider faced no competition, and even if it theoretically had the *ability* to harm competition in the content and applications markets, it would still usually have no *incentive* to discriminate against unaffiliated providers of complementary applications and content in ways that would harm consumer welfare. This point is complex and warrants brief elaboration.

Since the emergence of the Chicago School in the 1970s, antitrust law has taken a skeptical view of claims that vertically integrated firms will try to “leverage” their monopoly status in one market to harm competition in adjacent markets.<sup>47</sup> From the antitrust perspective, a broadband platform provider that is free from retail price regulation (as all broadband providers are today) should normally have incentives to deal evenhandedly with independent providers of complementary applications—even if it completely dominates the platform market—because discrimination in the applications market would simply devalue the platform and, as a general matter, would not enable the provider to earn any profits it could not otherwise earn for the underlying platform itself.<sup>48</sup> Where it applies, this principle (known as the “internalization of complementary externalities,” or “ICE”) does *not* hold that platform providers will never favor their own affiliates over independent companies. For example, they may favor their own

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*Industry Structure and Technological Convergence: Implications for Competition Policy and Regulation in Telecommunications*, 4 Int'l Economics & Economic Policy 109 (2007).

<sup>46</sup>Comments of Verizon in FCC WC Dkt No. 07-52, at 50-52 (June 15, 2007) ([http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519529411](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519529411)) (“Verizon Net Neutrality Comments”).

<sup>47</sup>*See, e.g.*, Richard A. Posner, *Antitrust Law* 223-29 (2d ed. 2001); Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 Geo. L.J. 1847, 1885-87 (2006); Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 Yale J. on Reg. 171 (2002); *see generally* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213, 255-83 (1985).

<sup>48</sup>*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, 104 (2003). Under a principle known as “Baxter’s law,” a vertically integrated company that is subject to price caps on its platform services—such as the pre-divestiture Bell System—may well have an incentive to discriminate against rival applications providers in order to recover the monopoly profits that price regulation precludes it from recovering in the platform market. *See id.* at 105-07.

affiliates in order to capture the efficiencies that vertical integration permits<sup>49</sup> or to attract consumers through efficient product differentiation.<sup>50</sup> But the ICE principle (where it applies) *does* hold that platform providers will have no rational incentive to favor their affiliates in ways that distort efficient competition and harm consumers. And it should be common ground that, with rare exceptions, economic regulation should be designed to promote *competition*, in the interests of consumers, rather than individual *competitors*.<sup>51</sup>

The ICE principle is nonetheless subject to a number of important exceptions—contexts in which vertical integration could give firms with market power incentives to discriminate in anticompetitive ways against rivals in the applications market.<sup>52</sup> One of these exceptions arises when a platform provider believes that an applications provider poses a competitive threat to the underlying platform. For example, Microsoft, as a monopoly provider of PC operating systems, may not normally have incentives to discriminate against unaffiliated applications software. But as the Justice Department demonstrated several years ago, Microsoft did have—and may have acted upon—incentives to crush an applications provider (Netscape) that threatened the market position of the Windows platform itself.<sup>53</sup> In the Internet access context, an analogous question arises about whether broadband providers that face inadequate broadband competition might likewise have incentives to thwart applications (such as VoIP and streaming video) that threaten any service traditionally offered by a given broadband provider (voice for telcos and

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<sup>49</sup>For classic expositions of the efficiencies of vertical integration, see Oliver E. Williamson, *The Mechanics of Governance* (1996), and Ronald Coase, *The Firm, The Market, and The Law* (1990).

<sup>50</sup>See *infra* note 56 and accompanying text.

<sup>51</sup>See, e.g., *AT&T BellSouth Merger Order*, *supra* note 19, at ¶ 195 (affirming that Commission’s “statutory duty is to protect efficient competition, not competitors”); see generally *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (antitrust laws are enforced “for the protection of competition not competitors”) (citation omitted).

<sup>52</sup>See Farrell & Weiser, *supra* note 48, at 105-19; see also Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. Telecomm. & High Tech. L. 329 (2007) (arguing for recognition of additional exceptions beyond those acknowledged in existing economic literature). Some net neutrality advocates argue that, whereas “[a] single monopolist may refrain from [anticompetitive] tactics due to the so-called ‘one monopoly rent’ rule,” that rule “becomes less relevant,” and the incentives to discriminate worsen, “[a]s the high-speed ISP market moves from monopoly to competition,” because each provider will have an incentive to stake out “a competitive position in the [platform] market by *differentiating itself*” from its competitors. Google Net Neutrality Comments 16-18 (emphasis added) (citing van Schewick, *supra*). The defect in this argument is that product differentiation is a key benefit of free markets; consumers would be worse off if, for example, the markets for cars, breakfast cereals, and videogame consoles lacked their current diversity. See William J. Baumol & Alan S. Blinder, *Economics: Principles and Policy* 248-52 (8<sup>th</sup> ed. 2000) (discussing consumer benefits of “monopolistic competition”). Any incentive to differentiate one’s platform through preferential treatment of certain applications is thus, standing alone, not an “exception” to the ICE principle, because the resulting differentiation tends to increase, not decrease, consumer welfare. See Hermalin & Katz, *supra* note 4; Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition?*, *supra* note 44, at 61.

<sup>53</sup>See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); Farrell & Weiser, *supra* note 48, at 110-11.

multichannel video service for cable companies).<sup>54</sup> That is one reason why so much scrutiny greeted Madison River's treatment of VoIP services and Comcast's treatment of a peer-to-peer technology used for sharing large video files.<sup>55</sup>

*Finally*, advocates and opponents of net neutrality regulation argue about the costs of regulatory intervention. The opponents first claim that, no matter how these economic questions should be resolved in the abstract, policymakers should adopt a cautious case-by-case approach to the resolution of particular net neutrality complaints and that, if and when market failures arise, policymakers should opt for after-the-fact remedies rather than prophylactic regulations, which grow obsolescent quickly in this dynamic market and inevitably create unintended consequences. Unnecessary or premature intervention, they add, would carry enormous costs: it would suppress investment incentives (why make risky sunk investments in a commodity product?), deprive consumers of needed diversity in Internet platforms, and open up a Pandora's box of unintended regulatory consequences, all without a showing that regulatory intervention is necessary in the first place.<sup>56</sup> Net neutrality advocates assert that these claims of investment disincentives are overstated and that, unless the government acts now, broadband providers may structure their networks in ways that will ultimately harm consumer interests in an "open" Internet and that cannot easily be undone later.<sup>57</sup>

### 3. *Facing up to the essential antitrust character of the net neutrality debate*

No matter how one comes out on these various subdebates within the net neutrality discussion, the following generalization seems valid: Proposals for net neutrality rules could have merit only if (i) the broadband Internet access market is inadequately competitive and will remain so indefinitely; (ii) such market concentration will give incumbent broadband providers both the incentive and the ability to discriminate against specific applications providers; (iii) such discrimination would harm *consumers* and not just particular *providers*; and (iv) any such consumer harm would exceed the costs of regulatory intervention. In short, the net neutrality debate, properly conceived, is fundamentally about core antitrust concepts: about market power,

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<sup>54</sup>See, e.g., Free Press Pet., *supra* note 26, at 24-25.

<sup>55</sup>See *supra* notes 18, 21-26 and accompanying text.

<sup>56</sup>See, e.g., Hermalin & Katz, *supra* note 4; Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition?*, *supra* note 44.

<sup>57</sup>See, e.g., Lawrence Lessig, *The Future of Ideas* 147-76 (2002).

market failures, market definition, and the costs and benefits of government intervention in a rapidly evolving, high-technology market.

That observation underscores the central question of this article: Why shouldn't this constellation of antitrust-oriented disputes be handled by an agency that specializes in applying rigorous antitrust analysis across multiple industries, rather than an agency that has been devoted for 75 years to legacy monopoly regulation of one industry and is subject to infinitely malleable "public interest" mandates? There is of course nothing novel about that question.<sup>58</sup> For much of the final quarter of the twentieth century, competition policy in the United States *was* dominated by a generalist antitrust agency—the Department of Justice, which had persuaded Judge Harold Green that the FCC was incompetent for the task.<sup>59</sup> DoJ not only forced the break-up of AT&T in the early 1980s, but then presided over the implementation of an elaborate, competition-oriented consent decree for the next dozen years.

Of course, Congress dramatically altered that regime when, in the Telecommunications Act of 1996, it abolished the consent decree and gave the FCC a sweeping new mandate to oversee competitive conditions in telecommunications markets. That legislation marginalized not only DoJ's role but the role of antitrust law in general. In its 2004 *Trinko* decision, the Supreme Court limited the availability of antitrust remedies in this industry partly because it found that "the additional benefit to competition provided by antitrust enforcement will tend to be small" when Congress has created "a *regulatory* structure designed to deter and remedy anticompetitive harm."<sup>60</sup> Similarly, in its 2007 *Credit Suisse* decision, the Supreme Court held that the securities laws, together with comprehensive regulation by the Securities and Exchange Commission, implicitly bar application of the antitrust laws to certain types of underwriting practices.<sup>61</sup> Although interpretations vary, these two decisions suggest that, as prescriptive regulation of a field waxes, antitrust enforcement must wane. In effect, the 1996 Act, together with the *Trinko* and *Credit Suisse* cases, has turned the pre-1996 regulatory scheme upside down. Whereas DoJ once displaced the FCC in the field of telecommunications competition, the FCC's current ascendancy has sharply curtailed the role of traditional antitrust enforcement.

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<sup>58</sup>See generally Peter Huber, *Law and Disorder in Cyberspace: Abolish the FCC and Let Common Law Rule the Telecom* (1997); Peter Huber et al., *Federal Telecommunications Law* 402-03 (2d ed. 1999).

<sup>59</sup>See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 168 (D.D.C. 1982).

<sup>60</sup>*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412 (2004) (emphasis added). Of course, that basis for caution in the judicial application of antitrust law would be absent if the FCC were deemed to lack jurisdiction over a given regulatory area.

<sup>61</sup>*Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

We should now revisit the merits of this policy switch. The point here is not so much that Congress made the wrong choice in 1996 when it subordinated antitrust enforcement to prescriptive regulation in 1996, although it arguably did. Instead, my point relates more specifically to a net neutrality debate that was essentially unanticipated in 1996. Substantive antitrust principles already squarely address the “vertical leveraging” concerns underlying net neutrality advocacy. *Whatever* agency confronts that debate will necessarily be applying those antitrust principles one way or another, whether in the context of after-the-fact enforcement actions, prescriptive rulemaking proceedings, or some hybrid of the two, such as the creation of enforcement “safe harbors.” We should keep that point in mind when considering whether to assign the net neutrality inquiry to generalist antitrust enforcement authorities or instead to industry-specific non-antitrust-oriented regulators.

## **II. Avoiding Administrative Redundancy in Oversight of the Broadband Market**

Three federal agencies—the Justice Department, the FCC, and the FTC—are theoretically equipped to address net neutrality disputes, and the FCC and the FTC have already taken steps to assert jurisdiction in this area. But both the FCC and the FTC, and much of the industry itself, appear oblivious to the risk that, by simultaneously exercising such jurisdiction, these two agencies could duplicate each other’s efforts in deeply inefficient ways, and that the ensuing regime would deepen regulatory uncertainty and systematically err on the side of excessive intervention. Let us briefly recount how we arrived at this point, first by examining the FCC’s net neutrality initiatives and then turning to the FTC’s parallel initiatives.

### **A. The FCC’s net neutrality initiatives**

The FCC first explicitly addressed the issue of net neutrality in its *Policy Statement* of 2005. As discussed, the *Policy Statement* adopted several “principles” (not binding rules) exhorting broadband providers to let their customers access the Internet applications and content of their choice, subject to the needs of law enforcement and sound network management. As noted, the FCC has considered, to date, two significant allegations that broadband providers have violated these principles. The first—the *Madison River* matter—actually predated the issuance of the *Policy Statement*. There, a small rural telephone company was accused of blocking the ports used for VoIP services; the FCC opened an enforcement proceeding; and the telephone

company quickly capitulated by settling the matter for a nominal fee.<sup>62</sup> That settlement precluded the FCC from having to explain the source, if any, of its regulatory authority to bring this enforcement action. More recently, the FCC has opened proceedings in response to allegations that Comcast improperly suppressed a type of peer-to-peer file-sharing technology (BitTorrent).<sup>63</sup> As of this writing, those proceedings remain pending.

Both the Madison River and Comcast proceedings involved alleged violations of the anti-blocking principle. In 2007, the FCC separately issued a *Notice of Inquiry* into whether it should impose *nondiscrimination* rules on broadband providers as well. The *Notice* was remarkably brief, given the complexity of the subject matter, and most industry analysts concluded that the Commission issued it only half-heartedly, in response to political pressure, and that it had no interest in resolving the issue before the end of the present administration. Indeed, during the open meeting in which the Republican-led Commission issued the *Notice*, Republican Commissioner Robert McDowell, considered a swing vote on network access issues, had the following telling exchange with Wireline Competition Bureau Chief Thomas Navin:

Commissioner McDowell: “[T]o the best of your knowledge, since the *Madison River* case and the adoption of the FCC’s net neutrality principals, have any complaints, formal or informal, been filed with the Commission under the net neutrality umbrella?”

Mr. Navin: “Not that we are aware. Indeed, I think that is what made writing the NOI so difficult, is the lack of real world problems to base the NOI on.”<sup>64</sup>

McDowell followed up with a written statement expressing his own skepticism that net neutrality advocates had yet demonstrated any market failure warranting government intervention.<sup>65</sup>

One of the great unanswered questions presented by the *Notice* is whether the FCC has existing authority to issue net neutrality rules in general and “nondiscrimination” rules in particular. The reason relates to the Commission’s own decision to remove broadband services from the ambit of its explicit authority to regulate common carriers. In *Brand X*, the Supreme Court upheld the FCC’s determination that broadband Internet access should be characterized as

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<sup>62</sup>See *supra* note 18 and accompanying text.

<sup>63</sup>See *supra* note 21-26 and accompanying text.

<sup>64</sup>Tr. of Open Commission Meeting, Mar. 22, 2007 (<http://www.fcc.gov/realaudio/mt032207.ram>).

<sup>65</sup>Statement of Commissioner Robert McDowell on *Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52 (Mar. 22, 2007) ([http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-31A6.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-31A6.pdf)) (“For those who fear or allege market failure, this NOI gives them an opportunity to present detailed evidence, of which we have none, thus far.”).

an “information service” without a “telecommunications service” component within the Communications Act’s arcane vocabulary.<sup>66</sup> Because a telecommunications provider “shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services,”<sup>67</sup> the upshot of the *Brand X* ruling is that broadband providers fall outside the FCC’s Title II authority to regulate the rates, terms, and conditions of “common carriers.” In a string of recent orders, the FCC has fully embraced that conclusion, reasoning that the broadband access market is dynamic and competitive enough that common-carrier-type (“economic”) regulation would do more harm than good. For example, in its *Wireline Broadband Order* of 2005, the Commission extended the deregulatory policies it had applied to cable modem services in 2002 and concluded that continued application of common carrier regulation to *any* broadband access providers, including traditional telephone companies, would serve no purpose beyond the destruction of healthy investment incentives.<sup>68</sup> On that basis, the Commission categorically exempted broadband providers from the “nondiscrimination” rules it had imposed, in the *Computer Inquiry* proceedings, to govern the dealings of wireline broadband carriers with unaffiliated ISPs.

Because broadband Internet access services fall outside the scope of Title II, the FCC could now regulate them only under its residual authority under Title I. But that authority merely allows the Commission to “perform any and all acts, make such rules and regulation, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”<sup>69</sup> It is unclear whether this provision would support any FCC decision to impose common-carrier-style net neutrality rules. As a general matter, if the FCC wishes to adopt rules that no substantive provision of the Communications Act explicitly authorizes it to adopt, it may not simply assert jurisdiction on the ground that the regulated subject matter involves interstate “communications by wire and radio.”<sup>70</sup> Instead, any exercise of such jurisdiction “must be ‘reasonably ancillary’ to other express provisions” in the Communications Act and “cannot be ‘inconsistent’ with other provisions of the Act.”<sup>71</sup> As the D.C. Circuit explained, “[w]ere an

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<sup>66</sup>545 U.S. 967.

<sup>67</sup>47 U.S.C. § 153(44).

<sup>68</sup>See *Wireline Broadband Order*, 20 FCC Rcd 14853 at ¶¶ 19, 44.

<sup>69</sup>47 U.S.C. § 154(i) (“Section 4(i)”).

<sup>70</sup>47 U.S.C. § 151; see also 47 U.S.C. § 152(a).

<sup>71</sup>*Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (internal quotation marks omitted); see also *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-09 (1979); *American Library Ass’n v. FCC*, 406 F.3d 689, 701 (D.C. Cir. 2005).

agency afforded *carte blanche* under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach.”<sup>72</sup>

In this context, the FCC has concluded that it has authority to impose certain types of *non-economic* regulations on Title I broadband services, including “any consumer protection, network reliability, or national security obligation[s]” that relate to the FCC’s explicit jurisdiction under Title II to protect consumer privacy, ensure network access for the disabled, police “slamming” and fraudulent billing practices, and serve the needs of law enforcement.<sup>73</sup> But it would be much more difficult for the FCC to impose *common carrier* requirements on broadband providers under its interstitial Title I authority after concluding (with the Supreme Court’s approval) that broadband providers do not provide “common carrier” services within the meaning of the Communications Act and should not be treated as though they do.<sup>74</sup> Indeed, the Commission itself has cast doubt on whether it believes Congress authorized it to take that step. In the *Wireline Broadband Order*, it concluded that “th[e] negative impact” that common carrier regulation of broadband services would have on deployment and innovation would be “particularly troubling in view of Congress’ clear and express policy goal of ensuring broadband deployment, and its directive that we remove barriers to that deployment[.]”<sup>75</sup>

In short, the Commission could lawfully impose “nondiscrimination” requirements on broadband providers only if, at a minimum, it first develops a compelling empirical basis for concluding that it has erred in repeatedly concluding that economic regulation of broadband services would disserve Congress’s objectives. Like any reversal of course reversal by an administrative agency, this one would likely receive a heightened degree of judicial scrutiny. The agency’s opponents could also plausibly argue that net neutrality rules are not “reasonably ancillary to” any of the Commission’s explicit statutory responsibilities and that they would therefore “be ancillary to nothing.”<sup>76</sup> Ultimately, however, few meaningful standards govern

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<sup>72</sup>*Motion Picture Ass’n of Am.*, 309 F.3d at 806.

<sup>73</sup>*Wireline Broadband Order*, 20 FCC Rcd 14853 at ¶¶ 109-110.

<sup>74</sup>Ironically, the Supreme Court simultaneously suggested in dicta that Title I may well authorize the Commission to regulate broadband Internet access. See *Brand X*, 545 U.S. at 996 (suggesting that “the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction,” while noting that the Commission “has invited comment on whether it can and should do so”).

<sup>75</sup>*Wireline Broadband Order*, 20 FCC Rcd 14853 at ¶ 44 (referring to Telecommunications Act of 1996, Pub. L. 104-104, Title VII, § 706, 110 Stat. 153 (47 U.S.C. § 157 note)); see also *id.* at ¶¶ 19, 65-73.

<sup>76</sup>*American Library Ass’n*, 406 F.3d at 702; cf. Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 Loy. U. Chi. L.J. 41, 60-61 (2003) (“Unlike previous regulations based on its Title I authority, the FCC’s potential

disputes about the scope of the FCC’s Title I “ancillary” jurisdiction. The only sure way to know whether an FCC assertion of such jurisdiction is valid is to await the outcome of whatever judicial challenge is brought to it.

## **B. The FTC’s net neutrality initiatives**

In June 2007, the FTC concluded a much publicized year-long inquiry into net neutrality issues by adopting a “Staff Report” on its findings.<sup>77</sup> The Report canvassed the competing views and concluded that the Commission would adopt an essentially deregulatory wait-and-see approach. The Report found that the broadband Internet access industry is “young and dynamic” and is “moving in the direction of more, not less, competition, including fast growth [and] declining prices for higher-quality service.”<sup>78</sup> The FTC further explained that “we are unaware of any significant market failure or demonstrated consumer harm from conduct by broadband providers.”<sup>79</sup> And it warned that “[p]olicy makers should be wary of enacting regulation solely to prevent prospective harm to consumer welfare,” both because there is no demonstrated need for such regulation and because “[i]ndustry-wide regulatory schemes—particularly those imposing general, one-size-fits-all restraints on business conduct—may well have adverse effects on consumer welfare.”<sup>80</sup> Nonetheless, the FTC added that it would “continue to devote substantial resources to maintaining competition and protecting consumers in the area of broadband Internet access” and would “continue to enforce the antitrust and consumer protection laws in evaluating conduct and business arrangements involving Internet access” should any market failures arise.<sup>81</sup>

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regulation of access to broadband platforms does not neatly fit as ‘reasonably ancillary’ to the Commission’s traditional statutory responsibilities. . . . [T]he FCC suggests that its general mandate to oversee ‘advanced services’ and pursue their rollout—as opposed to any specific authority over, say, voice telephone service—justifies its oversight of broadband transmission. This argument is both untested and quite novel, so it is unclear whether reviewing courts will accept it.”)

<sup>77</sup>FTC Staff Report, *Broadband Connectivity Competition Policy* (June 27, 2007) (“*FTC Net Neutrality Report*”) (<http://www.ftc.gov/reports/broadband/v070000report.pdf>). One of the FTC’s five members (Commissioner Leibowitz) filed a short statement that was denominated a “concurrency” but seemed skeptical about some of the Report’s key findings. Chairman Majoris and the other three commissioners approved the Report without further comment.

<sup>78</sup>*FTC Net Neutrality Report*, *supra* note 77, at 10-11.

<sup>79</sup>*Id.* at 11.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.* at 12.

Just as significant as the FTC's conclusion on the merits of net neutrality proposals, however, was the agency's assertion of authority to address those proposals in the first place. Formally adopting a position that top FTC officials had espoused before Congress,<sup>82</sup> the FTC claimed—almost in passing—that it had full jurisdiction to regulate broadband providers if and when it ever changes its mind about the balance of policy concerns.<sup>83</sup> This is an important and potentially controversial development, and it is worth exploring the basic contours of the FTC's authority to regulate the telecommunications industry.

Until recently, it was undisputed that the FCC exclusively occupied the field of telecommunications regulation, supplemented only by the antitrust oversight of the Justice Department. The FTC has played little role in the development of this industry because, in 1914, Congress fenced off from the FTC's jurisdiction the substantive subject areas assigned to other regulatory agencies.<sup>84</sup> Here, Section 5 of the Federal Trade Commission Act prohibits the FTC from exercising authority over “common carriers subject to the Acts to regulate commerce,”<sup>85</sup> a category that includes the later-enacted Communications Act of 1934.<sup>86</sup> In the *Net Neutrality Report*, however, the FTC contended that, because *Brand X* holds that broadband Internet access providers are not “common carriers,” this “common carrier exemption” no longer applies to the services those providers offer. That conclusion is not, however, quite as straightforward as it sounds.

As discussed, *Brand X* did uphold the FCC's determination that broadband Internet access is an “information service” with no “telecommunications service” component.<sup>87</sup> And for purposes of *the Communications Act*, a “telecommunications carrier” (defined as a “provider of telecommunications services”) “shall be treated as a common carrier *under this [Act]* only to the extent that it is engaged in providing telecommunications services[.]”<sup>88</sup> It does not inevitably

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<sup>82</sup>See, e.g., Testimony of William E. Kovacic, Commissioner, Federal Trade Comm'n, before the Senate Comm. On the Judiciary on FTC Jurisdiction Over Broadband Internet Access Services (June 14, 2006) ([http://judiciary.senate.gov/print\\_testimony.cfm?id=1937&wit\\_id=5415](http://judiciary.senate.gov/print_testimony.cfm?id=1937&wit_id=5415)).

<sup>83</sup>*FTC Net Neutrality Report*, *supra* note 77, at 38, 43-47.

<sup>84</sup>See generally *id.* at 38-42.

<sup>85</sup>15 U.S.C. § 45(a)(2),

<sup>86</sup>See 15 U.S.C. § 44.

<sup>87</sup>For the key underlying FCC orders on this statutory characterization issue, see Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 17 FCC Rcd 4798, 4821-22 (2002), *aff'd*, *Brand X*, *supra*; *Wireline Broadband Order*, *supra* note 10.

<sup>88</sup>47 U.S.C. § 153(44) (emphasis added). In light of this and similar provisions, the FCC has concluded that “the term ‘telecommunications carrier’ . . . means essentially the same [thing] as common carrier” for purposes of the

follow, however, that broadband providers no longer qualify as “common carriers” for purposes of *the FTC Act*.<sup>89</sup> As two courts of appeals have held, the “common carrier exemption” in the FTC Act is to be construed not by reference to other statutes, but on its own terms, according to its “ordinary sense . . . when Congress . . . create[d] the exemption” in the FTC Act in 1914.<sup>90</sup> And there is in particular “no statutory basis for . . . concluding” that “the correct definition for ‘common carrier’ under the FTC Act is found in the Communications Act.”<sup>91</sup> Thus, whether broadband Internet access providers should be deemed “common carriers” exempt from the FTC’s jurisdiction is a question that *Brand X* itself—and the FCC scheme it upholds—do not automatically resolve. The question turns instead on whether Internet access services exhibit the common law characteristics of “common carriage.” And the Communications Act definition of the term does not necessarily track that common law heritage. To the contrary, the FCC has adopted a specialized definition for the term that, for policy reasons, is narrower than the common law definition in one key respect.

The traditional definition of “common carrier” focuses simply on whether a provider “holds himself out to serve indifferently all potential users.”<sup>92</sup> This traditional definition could have been construed to encompass many providers of “enhanced services” (the forerunners of today’s Internet access services) because those services were in fact often sold on standardized terms to the public at large—as many consumer broadband services are still today. When it addressed the issue in the 1980s, the FCC wished to avoid that outcome for purposes of implementing the Communications Act, because it sought to insulate the fledgling class of enhanced service providers from the compulsory “economic regulation” that Title II of that Act then automatically imposed on all “common carriers.”<sup>93</sup> The FCC thus tweaked the definition of

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Communications Act. *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999) (some internal quotation marks omitted).

<sup>89</sup>See *FTC Net Neutrality Report* 38 (arguing that, although “the FTC’s enforcement authority under the FTC Act does not reach ‘common carriers,’ . . . [a]n entity is a common carrier . . . only with respect to services that it provides on a common carrier basis,” citing 47 U.S.C. § 153(44)).

<sup>90</sup>*FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 58 (2d Cir. 2006); see also *FTC v. Miller*, 549 F.2d 542, 455-56 (7th Cir. 1977).

<sup>91</sup>*Verity Int’l*, 443 F.3d at 58. The FTC’s contrary assumption is reminiscent of the claim, rejected by the D.C. Circuit, that the term “telecommunications carrier” has the same narrow meaning in the Communications Assistance for Law Enforcement Act (CALEA) that it has in the Communications Act, as interpreted in *Brand X*. As the D.C. Circuit held, that argument “falls apart because CALEA and the Telecom Act are different statutes, and *Brand X* was a different case.” *American Council on Educ. v. FCC*, 451 F.3d 226, 232 (D.C. Cir. 2006).

<sup>92</sup>*National Ass’n of Reg. Util. Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (“NARUC”).

<sup>93</sup>See, e.g., *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶ 123 (1980) (“Admittedly, vendors of enhanced services also have the ability, if they so desire, to

“common carrier” a bit to avoid that outcome. It added “[a] second prerequisite to common carrier status . . . with peculiar applicability to the communications field”—namely, whether the provider allows customers to “transmit intelligence of their own design and choosing,”<sup>94</sup> a criterion that, the Commission found, excludes data-processing-based services such as broadband Internet access.<sup>95</sup> When Congress amended the Communications Act in 1996, it essentially codified the FCC’s approach by enacting a distinction between “telecommunications services” (*i.e.*, common carrier services) and “information services” (*i.e.*, enhanced services).<sup>96</sup> For this policy-laden reason, the Communications Act regime treats broadband Internet access as an “information service”—and thus *not* as a “common carrier” service—whether or not the service is offered indiscriminately to the public, and whether or not it would qualify as a “common carrier” service under the traditional definition.

That is reason enough to hesitate before concluding that a carrier falls outside the “common carrier exemption,” and thus inside the FTC’s jurisdiction, simply because it does not qualify as a common carrier under federal telecommunications law. So long as the FCC continues asserting its own authority in this area, moreover, the FTC’s jurisdictional ambitions seem potentially at odds with the animating purpose of the carrier carrier exemption—a “traditional policy of dividing regulatory responsibilities along industry lines,”<sup>97</sup> and of “preventing [the] inter-agency conflict[s]” that would arise if the FTC began regulating industries that are already subject to the comprehensive regulatory authority of specialized agencies such as the FCC.<sup>98</sup> There is obviously some tension between that purpose and the FTC’s conclusion that both it “and the FCC share jurisdiction over broadband Internet access, with each playing an important role in protecting competition and consumers in this area.”<sup>99</sup> Without any clear division of responsibilities among those three agencies, this amorphous and redundant jurisdictional scheme seems like precisely the outcome Congress sought to avoid. Of course, such redundancy concerns would be allayed to the extent that, for the reasons discussed

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provide these services on an indiscriminate basis. Presumably, some do. But this is not a sufficient basis for imposing the burdens that go with common carrier status.”). The FCC would not face the same conundrum today, because in 1996 Act, Congress enabled the Commission to “forbear” from legacy requirements that no longer make sense. *See* 47 U.S.C. § 160; *compare MCI Telecomm’ns Corp. v. AT&T*, 512 U.S. 218 (1994).

<sup>94</sup>*NARUC*, 533 F.2d at 609.

<sup>95</sup>*See generally Brand X*, 545 U.S. at 977-79

<sup>96</sup>47 U.S.C. § 153(20), (46).

<sup>97</sup>*Miller*, 549 F.2d at 459.

<sup>98</sup>*Verity Int’l*, 443 F.3d at 57; *see also Miller*, 549 F.2d at 457.

<sup>99</sup>*FTC Net Neutrality Report*, *supra* note 77, at 11.

in Part II.A above, the FCC is found to lack Title I authority to impose economic regulation on broadband providers.

### C. The case against regulatory redundancy

In sum, there are non-trivial legal obstacles to the jurisdiction of either the FCC or the FTC to impose, under current law, common-carrier-style “net neutrality” obligations on broadband Internet access providers. No matter what position one takes about net neutrality on the merits, these open jurisdictional questions are unfortunate, because regulatory uncertainty is toxic for this uniquely dynamic industry.

There are two ways to resolve that uncertainty. One is to let the courts sort it out. The obvious disadvantage of that approach is that the courts have a dismal track record in bringing such disputes to a prompt and efficient resolution.<sup>100</sup> The second option is for Congress to clarify precisely who does, and who does not, have authority to address the antitrust-oriented concerns at the heart of net neutrality proposals. In principle, this is the preferred solution, and there is cause for guarded optimism that Congress will indeed step in. Comprehensive reform of telecommunications law is long overdue, in part because, when Congress passed the Telecommunications Act of 1996, it did not foresee how much broadband Internet access would revolutionize every facet of the telecommunications industry.<sup>101</sup> And the FTC has recently ratcheted up its longstanding efforts to persuade Congress to repeal the common carrier exemption outright, in order to remove any uncertainty about its authority to remedy antitrust and consumer-protection violations in the Internet access market.

My main objective here is to consider *how* Congress should divide up regulatory jurisdiction for net neutrality disputes *if* Congress addresses that issue. Part III below argues for a particular division of jurisdiction that reflects various pragmatic and public choice concerns. But I must first address a threshold question: whether there is any need to divide up jurisdiction in the first place, given the stated intentions of both the FCC and the FTC to maintain a key oversight role in this area. Would it be problematic if, as the FTC proposes, “the federal antitrust agencies, the FTC and the DOJ, and the FCC share jurisdiction over broadband Internet access,

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<sup>100</sup>See Nuechterlein & Weiser, *Digital Crossroads*, *supra* note 5, at 421-22.

<sup>101</sup>*Id.* at 407-11.

with each playing an important role in protecting competition and consumers in this area,”<sup>102</sup> but *without* any clear statutory division of labor? Suppose, for example, that for the foreseeable future, the FTC and the FCC, both purporting to apply basic competition law principles, examine the same industry practices and make independent determinations about which practices require government intervention and which do not. Would that be a problem?

Indeed it would be a problem, and not just for the obvious reason that bureaucratic duplication wastes taxpayer dollars. More fundamentally, such duplication would imperil consumer welfare by systematically increasing both regulatory uncertainty and the risk of regulatory overreaching.

Let’s first address the uncertainty concern. Both the FCC and the FTC are independent, multi-member agencies characterized by political intrigue and chronic delay (although, to be fair to the FTC, the FCC is the more intrigue-ridden and dilatory of the two agencies). Permitting these separate institutions to conduct drawn-out, highly consequential proceedings in parallel, on the same set of issues but with potentially conflicting outcomes, would exacerbate the regulatory indeterminacy that has beset the telecommunications industry for the past ten years. I have previously argued that the federal government should more aggressively preempt state-level telecommunications regulation *not* because states are less likely than the federal government to make good decisions on the merits, but because state regulation adds a new layer of regulatory uncertainty to the industry, making capital investments riskier than they would otherwise be and thereby deterring welfare-maximizing investments on the margin.<sup>103</sup> For similar reasons, one federal agency—not two—should have authority to resolve any given net neutrality dispute.

Second, jurisdictional duplication would almost inevitably distort the federal government’s substantive decisionmaking in favor of inefficient over-regulation. That follows as a matter of both logic and *Realpolitik*. I will address the logical point first.

Any regulatory decision about whether to intervene in a market involves a cost-benefit analysis, in which the regulator weighs the perceived benefits of intervention against the short-term and long-term costs, including the costs of unintended consequences. That weighing of competing values is inherently subjective and will necessarily produce, some percentage of the time, what will turn out later to have been errors of commission and omission: cases where, in

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<sup>102</sup>FTC Net Neutrality Report, *supra* note 77, at 11.

<sup>103</sup>See Jonathan E. Nuechterlein, *Incentives to Speak Honestly About Incentives: The Need for Structural Reform of the Local Competition Debate*, 2 J. Telecomm. & High Tech. L. 399 (2003).

hindsight, an agency intervened in the market but should not have (“false positives”) and cases where it did not intervene but should have (“false negatives”). Public choice theorists might argue about whether a *single* agency, acting alone, is more likely to commit false positives (because it overvalues the short-term benefits of intervention and undervalues the long-term costs) or false negatives (because the major corporate targets of regulation can bring powerful political pressure to bear in favor of their own deregulatory objectives).<sup>104</sup> For immediate purposes, however, I will assume that each agency will produce approximately the same basic quantum of false positives and false negatives.

Now suppose that Congress assigns oversight of a given subject matter to *two* peer federal agencies, neither of which has the explicit power to veto the other’s decisions. The logical result will be a systematic skewing of results in favor of false positives (*i.e.*, overregulation). That is because, even if one assumes a random distribution of false positives and false negatives, each agency can “correct” the other’s false negatives simply by intervening in the market when the other has declined to do so, whereas neither can “correct” the other’s false positives. If one agency concludes that the benefits of regulation outweigh the costs and the other reaches precisely the opposite conclusion, the first, pro-regulation agency will “win” the dispute, because the anti-regulation agency can do nothing to stop the first agency from intervening in the market. This chart illustrates the problem (in an simplified form) by highlighting what happens in the four basic scenarios that can arise when two peer agencies are presented with a binary choice between intervention and reliance on the free market:

	Agency 2: Intervene	Agency 2: Free market
Agency 1: Intervene	Intervene	Intervene
Agency 1: Free market	Intervene	Free market

<sup>104</sup>Compare Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 Harv. L. Rev. 915 (2005), with William A. Niskanen, Jr., *Bureaucracy and Representative Government* 36-42 (1971).

In short, where two peer agencies exercise redundant jurisdiction, the government (writ large) will intervene frequently in the market, even though, in a range of cases, one of the two government decisionmakers will have concluded that intervention is inappropriate and harmful. This problem arises only when agencies are “peers” in the sense that, if one acts, the other cannot stop it. Significantly, the same problem does not arise when Congress assigns concurrent jurisdiction to the FCC and *state* regulators over the same subject matter. In that context, whenever the FCC makes a discrete policy judgment about the relative costs and benefits of regulatory intervention, that judgment binds the states, whether the judgment comes out for or against such intervention. Indeed, that is a staple of federal preemption law. As the Supreme Court decided in *Geier v. American Honda Motor Co.*,<sup>105</sup> a federal agency’s decision not to impose given regulatory obligations on an industry, if that decision reflects a substantive judgment that regulation is inappropriate, can preempt the states from imposing similar obligations even when the federal agency does not expressly announce an intent to preempt.

To this point, I have addressed the concerns about duplicative peer-agency jurisdiction in the abstract. But the nature of the net neutrality debate only intensifies those concerns. As a glance at SavetheInternet.com makes clear, popular advocacy for net neutrality regulation is emotional and Manichean: it portrays the issues as a war of good (edge providers) against evil (access providers), with barely a nod to the complex economic trade-offs at stake. That advocacy is often uncritically accepted by the popular media, and it has surfaced, largely unfiltered by economic nuance, into the official platforms of several presidential campaigns.<sup>106</sup> If it becomes official policy, even the most conscientious regulators will err on the side of market intervention in close cases, because no administration wishes to seem indifferent to the core agendas of its main constituencies.

For that reason, false positives would proliferate even if only one federal agency had responsibility for resolving net neutrality disputes. That is reason enough to limit to one the number of peer agencies with jurisdiction over the dispute, because the bias toward inefficient over-regulation would be even greater if each of two federal agencies were competing to show its greater fidelity to this constituency’s agenda (and, as noted, if each had effective veto power over the other’s false negatives but not false positives). It is also, as I discuss below, a key

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<sup>105</sup>529 U.S. 861 (2000).

<sup>106</sup>*See supra* note 3 and accompanying text.

reason to assign responsibility for this emotionally charged field to a generalist agency that does not focus exclusively on one industry and is thus less subject to capture by interest groups. In all events, the *least* attractive of the institutional options is the one the FCC and the FTC implicitly advocate: a regime in which each agency shares concurrent jurisdiction over the same subject matter.

Conceivably, the two agencies could mitigate these concerns by negotiating an effective division of their respective responsibilities into non-overlapping spheres of responsibility. But there is little basis for optimism on this score. True, the FTC and the Justice Department have long avoided duplication through a series of bilateral agreements that allocate oversight of specified industries to one agency or the other. These “clearance agreements” can be contentious, and they require continuous renegotiation as the boundaries between industries shift with changing economic conditions. But the process usually manages to avoid redundant antitrust oversight by both the FTC and the Justice Department. The FCC, too, has occasionally agreed to let the FTC take exclusive responsibility for certain consumer-protection issues that are technically within both agencies’ jurisdiction but seem more appropriately handled by consumer-protection officials than by telecommunications regulators.<sup>107</sup>

But there is no reason to expect that either the FTC or the FCC would cede jurisdiction to the other agency over core net neutrality disputes. All of the FTC’s public statements suggest an eagerness to play a key role in shaping competition policy for the Internet in response to any perceived market failures. The FCC is similarly disposed to play such a role; indeed, pointing to the legacy of the *Computer Inquiry* rules, the Commission has long viewed itself as the Internet’s nurturer-in-chief.<sup>108</sup> Neither of these agencies would likely abandon the glamour of this field in deference to the other’s greater “expertise.” Any limitation on either agency’s power would have to come from jurisdictional limitations in existing or future legislation.

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<sup>107</sup>See, e.g., Annual Report on the Do-Not-Call Registry, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 20 FCC Rcd 14306 ¶ 15 (2005) (ceding portion of responsibility for “do not call registry” to FTC); Final Rule, *Elimination of Unnecessary Broadcast Regulation*, 50 Fed. Reg. 5583, 5584 ¶ 7 (Mar. 14, 1985) (“The FTC is the agency with expertise in determining whether an advertisement is false or misleading . . . . Our limited resources can more effectively be devoted to other endeavors where our expertise is critical to protecting the public interest.”).

<sup>108</sup>See, e.g., Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11,501, ¶¶ 46-48, 95 (1998).

### **III. Leaving Antitrust Disputes to the Antitrust Authorities**

In Part I, I explained why net neutrality disputes are, at bottom, disputes about the proper application of core antitrust principles in this particularly volatile market setting. In Part II, I explained why only one federal agency, rather than two, should have responsibility for resolving those disputes. The final question now arises: which agency?

#### **A. The advantages of perspective**

There are three major contenders for this role: the FCC and the FTC, which have both already asserted jurisdiction over this area, and the Antitrust Division of the Justice Department, which has traditionally exercised antitrust oversight of the telecommunications industry, oversaw the breakup of the Bell System in 1984, and administered the ensuing consent decree until 1996. The threshold choice is between (i) a *antitrust* agency with general jurisdiction over *multiple economic sectors* (the FTC or DoJ) and (ii) a *non-antitrust* agency with specific jurisdiction over *one economic sector* (the FCC). For several reasons, the first of these institutional options seems preferable to the second, at least as a means of resolving net neutrality disputes.

Today's net neutrality debate is a study in rhetorical ugliness. What it badly needs, if it is to be resolved properly, is a referee inclined towards calm objectivity and a rigorous adherence to economic principle. In other words, it needs analytical perspective, a greater detachment from political forces, and an expertise in addressing the type of complex antitrust issues presented here. And the FCC is less equipped to deliver on those aspirations than either of the two antitrust agencies.<sup>109</sup>

DoJ and the FTC have gained invaluable perspective on competition disputes by exercising, between them, oversight of the entire American economy. That perspective allows them to keep their eyes on dispassionate antitrust analysis and diminishes the significance of lobbyists for particular interest groups. When confronted with a dispute about whether a large firm's business practices are "fair," their first response tends to be: "what type of competition dispute is presented here, and how does antitrust law frame the analysis for such disputes?"

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<sup>109</sup>For other perspectives on this institutional choice, see, e.g., Progress and Freedom Foundation: "Digital Age Communications Act: Report of the Working Group on Institutional Reform," Release 1.0 (Nov. 2006) (<http://www.pff.org/issues-pubs/books/061114dacainstitutionalreform1.0.pdf>); Raymond L. Gifford, Testimony to the U.S. Senate Judiciary Committee on "Reconsidering Our Communications Laws: Ensuring Competition and Innovation" (June 16, 2006) ([http://www.pff.org/issues-pubs/testimony/060616gifford\\_com.pdf](http://www.pff.org/issues-pubs/testimony/060616gifford_com.pdf)); see also Weiser, *Next Frontier*, supra note 4.

Obviously, in answering that question, the FTC and DoJ may be subject to any number of biases, but they are at least asking the right question. In contrast, the FCC tends to focus on other questions. First, because it is responsible only for a single economic sector, it must answer permanently and exclusively to a relatively narrow cast of market actors and to their congressional allies. Thus, when presented with a competition dispute, the FCC tends to focus heavily on a political question: “how can we reach a compromise that will expose us to the least political damage?” The answer to that question is unlikely to correspond closely with what antitrust practitioners would consider the optimal economic answer.

Second, the FCC’s narrow focus on a single industry creates incentives for the agency to keep itself relevant by erring on the side of market intervention in close cases. Consider an analogy. One of the main criticisms of the federal independent counsel law was that a prosecutor hired to investigate just one set of potential defendants has perverse incentives to indict those defendants for marginal offenses that do not genuinely warrant indictment, because otherwise the prosecutor must conclude that his once high-profile job was unimportant and should be eliminated.<sup>110</sup> The advantage of generalist U.S. Attorney’s offices—and the advantage of generalist antitrust enforcement agencies—is that they must and do focus their limited resources on prosecuting only serious offenses that genuinely warrant government action. The FCC lacks that advantage because, like an independent counsel, it has limited jurisdiction confined to a specific set of controversies. Thus, whereas the Justice Department and the FTC must ask, “which competition offenses across the economy threaten the greatest harm to consumer welfare?”, the FCC too often asks: “what do we need to do in order to remain important players in the telecommunications industry?” Here, too, the answer to that question will often diverge from the answer that would best serve long-term consumer welfare.

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<sup>110</sup>As the D.C. Circuit explained in its (ultimately reversed) decision invalidating the law on separation-of-powers grounds:

A person occupying this statutory office has, it seems to us, unique incentives to seek an indictment. Our concern is based on the self-evident proposition that the whole *raison d’être* of the independent counsel is not to administer the criminal law across a wide population, but rather to focus on one individual or group of individuals targeted at the inception of the office. In effect, an entire self-sufficient government agency is created from scratch to investigate and perhaps prosecute a single individual. The need to justify even the expense of an office dedicated solely to one goal must generate a reluctance to decide against indictment or to conclude the investigation absent near certainty that no indictment is possible or that no further leads remain. And inevitably, the success of the office itself, in the public’s eyes, at least, must turn to some extent upon whether indictment and conviction are obtained.

*In re Sealed Case*, 838 F.2d 476, 509-510 (footnote omitted), *rev’d*, *Morrison v. Olson*, 487 U.S. 654 (1988).

This difference in institutional perspectives is reinforced by the distinct statutory standards these agencies are required to apply. When they address competition disputes, DoJ and the FTC are more or less bound by the antitrust laws and by court precedents applying those laws.<sup>111</sup> They cannot generally hold an economic actor liable for aggressive business practices unless they have support from objective principles honed during decades of antitrust enforcement. Antitrust law thus anchors the activities of those agencies to economic principles tested over time and studied in a variety of markets.

In contrast, the FCC is often subject only to the loosest of statutory standards—for example, an obligation to serve “the public interest.” Such “standards,” however, are conceptually empty and permit a wide range of outcomes, depending on the inclinations of whoever is in power. This malleability in the FCC’s governing statute unmoors the Commission from time-tested economic analysis and exacerbates its susceptibility to expedient political compromise. Similarly, whereas the FTC and DoJ are generally bound by antitrust precedent, the FCC is also freer to intervene more extensively in the market than is optimal from a consumer-welfare perspective, confident in the deference a court will extend to the Commission’s construction of its amorphous mandate. It is true that reviewing courts—and particularly the D.C. Circuit—have occasionally invoked antitrust principles in deeming particularly interventionist FCC policies “unreasonable” for purposes of standard judicial review under the Administrative Procedure Act.<sup>112</sup> But this shadow antitrust review is no substitute for explicit adherence to antitrust principles as the governing rules of decision.

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<sup>111</sup>I say “more or less” because, in a recent 3-2 decision, the FTC reasserted a long-dormant authority to issue cease-and-desist orders against business practices the Commission deems “unfair methods of competition” under Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1), even when a given practice “does not infringe either the letter or the spirit of the antitrust laws.” Analysis of Proposed Consent Order to Aid Public Comment, *Negotiated Data Solutions LLC*, File No. 0510094 (FTC 2008) (quoting *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972)). Chairman Deborah Majoris dissented on the grounds that the Commission had previously limited its invocation of this Section 5 authority for the most part “to matters in which respondents took actions short of a fully consummated [Sherman Act] Section 1 violation (but with clear potential to harm competition), such as invitations to collude”; that this limiting principle conforms to “the scholarly consensus that finds the Sherman and Clayton Acts, as currently interpreted, to be sufficiently encompassing to address nearly all matters that properly warrant competition policy enforcement”; and that grounding Section 5 authority in antitrust doctrine is necessary to accommodate “the insistence of the appellate courts that the Commission’s discretion is bounded and must adhere to limiting principles.” *Id.* (dissenting statement of Chairman Majoris) (citing *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 138-40 (2d Cir. 1984)). Time will tell how broadly the FTC tries to apply this Section 5 authority and whether it will try to apply that authority to standard exclusionary-conduct (and related) claims typically asserted under Section 2 of the Sherman Act.

<sup>112</sup>See, e.g., *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 428 n.4 (D.C. Cir. 2002) (“[Antitrust] scholars have raised very serious questions about the wisdom of the essential facilities doctrine as a justification for judicial mandates of competitor access, and accompanying judicial price setting. But a doctrine that is inadequate for that

Those who support broad FCC jurisdiction might invoke two related but distinct rationales for preferring the FCC as the decisionmaker in this context. The first is the proposition that the net neutrality dispute is so technologically complex that only an agency devoted to it exclusively can have the “expertise” necessary to resolve antitrust disputes correctly. I am skeptical. To begin with, the FCC’s technical experts are not serfs bound to any particular agency; they—and other experts from the outside world—could and would be assigned to whatever agency needs their expertise. It is also implausible in any event to suggest that the net neutrality dispute is somehow more esoteric than any number of other highly technical disputes that are routinely addressed by the “generalist” antitrust agencies, such as the Microsoft antitrust suit litigated by DoJ, which involved the arcane economics of the software industry.<sup>113</sup>

The second reason one might prefer the FCC as the arbiter of net neutrality disputes involves a normative judgment about the soundness of contemporary antitrust law. Specifically, some have argued that antitrust theory is too restrictive, that it permits too many false negatives, and that society will be better off in the long run if the government intervenes more often in the marketplace than modern antitrust principles would permit.<sup>114</sup> This is obviously a disputed claim on the merits.<sup>115</sup> But if the claim were valid, the solution would be to reform antitrust principles themselves, across all industries, not to give particular agencies largely unconstrained authority to reshape particular industries without regard to those principles.

Some perspective is important here. The following chart illustrates the national market share of the largest providers in selected Internet-related markets:<sup>116</sup>

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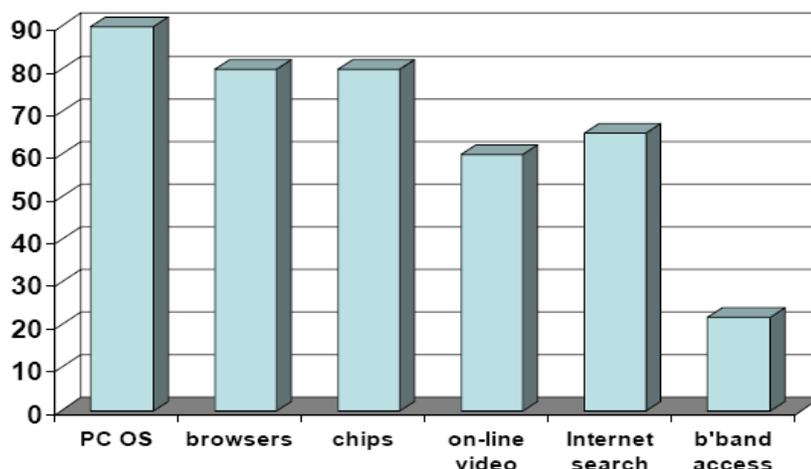
purpose may nonetheless offer useful concepts for agency guidance when Congress has *directed* an agency to provide competitor access in a specific industry.”) (internal citation omitted).

<sup>113</sup>See *supra* note 53 and accompanying text.

<sup>114</sup>See generally Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 Antitrust L.J. 3, 36-51 (2004); Marina Lao, *Reclaiming a Role for Intent Evidence in Monopolization Analysis*, 54 Am. U. L. Rev. 151 (2004); see also Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 Geo. Mason L. Rev. 617 (1999).

<sup>115</sup>See, e.g., Frank H. Easterbrook, *Information and Antitrust*, 2000 U. Chi. Legal. F. 1 (2000).

<sup>116</sup>The sources for the figures in this chart are Top Operating System Market Share Trend, July, 2006 to June 2007 (<http://marketshare.hitslink.com/report.aspx?qprid=5>); Browser Market Share for June, 2007 (<http://marketshare.hitslink.com/report.aspx?qprid=0>); Tom Krazit, *Intel's market share rises on AMD's problems*, CNET News.com, Apr. 24, 2007 ([http://news.com.com/2100-1006\\_3-6178921.html](http://news.com.com/2100-1006_3-6178921.html)); Eric Auchard, *YouTube visits larger than rivals combined: survey*, Reuters UK, June 28, 2007 (<http://uk.reuters.com/article/technologyNews/idUKN2742598120070628?pageNumber=1>); Marshall Kirkpatrick, *Hitwise—Google Continues to Grow Market Share*, ReadWriteWeb, Dec. 11, 2007 ([http://www.readwriteweb.com/archives/hitwise\\_google\\_continues\\_to\\_gr.php](http://www.readwriteweb.com/archives/hitwise_google_continues_to_gr.php)); Eric Bangeman, *Microsoft, others suffer as Google's web search share grows*, Ars Technica (Feb. 28, 2007) (<http://arstechnica.com/news.ars/post/20070228-8946.html>); Verizon Net Neutrality Comments, *supra* note 46, at 52 (citing sources for broadband market shares). The largest broadband provider (AT&T) has only about 22% of the national broadband market because its footprint of local infrastructure extends to only a minority of U.S.



No one suggests that Congress should establish specialized agencies to come up with new competitive principles to govern the PC operating system market (dominated by Microsoft), or the microchip market (dominated by Intel), or the Internet search market (dominated by Google), even though each of those markets is more concentrated than the broadband access market and arguably as integral to the Internet's future. In each of those contexts, there is a general consensus in favor of allowing the antitrust authorities to strike the right balance between allowing free-market forces to operate efficiently and prosecuting anticompetitive conduct that threatens long-term consumer welfare. There is no reason to treat the net neutrality debate differently.

**B. Challenges in the transition to antitrust oversight of net neutrality disputes**

As discussed, an optimal telecommunications policy regime would assign exclusive jurisdiction over net neutrality disputes to federal antitrust authorities. Whether the FTC or the Justice Department's Antitrust Division is better equipped to exercise such oversight is a difficult and complex question. I have no conclusive views on that topic; indeed, I am still perplexed about why the federal government needs to have two antitrust enforcement agencies in the first place. Nonetheless, I will briefly note some of the considerations that would be relevant to this

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households (and because it faces competition within that footprint with cable companies and others). If the graph were adjusted to show regional rather than national market shares, the broadband figure in any given region would obviously be higher, but it would still typically be no greater than 50-60%, similar to or lower than the market shares for the other listed industries.

institutional choice and then conclude with an observation about the need for the FCC's continuing oversight of broadband policy generally, if not of net neutrality disputes specifically.

The FTC and the Antitrust Division have markedly different modes of operation. The Antitrust Division is a pure litigating authority: it can act only by persuading the courts to adopt its substantive positions on antitrust law. In contrast, the FTC can pursue its antitrust agenda either by filing court actions or by prosecuting corporate defendants before the FTC's administrative law judges. In these ALJ proceedings, the Commission walls off its enforcement staff from the chairman and commissioners; the ALJ's ultimate decisions (for or against the enforcement staff) are then subject to full review by the Commission itself, in a process that can consume several years; and the Commission's final decisions are then subject to review by a federal court of appeals, which grants substantial deference to the FTC's factual findings but not to its construction of federal antitrust law.<sup>117</sup>

The Antitrust Division also tends to be more immune from political pressure than the FTC. Like the Solicitor General, the Antitrust Division reports to the Attorney General and enjoys a long tradition of professional autonomy. In contrast, the FTC, like the FCC, is an independent agency that effectively reports to the House and Senate oversight committees rather than the President. And like the FCC, the FTC is a multi-member agency. The multiplicity of commissioners presents a constant potential for log-rolling and intrigue, as various commissioners pursue the support of different political constituencies. This problem is endemic to the structure of multi-member independent agencies,<sup>118</sup> although in practice it afflicts the FTC less than the FCC.

These are reasons to prefer the Antitrust Division over the FTC if one places supreme value on avoiding delay and shifting political influences in the resolution of antitrust disputes. There are nonetheless other factors that may favor entrusting net neutrality disputes to the FTC.

First, although such disputes are antitrust-oriented on the merits, they sometimes involve a consumer protection component as well. For example, some have argued that Comcast's principal error in the BitTorrent affair lay not in its threshold decision to constrain the bandwidth consumed by that technology, but in its failure to give fuller disclosure about that practice. And Comcast's opponents seek to hold Comcast liable not just for violations of fair competition

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<sup>117</sup>*E.g., FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

<sup>118</sup>*See generally* Nuechterlein & Weiser, *Digital Crossroads*, *supra* note 5, at 420.

principles, but also for deceiving its own subscribers about the nature of the Internet access service they were buying.<sup>119</sup> One might plausibly argue that whatever agency exercises jurisdiction over the substantive antitrust issues raised by such disputes should also have jurisdiction over any ancillary consumer-protection issues as well. The FTC has an entire Bureau (of Consumer Protection) devoted to the latter set of issues,<sup>120</sup> whereas the Justice Department has no consumer-protection authority with comparable scope or clout.<sup>121</sup>

The other main advantage the FTC has over the Antitrust Division as an institutional matter is that it is more familiar with the APA's rulemaking process. To be sure, unlike the FCC, the FTC does *not* have plenary authority to adopt enforceable prospective rules on particular issues that arise within the scope of its statutory jurisdiction. Instead, the FTC normally proceeds through post hoc adjudication and issues formal regulations only on topics that Congress has specifically designated for rulemaking, such as implementation of the Children's Online Privacy Protection Act.<sup>122</sup> But the FTC is nonetheless a more natural choice than the Antitrust Division, which has no substantive rulemaking authority to speak of, if policymakers conclude that efficient resolution of today's net neutrality debate requires, at least in the near- to medium term, partial reliance on prescriptive rules instead of full reliance on after-the-fact enforcement actions. Under a hybrid approach, the FTC might also create "safe harbors"—as both it and the Antitrust Division have done in other contexts—specifying business practices that will not give rise to later federal enforcement actions. Such enforcement guidelines would not technically insulate potential defendants from private (or state) antitrust litigation, but the substantive antitrust judgments they reflect would likely be highly influential in practice.

A smooth transition to an antitrust regime for net neutrality disputes will also require the FCC to continue playing a key role on a range of non-antitrust-related broadband policy issues,

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<sup>119</sup>See *Free Press Pet.*, *supra* note 26, at 32-33.

<sup>120</sup>Within the FTC, the Bureau of Competition handles antitrust cases targeting antitrust violations and "unfair methods of competition," and the Bureau of Consumer Protection handles consumer protection cases targeting "unfair or deceptive acts or practices." See *generally* 15 U.S.C. § 45(a)(1). The FTC's third major subdivision—the Bureau of Economics—provides expert analysis for the other two bureaus and the Commission as a whole.

<sup>121</sup>I do not wish to make too much of this point, for one could plausibly cite the same considerations as support for the contrary conclusion. The FTC has been occasionally accused of blurring the lines between antitrust and consumer-protection principles to create hybrid, interventionist policies with no solid grounding in either antitrust law or consumer protection norms. Such concerns would obviously not arise if Congress assigned exclusive oversight of net neutrality disputes to the Antitrust Division and confined the FTC's role to consumer-protection measures.

<sup>122</sup>Pub. L. 105-277, div. C, tit. XIII (Oct. 21, 1998), 112 Stat 2681-728, *codified at* 15 U.S.C. § 6501-6506.

some of them highly technical. For example, few would question the need for the FCC to implement such diverse issues as accommodating the needs of law enforcement under CALEA, requiring telecommunications networks to have adequate emergency-response capabilities, overseeing North American telephone-number resources, guaranteeing access to communications networks by people with disabilities, and supervising subsidy mechanisms for greater broadband deployment.

The FCC's continued involvement may also be indispensable in a few regulatory areas—such as spectrum management and network interconnection—that are sometimes closely related to the net neutrality debate. For example, it will likely be the FCC, not the FTC or the Antitrust Division, that oversees the licensing of spectrum to wireless broadband companies and that decides what compensation is due for the exchange of traffic between broadband-originated VoIP traffic and the conventional telephone network. Each of those regulatory areas overlaps to some extent with policy issues presented by the net neutrality debate.<sup>123</sup> For that reason, it will be important for Congress to draw clear and workable lines dividing the FCC's continuing jurisdiction over such areas and the jurisdiction of federal antitrust authorities to resolve core net neutrality disputes. That task will not be simple, but it will be necessary if policymakers are to manage an effective transition from legacy regulation to a more rational regime that subjects competition disputes in the telecommunications industry to the same economic principles applicable to competition disputes in other industries across the economy.

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<sup>123</sup>See, e.g., Sidak, *Consumer-Welfare Approach*, *supra* note 4, at 416-22 (noting relationship between intercarrier compensation rules and the *Madison River* port-blocking controversy).