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## **ANTITRUST, THE “PUBLIC INTEREST” AND COMPETITION POLICY: THE SEARCH FOR MEANINGFUL DEFINITIONS IN A SEA OF ANALYTICAL RHETORIC**

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### **“Neo-Competition”: Should We Believe in It?**

Nearly forty-five years ago, Justice Felix Frankfurter warned that the term “competition” may not be viewed in an “abstract, sterile way.”<sup>1</sup> Unfortunately, it nonetheless appears that over the last five years, both antitrust enforcement and major public policy regulatory initiatives have ignored Frankfurter’s caveat by recasting the end-goal of “competition” (which, through rivalry, attempts to maximize consumer welfare by producing dynamic and static economic efficiencies) to something more akin to “fair, competition-like outcomes accompanied by the benevolent use of ‘market-friendly’ regulation.” In other words, competition is a zero-sum game.<sup>2</sup>

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<sup>1</sup> FCC v. RCA Communications, Inc., 346 U.S. 86, 93-95 (1953).

<sup>2</sup> See Thomas W. Hazlett & George S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the “Level Playing Field,”* in *Cable TV Franchising Statutes (1997)* (unpublished manuscript) (citing Harold Demsetz, *Information and Efficiency: Another Viewpoint*, J.L. & Econ., Apr. 1969, at 122) (notion of “fair, competition-like (continued ...)

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As discussed more fully below, the concepts of “antitrust,” the “public interest,” and “competition policy” appear no longer to bear any nexus to their original core purpose: the maximization of consumer welfare.<sup>3</sup> In the absence of such a nexus, therefore, I can only describe this view as the theory of “neo-competition.” I deliberately choose this phrase “neo-competition,” because by blatantly disregarding (or, to use current parlance, “re-inventing” or “moving beyond”) basic economic first principles, it is very unlikely that such policies will produce, and accordingly permit consumers to enjoy, the economic benefits associated with good market performance—i.e., declining prices and additional new services and products. [\*3] Tragically, by becoming the *de rigueur* intellectual buzzword of the nineties, these policies have reduced the concept of “competition” to nothing more than an effective “smoke screen” to advance flawed economic theories that were soundly discredited the first time they were run up the flagpole.<sup>4</sup> As discussed in varying degrees below, these failed economic theories include, *inter alia*, the discredited notions that: (1) until “perfect” competition is achieved, continued stringent regulation is necessary; (2) government can actually draft regulation that “mimics” competition or produces a “workably competitive market”; (3) by protecting competitors, we *a fortiori* protect “competition” (*a.k.a.* “competition without change”); (4) increased concentration can actually lead to more rivalry; and (5) mercantilism actually promotes consumer welfare.

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outcomes” is ridiculous because regulators will never “choose ‘efficient’ prices, outputs, and quality costlessly and with perfect information”); see also Paul McNulty, *Economic Theory and the Meaning of Competition*, 82 Q.J. Econ. 639-56 (1968).

<sup>3</sup> See James K. Glassman, *Consumers First*, Wash. Post, Oct. 24, 1997, at A21 (noting that Adam Smith concluded over 200 years ago: “Consumption is the sole end and purpose of all production, and the interests of producers ought to be attended to, only insofar as it may be necessary for promoting that of the consumer.”).

<sup>4</sup> Again, as I have argued in the past, “economic-style” or “public interest-type” regulation has really become the intellectual equivalent of “kosher-style”—i.e., it tastes really good, but it still violates all of the dietary laws. Lawrence J. Spiwak, *Reconcentration of Telecommunications Markets After the 1996 Act: Implications for Long-Term Market Performance*, Antitrust Report, May 1997, at 21 n.12 [hereinafter *Market Reconcentration*].

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What is particularly disturbing, however, is that this approach appears to ignore the basic precept that those in a position to either influence or outright determine public policies or legal precedent owe a fiduciary duty to society as a whole, and not just to themselves.<sup>5</sup> Thus, as the neo-competition doctrine becomes increasingly entrenched in antitrust jurisprudence and in the rationales behind the current efforts to “restructure” major sectors of the U.S. economy—i.e., the telecommunications and electric utility industries<sup>6</sup> — it is high time to examine closely the merits of this neo-competition approach before all of the eggs are completely scrambled.

There are perhaps several plausible reasons why the neo-competition movement has neither been noticed explicitly nor discredited before. First, depending on the scope and ubiquity of regulatory oversight into a particular industry, a regulated entity has very little incentive to publicly protest neo-competition policies if the firm is, at the same time, wholly-dependent on these same regulators for its corporate and financial existence.<sup>7</sup> Moreover, the Washington antitrust/regulatory legal establishment also has very little incentive to jeopardize their hard-won personal relationships and inside access with friends who have yet to exit

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<sup>6</sup> For a detailed exegesis of the current restructuring process underway in the electric utility industry, see L. Spiwak, *Utility Entry Into Telecommunications: Exactly How Serious Are We?*, Phoenix Center for Advanced Law and Economic Policy Studies Press (forthcoming Winter 1998).

<sup>7</sup> For example, because an electric utility generally has several rate cases pending before FERC at the same time, so long as the utility knows that its regulator has the power and disposition to inflict swift and severe punishment (i.e., adverse rulings costing millions of dollars) in any one of its pending rate cases, the regulated entity has absolutely no incentive to challenge FERC’s generic “restructuring” policies in other rulemaking proceedings. See Frank Easterbrook, *The Court and the Economic System*, 98 Harv. L. Rev. 4, 39 (1984) (“[A]n agency with the power to deny . . . or to delay the grant of [an] application . . . only if the regulated firm agrees to conditions . . . is a potent way to greatly increase the span of the agency’s control.” (emphasis supplied)).

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through the revolving door. The problem with this approach, however, is that a sustained “go along/get along” strategy will not help a regulated firm’s long-term bottom line and is, instead, more likely to result in nothing more than a shattered corporate shell.

Second, because regulated entities are extremely reluctant to draw public attention to their plight (lest they further incur the wrath of their omnipotent regulators), no one in the general public has any actual knowledge of, or real incentive to learn about, the unfolding societal and economic events around them. Thus, the promise of “competition without change” is a very enticing narcotic for both those specific individuals with an insatiable political narcissism and our society’s generic natural desire for some sort of utopian paradise.<sup>8</sup>

**[\*4]** As with all ideas built on shaky ground, however, it is unclear how long such policies can sustain themselves when American consumers are nonetheless starting to recognize (and complain loudly) that neither deregulation nor competition is actually occurring in a form that would square with the basic purpose of regulation—i.e., that economic regulation is designed to be a *substitute for*, and *not a complement of*, competitive rivalry.<sup>9</sup> Quite to the contrary, because American voters continue to observe the daily promulgation of *more* regulation (both *sua sponte* and by express Congressional mandate) and a demonstrable proclivity in telecommunications and electric utility industry re-concentration, they are starting to question seriously whether policies which take a “neo-competition” approach will actually succeed

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<sup>8</sup> Cf. George Orwell, *Animal Farm* (1945) (because the animal residents of the farm were promised, and always continued to believe in, a great utopian society—i.e., “four legs good, two legs bad”—everyone refused to accept and recognize the increasing amount of adverse developments occurring around them; the end result, of course, was not a utopian paradise, but was instead nothing more than a farm run by pigs).

<sup>9</sup> As discussed more fully below, however, this article distinguishes between “economic” regulation (i.e., price, structural, and conduct regulation) and residual “public interest” regulation, which seeks to promote societal policies unrelated to competitive conduct.

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in concurrently promoting competition and reducing the need for stringent regulation.<sup>10</sup>

Rather than to re-examine the merits of the “neo-competition” approach and to correct the problems at hand, however, the frequent response to such criticism is that present restructuring policies are strictly designed to manage the “transition to competition.”<sup>11</sup> Yet, as no one to date (private or public sector) has articulated a clear vision of long-term industry structure and performance (aside from apparently satisfying

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<sup>10</sup> See, e.g., Communications Daily, Aug. 27, 1997, reporting that FCC’s “pro-competitive actions,” such as access charge reform, number portability, and universal service revisions, “could delay competition rather than speed it.” In particular, the article reported that “at least” four FCC goals would “backfire”: (1) lower long distance rates would be offset by increased subscriber line charges; (2) reductions in access charges to long distance companies would be offset by higher costs from “dramatic expansion” of universal service fund to cover such things as school and library wiring; (3) universal service goals would be “undermined by the FCC’s failure to set cost-recovery mechanisms for high-cost service areas”; and (4) local phone companies could be unable to maintain network infrastructure properly because of cost drains resulting from “unfunded FCC mandates” to provide local number portability, make rate reductions, and offer interconnection. According to the article, the Commission’s basic assumptions that “competition can be stimulated by regulatory decree” may be incorrect and, as such, “may have the unintended effect of suppressing competition and defeating the intent of the Telecom Act.”

<sup>11</sup> See, e.g., Paul Farhi, *Telephone Market Probes Planned: FCC, Senate Ask Why Competition Is on Hold*, Wash. Post, July 16, 1997, at C11. It should also be noted that another popular defense is the argument that consumers would be enjoying the benefits of competition if only the courts would accord regulatory agencies the unfettered discretion they deserve. See, e.g., Testimony of Reed E. Hundt, Chairman, Federal Communications Commission on the 1996 Telecommunications Act: An Anti-Trust Perspective, before the Subcommittee on Antitrust Business Rights and Competition, Committee on the Judiciary, U.S. Senate (Sept. 17, 1997). According to Hundt, the prevalent “legal fog” of litigation that “surrounds every significant FCC decision immediately upon adoption” is significantly slowing “the pace of competition in the telecommunications industry.” Congress, however, can help fix these problems by, *inter alia*, “re-affirm[ing] the deference courts should give to the FCC’s expert judgement, as articulated by the Supreme Court in the *Chevron* case.” Unfortunately, once again neo-competition proponents tragically miss the point: while it is true that courts must give great deference to an administration agencies’ expertise, this expertise does not, nor should it ever, grant an administrative agency absolute immunity from review. See, e.g., *MCI v. AT&T*, 512 U.S. 218, 229 (1994) (“an agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning the statute can bear”).

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consumers' alleged desire for "one-stop-shopping" from a few dominant, vertically integrated firms<sup>12</sup> and the wiring of the schools of America<sup>13</sup>), this so-called "transition period" to competition may be a very long time to endure.<sup>14</sup>

In fact, a close look at the various economic restructuring paradigms proposed over the last five years often indicates that a "Potter Stewart I Know It When I See It" test of anticompetitive conduct or market power

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<sup>12</sup> See Michael J. Mandel et al., *A Pack of 800 lbs Gorillas: The Number of Major Corporate Players Is Shrinking. Is that Bad?*, Business Week, Feb. 3, 1997; John Greenwald et al., *Hung Up on Competition*, Time, July 21, 1997, at 50; see also Zaiba Nanji & Kirk Parsons, *So Many Choices*, Telephony, July 14, 1997.

<sup>13</sup> See Jerry Hausman, *Taxation by Telecommunications Regulation*, in Tax Policy and the Economy (forthcoming 1998) (calculating that the efficiency loss to society of policy to raise \$2.25 billion per year to fund an Internet subsidy to schools and libraries to be approximately \$1.25 per dollar raised, or a total of approximately \$2.36 billion per year (in addition to the \$2.25 billion per year of tax revenue)); Robert J. Samuelson, *Telephone Straddle*, Wash. Post, May 14, 1997, at A21 (FCC, at the behest of Congress, "perpetuated a baffling system of . . . subsidies—and created a huge new one to connect every school to the Internet" which will "prop up phone rates [and] prolong regulation." Moreover, because this program "is mostly a way to subsidize photo ops for politicians who like to be seen with children and computers . . . it's a lousy idea . . . because computers won't teach children how to read, write and think."); Michael Schrage, *Just Say No Net in Schools*, Hotwired, Feb. 19, 1997 (notion of wiring the schools is "pathetic" because the idea is "just the latest technology that desperate educators, unhappy parents, and pandering politicians have tacked onto in hopes of avoiding the real problems confronting the schools").

<sup>14</sup> Actually, this point is a bit disingenuous. Given the huge amount of money at stake, coupled with the corresponding amount of legislative and regulatory capture behind the 1996 Act to get or protect a chunk of this money, it is very obvious that a lot of people did a lot of thinking about what long-term market structure should look like. The only problem with this process, however, is that consumer welfare was clearly at the bottom of everyone's priority list. Indeed, Scott Cleland, Director of Legg Mason's "Precursor Group," observed that the "political reality" behind the 1996 Act was that "the Bells and the local telcos were the driving force behind getting this legislation done" and that the politicians and regulators simply served as "natural accomplices" in spin that legislation was a "fair balance" rather than "admit they chose winners and losers, even though they did . . . . [However,] the cold reality is that the Bells WON and the long distance industry LOST." (Emphasis in original.) Perhaps *Time* magazine summed it up the best: "if you were a local phone company with 100% of the market, how helpful would you be in allowing a competitor into the area? Exactly." John Greenwald et al., *supra* note 12.

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has become an acceptable substitute for sound legal and economic analysis in public-policy decision-making.<sup>15</sup> By doing so, government is now free to intervene into the market—via regulation or antitrust—and to reallocate wealth from one sector to another, without having to provide any rational nexus to the maximization of overall consumer welfare.<sup>16</sup> What is more incredulous, however, is that no one has asked whether the “beneficiaries” of this “reallocation” are worthy of (or even want) this new-found wealth.<sup>17</sup> Given the foregoing, perhaps the only logical explanation for such an active policy of wealth reallocation is that once government can dislodge these nuggets of wealth from those who

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<sup>15</sup> See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (while it is impossible to define “obscenity,” “*I know it when I see it.*” (emphasis supplied)). Thus, if government continues to intervene in the market without providing any legal or economic analysis to justify its actions, then the terms “market power,” “dominant,” or “anticompetitive” will essentially boil down to nothing more than the intellectual equivalent of “I don’t like you.” See *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1026 (10th Cir.), *cert. denied*, 113 S. Ct. 601 (1992); see also *Hawaiian Telephone v. FCC*, 498 F.2d 771, 776-77 (D.C. Cir. 1974) (FCC “cannot merely assert the benefits of competition in an abstract, sterile way”).

<sup>16</sup> See Samuelson, *supra* note 13 (for Congress in the 1996 Act to order the FCC “[t]o do all this in the name of ‘deregulation’ is odd” because “Congress and the FCC praise deregulation and practice regulation”; moreover, “States, which control local rates, also like regulation”); *Congress Should Mandate FERC Oversight of ISOs, Coalition Says*, Inside F.E.R.C., Mar. 31, 1997 (reporting that now FERC Chair James Hoecker stated that while competition should be allowed to work without the distortion regulators can sometimes cause, Hoecker argued that “government should not hesitate to intervene where . . . non-market power values are deemed worthy of protection, if it can do so in a competitively neutral way and in defense of the competitive interests of the market”); see also James A. Miller III, *Reindustrialization Through the Free Market*, 53 *Antitrust L.J.* 121, 124-25 (1984) (when government takes “an activist,” collaborative approach to work with industry in order to promote “competition,” it is virtually impossible to avoid the inevitable conclusion that the outcome of such policies “could do anything but restrict output, raise prices and retard innovation”; because such an approach ignores “the distinct interests of over 200 million American consumers in lower prices and higher product quality” most consumers should “start counting their silverware”).

<sup>17</sup> See Samuelson, *supra* note 13 (Congress and the FCC are “manipulating deregulation to advance pet agendas”).

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hold it currently, it will *a fortiori* be far easier for government to [\*5] appropriate this wealth at some later time.<sup>18</sup>

As this approach probably is not our society's most desired end-goal, this article, consistent with my other writings, seeks to remind people once again that, given the enormous economic and societal costs incurred whenever government decides to undertake a fundamental "restructuring" of major sectors of the economy, it is crucial for all of us to think (and openly and vigorously debate) today about what kind of a world we want to live in tomorrow.<sup>19</sup> Accordingly, this article tries to move beyond the daily disputes and instead toward the fundamental, yet unanswered, issue confronting us all: *What is our real purpose behind this whole restructuring exercise?* Is it just to reallocate wealth and maintain "benevolent" regulation over one or more industries, or do we really want to maximize consumer welfare?

It is hoped that we will all arrive at the latter choice. In this case, if we are truly serious about achieving tangible competition and deregulation, we need to set aside the political rhetoric and start our analysis *tabula rasa*. However, rather than propose specific solutions for specific issues—which is clearly too ambitious and controversial a task to accomplish here—this article will instead attempt to provide some

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<sup>18</sup> Sort of like the process of forcing fruit through a juicing machine—you need to break up each individual juice cell to get the maximum amount of juice.

<sup>19</sup> See Lawrence J. Spiwak, *What Hath Congress Wrought? Reorienting Economic Analysis of Telecommunications Markets After the 1996 Act*, Antitrust, Spring 1997, at 32, 36 [hereinafter *Reorienting Economic Analysis*] (without adequate forethought, the "possibilities for innovative ways to maximize—or, if we are not careful, to harm—consumer welfare seem endless"); *Market Reconcentration*, supra note 4, at 24 ("[B]ecause of the huge economic and societal implications at stake whenever government starts talking about a fundamental 'restructuring' of any industry . . . without effective quality control, the final omelet may be so unappetizing that American consumers may end up with only dry toast and water on the menu."). Indeed, our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open" is reflective of the fundamental understanding that "[c]ompetition in ideas and governmental policies is at the core of our electoral process." See, e.g., *Elrod v. Burns*, 427 U.S. 347, 357 (1996); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting) ("[S]urest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed."); see also *United States v. NTEU*, 513 U.S. 454, 469-76 (1995).

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definitional guidance to the terms many people seem to take for granted. In this way, we all can begin our collective voyage through the currently expanding sea of analytical rhetoric from the same port.

### **Defining the Roles: Who Does What?**

As with any other strategic plan, Washington needs to figure out “who-should-do-what” during the restructuring process. Thus, before Congress and the White House even commit pen to paper (or, perhaps more accurately, get ideas from industry lobbyists during a free lunch at the Palm), it is crucial to understand the proper and respective roles of the antitrust enforcement agencies and those agencies responsible for economic regulation of a particular industrial sector.

Probably the most misunderstood issue regarding the proper roles of antitrust and economic regulation is the exact scope and definition of the “public interest” standard included in many administrative agencies’ enabling statutes (e.g., the FCC and the Communications Act; FERC and the Federal Power Act; and previously the ICC and the Interstate Commerce Act) and the relationship of this standard to the [\*6] enforcement of the U.S. antitrust laws. Clearly, these agencies are not (nor should they be) responsible for enforcing the antitrust laws. Rather, Congress explicitly and appropriately left this task to the Department of Justice or the Federal Trade Commission. These regulatory agencies have a separate and distinct duty from these enforcement agencies, and, as such, they have “significantly different” standards.<sup>20</sup>

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<sup>20</sup> See, e.g., *ABC Cos. Inc.*, 7 F.C.C.2d 245, 249 (1966) (“Antitrust Division is charged with the enforcement of the antitrust laws . . . while the Commission is charged with effectuating the policies of the Communications Act.”); see also Dissenting Statement of FTC Commissioner Mary L. Azcuenaga in *Time Warner, Inc.*, FTC File No. 961-0004 (Aug. 14, 1996) (because FCC already had rules in place prohibiting discriminatory prices and practices, there was “little justification” for the FTC to require Time Warner to “comply with communications law” and, therefore, to the extent that the proposed consent order offered “a standard different from that promulgated by Congress and the FCC, it arguably is inconsistent with the will of Congress”; as such, “[t]here is much to be said for having the FTC confine itself to FTC matters, leaving FCC matters to the FCC” (emphasis supplied)).

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### ***The Role of the Antitrust Enforcement Agencies***

The DOJ and FTC are the agencies responsible for enforcing the antitrust laws. They serve in a *prosecutorial* role and bring actions on a case-by-case basis. To facilitate their objective, Congress bestowed certain powers on them, such as the Hart-Scott-Rodino confidentiality and subpoena provisions. However, because the DOJ, and not the defendant, has the burden to demonstrate to a judge and jury (or, in the case of the FTC, the full Commission) either that a specific transaction would substantially lessen competition under current market conditions or that one or more parties have engaged or attempted to engage in anticompetitive conduct, these agencies typically view economic analysis through a “static” model. That is to say, their determinations generally utilize narrow market definitions and short time periods because they assume that the quantity of inputs is fixed and the state of technology is given and unchanging.<sup>21</sup>

### ***The Role of Administrative Agencies Responsible for Economic Regulation***

In contrast to the antitrust enforcement agencies, administrative agencies serve as independent *regulatory* bodies. In other words, interested parties must first seek their approval before they may engage in a jurisdictional activity. In contrast to the DOJ procedure, therefore, the burden rests with the moving parties—and not with the regulatory agencies—to show that a particular transaction meets the relevant statutory criteria.

Notwithstanding this procedural difference, because regulators serve as both investigators and adjudicators, regulatory agencies are bound by the Administrative Procedures Act. In particular, these agencies must examine, *inter alia*, all of the relevant facts, and must make clear the

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<sup>21</sup> See *Reorienting Economic Analysis*, *supra* note 19, at 32-33. Notwithstanding the above, however, antitrust enforcement agencies often cannot overcome the temptation to become pseudo-regulators. See *id.* at 33; This trend appears to have increased exponentially over the last several years, as the various antitrust enforcement agencies on several occasions simply have ordered the defendants to obey applicable FCC regulation(s). See *Market Reconcentration*, *supra* note 4.

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“basic data and the ‘whys and wherefores’ of [their] conclusions.”<sup>22</sup> Moreover, these regulatory agencies must take great care to ensure procedural due process for all parties in a proceeding. If an agency fails in any or all of these responsibilities, a reviewing court may reverse and remand the agency's decision as arbitrary and capricious.<sup>23</sup>

At bottom, these regulatory agencies are concerned about solving two basic [\*7] economic problems: (1) assuring that the regulated firms under their jurisdiction do not engage in anticompetitive behavior or charge captive ratepayers monopoly prices; and (2), where practical, formulating regulatory paradigms designed to improve overall market performance in both the short-run and especially, given the huge sunk costs inherent to the telecommunications and electric utility industries, the long-run.<sup>24</sup> Given this daunting and difficult task, courts generally hold that the powers of regulatory agencies responsible for economic

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<sup>22</sup> See, e.g., *City of Holyoke Gas & Electric Dept. v. FERC*, 954 F.2d 740, 743 (D.C. Cir. 1992) (“Since it is already doing the relevant calculation, it is a small matter to abide by the injunction of the arithmetic teacher: Show your work! For the Commission to do less deprives the [consumer] of a rational explanation of its decision.”).

<sup>23</sup> *Id.*

<sup>24</sup> It should be noted, however, that the FCC's challenge is made more complex because telecommunications is clearly an industry characterized by rapid change and innovation. This challenge is now exacerbated with the passage of the Telecommunications Act of 1996. See *Reorienting Economic Analysis*, *supra* note 4, at 32 and citations therein; *Reconcentration* at 18-19; see also *Turner Broadcasting System, Inc., v. FCC*, 117 S. Ct. 1174, 1189 (1997) (regulatory schemes concerning telecommunications have “special significance” because of the “inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change”); *Denver Area Educational Telecommunications Consortium, Inc., v. FCC*, 116 S. Ct. 2374, 2385 (1996) (Court is “aware . . . of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, see, e.g., Telecommunications Act of 1996 . . . .”); *Columbia Broadcasting, Inc v. Democratic National Committee*, 412 U.S. 94, 102, 93 S. Ct. 2080, 2086 (1973) (“The problems of regulation are rendered more difficult because the . . . industry is dynamic in terms of technological change”); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (“Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects” of the telecommunications industry).

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regulation are significantly *broader* than those of the antitrust enforcement agencies, because they are “entrusted with the responsibility to determine when and to what extent the public interest would be served by competition in the industry.”<sup>25</sup>

### ***Harmonizing Economic Regulation and Antitrust***

Despite the fact that economic regulation and antitrust approach and analyze market performance from different perspectives—i.e., economic regulation seeks to promote competitive rivalry directly “through rules and regulations” while antitrust enforcement by the DOJ and FTC seeks to foster competitive rivalry “indirectly by promoting and preserving a process that tends to bring them about”<sup>26</sup>—both regimes should fulfill identical public-policy goals. According to (now) Justice Stephen Breyer, these goals are “low and economically efficient prices, innovation, and efficient production methods.”<sup>27</sup>

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<sup>25</sup> *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953); *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies “to analyze proposed mergers under the same standards that the [DOJ] . . . must apply” because administrative agency is not required to “serve as an enforcer of antitrust policy in conjunction” with the DOJ or FTC; thus, while agency “must include antitrust considerations in its public interest calculations . . . it is not bound to use antitrust principles when they may be inconsistent with the [agency’s] regulatory goals”). *See also* *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) (Congress, through the Communications Act, “gave the Commission not niggardly but expansive powers.”); *Craig O. McCaw*, Memorandum Opinion & Order, 9 FCC Rcd. 5836 (1994) at ¶ 7, *aff’d*, *SBC Communications v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) (FCC’s “jurisdiction under the Communications Act gives us much more flexibility and more precise enforcement tools than the typical court has”).

<sup>26</sup> *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.), *cert. denied*, 499 U.S. 931 (1991).

<sup>27</sup> *Id. Accord* *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (“basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible”); *see also* Hausman *supra* note 13 (“The public interest standard should recognize economic efficiency as one of its primary goals. Economic efficiency implies not assessing unnecessary costs on U.S. consumers and firms.”).

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As such, those who argue that there is no relationship between antitrust and economic regulation completely miss the point.<sup>28</sup> Congress clearly intended this “direct/indirect” dual regime approach, because there are often situations where certain market conditions or an individual firm’s conduct may not satisfy the requisite legal criteria to violate the antitrust laws but nonetheless have a direct negative impact on market performance. These conditions are sometimes referred to as “policy-relevant” barriers to entry—i.e., those situations where government intervention may be warranted, because the economic costs of imposing remedial regulation will not exceed the existing economic costs created by the barrier if no government intervention occurs.<sup>29</sup> If a “policy-relevant” barrier to entry is present, then regulatory intervention may be appropriate.<sup>30</sup> What Congress did not intend by this dual review process is wasteful redundancy of government and taxpayer resources.<sup>31</sup>

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<sup>28</sup> See *United States v. AT&T*, 498 F. Supp. 353, 364 (D.D.C. 1980) (Green, J.) (it is “not appropriate to distinguish between Communications Act standards and antitrust standards” because “both the FCC, in its enforcement of the Communications Act, and the courts, in their application of the antitrust laws, guard against unfair competition and attempt to protect the public interest”).

<sup>29</sup> See *Reorienting Economic Analysis*, *supra* note 19, at 35 & n.32 & citations therein. That is to say, from a public policy perspective, not all impediments to entry are necessarily barriers to entry that require some type of government intervention or remediation. Thus, when analyzing whether a particular structural characteristic is a “policy-relevant” barrier to entry, policy makers will have to engage in a cost-benefit analysis that identifies, *inter alia*: (1) all possible economic efficiencies, if any, that might result from the presence of the barrier to entry; (2) all offsetting economic efficiencies that might be attributable to the barrier to entry, if any; (3) all relevant positive and negative network externalities; and (4) the estimated economic cost of eliminating the barrier to entry or minimizing its effects. *Id.*

<sup>30</sup> For example, while ESPN, CNN, HBO or Showtime appropriately should not be considered to be an “essential facility” under the antitrust laws, without these popular channels, new entrants will find it extremely difficult to establish a viable, rival distribution system for delivered multichannel video programming. As such, Congress in the 1992 Cable Act required, *inter alia*, parties to an exclusive programming distribution contract to demonstrate that such contract is in the public interest. See 47 U.S.C. § 548. When undertaking this review—just like under antitrust precedent—the Commission must weigh the procompetitive benefits of an exclusive distribution contract against its likely anticompetitive harms. Evidence has borne out that this short-term regime has contributed significantly to the deconcentration of the MVPD market. See James Olson & (continued ...)

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This concept is the *raison d'être* of regulation—i.e., (again, just to emphasize the point) that economic regulation is supposed to be a *substitute for*, and *not a complement of*, competitive rivalry. It is not, contrary to popular belief, “because we can.”<sup>32</sup> In other words, economic regulation is appropriate only when one or more firms are capable [\*8] of successfully exercising market power (charging monopoly prices or restricting output) for a sustained period of time and additional entry is unlikely.<sup>33</sup>

If regulation is, in fact, warranted, however, it does not mean that government suddenly has a “green light” to prescribe specific prices for goods or services. Indeed, if economic regulation is truly supposed to be a substitute for competition, then, just as in competitive, non-regulated markets, regulation should permit a range of prices for a particular product or service, each of which accounts for different consumer preferences and purchasing capabilities (e.g., volume discounts, superior

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Lawrence Spiwak, *Can Short-Term Limits on Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance?*, 13 *Cardozo Arts & Ent. L.J.* 283 (1994).

<sup>31</sup> Again, as now Justice Breyer once wrote, an “antitrust rule that seeks to promote competition but nonetheless interferes with regulatory controls could undercut the very objectives the antitrust laws are designed to serve.” As such, where regulatory and antitrust regimes coexist, “antitrust analyses must sensitively ‘recognize and reflect the distinctive economic and legal setting’ of the regulated industry to which it applies.” *Town of Concord*, 915 F.2d at 22. See also *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 760 (1973) (“Consideration of antitrust and anticompetitive issues by [regulatory agencies,] moreover, serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings.”).

<sup>32</sup> See Easterbrook, *supra* note 7. But cf. Hoecker Cites “Misconceptions,” *Electric Utility Week*, Mar. 31, 1997 (reporting that now FERC Chair James Hoecker issued a “strong defense” for a continuing role for regulators in deregulated markets). According to Hoecker, some view the concept of “regulated competition [as] an oxymoron like ‘postal service’ or ‘airline food’ . . . [However,] I prefer to think of regulation as evolving into a guardian and guarantor of competition, *instead of its substitute*.” (Emphasis supplied.)

<sup>33</sup> For example, there are certain types of “procompetitive” regulation which, when properly constructed, can produce more public interest benefits than the economic costs the regulation imposes on the market. See, e.g., Part 68 of the FCC’s rules, 47 C.F.R. § 68.1 *et seq.*, which, by requiring standard technical interfaces, permits competition in the terminal equipment market.

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service quality, etc.). For this reason, basic ratemaking principles instruct that there cannot be one, single, generic industry-wide price under the common “just and reasonable” standard. Rather, the “just and reasonable” standard requires only that rates fall within a “zone of reasonableness”—i.e., rates must only be neither “excessive” (rates that permit the regulated firm to recover monopoly rents) nor “confiscatory” (rates that do not permit the regulated firm to recover its costs).<sup>34</sup> They need not—just like caviar or Rolls Royce limousines—be “fair” or “affordable” for everyone.

Thus, if we are truly serious about “deregulation,” then we need to formulate policy paradigms designed to establish, to the extent practicable, a structural framework conducive to competitive rivalry, under which firms will be unable to engage in strategic anticompetitive conduct—even if they try.<sup>35</sup> Think about it. In a market structure conducive to vigorous rivalry, efficient firms (i.e., those firms that can lower their costs, innovate to make new products, and regularly offer consumers more choices) should, in theory, be able to make *more* money as demand and supply continue to shift down and to the right. Such an outcome is infinitely superior to the probable performance of a market that—even though it lacks a structural framework conducive to competitive rivalry—government believes with sufficient intervention is nonetheless capable of achieving a level of “workable” market performance which “mimics” competition.

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<sup>34</sup> See *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1504 (D.C. Cir.), cert. denied, 469 U.S. 1034 (1984) (the concept of “just and reasonable” must clearly be more than a “mere vessel into which meaning must be poured”).

<sup>35</sup> See generally *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, reh'g denied, 509 U.S. 940 (1993); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989) (“Market structure offers a way to cut the inquiry [of potential, anticompetitive strategic vertical conduct] off at the pass . . .”). See also F.M. Scherer & David Ross, *Industrial Market Structure and Economic Performances* (3d ed. 1990) (despite antitrust’s focus on structural measures such as the HHI, economic concentration is only one aspect of market structure; other relevant features of market structure include product differentiation, barriers to entry, cost structures, vertical integration, and diversification).

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Yet, despite the fact that government has a wide variety of tools to help it accomplish this goal,<sup>36</sup> it is also crucial to recognize that government intervention, no matter how innocuous, *de minimis*, or well-meaning, will impose significant economic costs on society. These economic costs include administrative and compliance costs, the possible deterrence or delay of innovation, the creation of [\*9] market structures that can promote collusive behavior and, as discussed in more detail below, the often denied, yet highly ubiquitous (and insidious) issue of “regulatory capture.”<sup>37</sup>

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<sup>36</sup> Public policy officials have a wide variety of regulatory tools in their arsenal to create procompetitive, forward-looking regulatory paradigms or antitrust consent decrees. These tools include *price* regulation, where government limits the maximum amount of money a regulated firm may charge consumers (e.g., “rate-of-return,” “price cap,” “universal service” at subsidized rates, or special pricing plans for low income or low volume users); *conduct* regulation (e.g., line of business restrictions, reporting requirements, and extended or asymmetrical notice and comment periods before any new rate can go into effect); and *structural* regulation (e.g., some degree of mandatory separation between regulated and non-regulated businesses to protect against affiliate self-dealing or other related concerns). However, structural separation is not a homogenous regulatory or antitrust enforcement tool. Rather, like all forms of economic regulation, structural separation is question of degree: the stricter the regulatory requirement of “separateness,” the higher the cost to the regulated firm. As such, depending on the specific regulatory harm to be mitigated, or particular long-term market structure regulators may want to achieve, “structural separation” generally takes on four primary forms (each of which is listed in order of most significant economic costs to least imposed economic costs): (1) “line-of-business” restrictions; (2) mandatory separate subsidiaries with outside equity participation; (3) wholly-owned separate subsidiaries; and (4) mandatory separate corporate divisions. As a regulatory alternative to strict structural separation, however, it is also possible to impose strict accounting requirements accompanied by various conduct restrictions or mandates.

<sup>37</sup> See *Reorienting Economic Analysis*, *supra* note 19, at 34-36 & citations therein; see also *In re Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd. 5880 (1991) at ¶ 80 (finding that when there is no economic nexus between regulations imposed and current market conditions, regulation can have a variety of adverse effects on market performance, including, *inter alia*: (1) denying a firm flexibility to react to market conditions and customer demands; (2) regulatory delays and uncertainty which reduce the value of a firm’s service offerings; (3) affording competitors advanced notice of another firm’s price and service changes which fosters a “reactive market, rather than a proactive one,” and thus reduces the incentives for firms to “stay on their competitive toes”; and (4) negating, in whole or in part, a heavily-regulated firm’s incentive and ability to become a “first-mover” in the market).

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As such, government intervention must be wielded like a scalpel rather than a blunt-edged sword—i.e., truly responsible public policies will, first, correctly and precisely identify whatever structural elements actually frustrate competition, and then (after concluding that the economic costs of the intervention do not outweigh the competitive benefits) narrowly tailor the remedy to mitigate that specific harm. However, if either antitrust enforcement officials or regulators fail to conduct such an analysis—because of the economic costs mentioned above—then poorly conceived or outdated regulation or antitrust conditions can actually create more distortions in market performance than the public interest benefits the regulation or conditions are designed to achieve.<sup>38</sup>

### **Defining the Rhetoric: What Do We Mean?**

So if antitrust and economic regulation are supposed to achieve the same goals, why all the fuss? The debate about the appropriate roles of antitrust and economic regulation stems from a long line of cases which stand for the proposition that an administrative agency charged with the economic regulation of one or more industrial sectors must, in the exercise of its responsibilities, “*make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these*

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<sup>38</sup> See, e.g., *Clamp-All Corp v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 484 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) (Breyer, J.) (rejecting argument that antitrust policies warrant the imposition of stringent conditions to remedy interdependent pricing, “not because [interdependent] pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for ‘interdependent’ pricing. How does one order a firm to set its prices without regard to the likely reactions of its competitors?”); *In re Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, FCC 95-427, 11 FCC Rcd. 3271 (1995) at ¶ 32 (“When the economic costs of regulation exceed the public interest benefits, the Commission should reconsider the validity of continuing to impose such regulation on the market.”); see also Joseph Kattan, *Beyond Facilitating Practices: Price Signaling and Price Protection in the New Antitrust Environment*, 63 *Antitrust L.J.* 133, 136 (1994); Nina Cornell, Peter Greenhalgh & Daniel Kelley, *Social Objectives and Competition in Common Carrier Communications: Incompatible or Inseparable?*, Federal Communications Commission OPP Working Paper No. 1 (1980); John Haring & Kathleen Levitz, *What Makes the Dominant Firm Dominant?*, Federal Communications Commission OPP Working Paper No. 25 (1989).

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*conclusions along with other important public interest considerations.”*<sup>39</sup> The big question, therefore, is how to define “antitrust policies” and “other public interest factors”?

### **“Competition”**

Before we start, however, perhaps it is a good idea—again, starting *tabula rasa*—to try to assign some analytical concept to the term “competition” itself. Unfortunately, while numerous people in both the private and public sectors seem to enjoy bandying this phrase about, it is increasingly evident that many of these people have no real idea about its exact meaning. “Competition” is neither some utopian destination like Xanadu or Nirvana nor a tangible object that we can reach out and touch and comfort ourselves with. Indeed, because economic terms actually have technical meaning, the mere ability to conjugate the verb “to compete” in the same sentence with the word “market” does not necessarily mean that one understands economic theory—e.g., how the presence of high sunk costs affects both entry decisions and strategic behavior to protect sunk assets; the economic costs of residual “public interest” obligations such as “universal service” or an [\*10] “obligation to serve”; the economic costs of advanced tariffing and reporting requirements.

In fact, the dictionary simply defines “competition” as the “act of competing.” However, the fact that there may be multiple firms “competing” against one another does not necessarily mean that this rivalry will produce lower prices or more services. For example, there are many types of market structures in which a very efficient fringe is vigorously competing with a dominant firm, yet the underlying structural characteristics of the market prevent the realization of static and

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<sup>39</sup> United States v. FCC, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (quoting Northern Natural Gas Co. v. FPC, 399 F.2d 953, 961 (D.C. Cir. 1968)). See also FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 795 (1978); Gulf States Utils. Co. v. FPC, 411 U.S. 747, 755-62 (1973) (regulatory agencies must consider “matters relating to both the broad purposes” of their enabling statutes “and the fundamental national economic policy expressed in the antitrust laws”); FCC v. RCA Communications, Inc., 346 U.S. 86 (1953) (“There can be no doubt that competition is a relevant factor in weighing the public interest.”).

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dynamic economic efficiencies. Conversely, there may be market structures that may look to the inexperienced as being *prima facie* incapable of producing competitive rivalry, yet nonetheless demonstrate sustained trends of dynamic and static economic efficiencies.<sup>40</sup>

As such, the more appropriate question to ask is how a market is actually *performing*. “Good” market performance is usually characterized by the presence of static economic efficiencies (declining prices), dynamic economic efficiencies (innovation in new services or technologies), or both. If a market is performing well, then consumers will enjoy other societal benefits such as the long-term growth of real income per person.<sup>41</sup> More important, however, is that under the rationale of regulation explained above, if a market is performing well, *then the need for stringent government intervention should be unnecessary.*<sup>42</sup>

Notice that the operative word here is “*well*”—not “*perfectly*.” As I have argued in the past, various economic factors make it impossible to achieve “perfect competition” in certain regulated network and public utility industries. For example, because telecommunications, and certainly the electric utility industry as well, are characterized by high fixed and sunk costs, marginal cost pricing (the *raison d’être* of perfect competition) makes “perfect competition” impossible to achieve.<sup>43</sup> Also,

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<sup>40</sup> See *Reorienting Economic Analysis*, *supra* note 19, at 33-35 & n.33 and citations therein.

<sup>41</sup> See Scherer & Ross, *supra* note 35, at 4-5.

<sup>42</sup> See *Reorienting Economic Analysis*, *supra* note 19, at 35-36 & n.33; *Market Reconcentration*, *supra* note 4; see also Walter Adams, *Public Policy in a Free Enterprise Economy*, in *The Structure of American Industry* (7th ed. 1986, Walter Adams, ed.) (primary purpose of economic public policy paradigms should be to “perpetuate and preserve, in spite of possible cost, a system of governance for a competitive, free enterprise economy” where “power is decentralized; . . . newcomers with new products and new techniques have a genuine opportunity to introduce themselves and their ideas; . . . [and] the ‘unseen hand’ of competition instead of the heavy hand of the state performs the basic regulatory function on behalf of society”).

<sup>43</sup> See generally David Evans & Richard Schmalensee, *A Guide to the Antitrust Economics of Networks*, Antitrust, Spring 1996, at 36, 38. The authors explain that because many network industries are characterized by high fixed costs and low marginal costs, firms that price at marginal cost “would not recover their fixed costs, which are often the  
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the presence of network externalities (i.e., the value of the network increases with the number of users) makes “perfect competition” difficult to obtain. Finally, as argued throughout, residual “public interest” regulation will continue to distort market performance by affecting both the structure of many markets and the conduct of firms within those markets.<sup>44</sup> [\*11]

### **“Antitrust Policies”**

What exactly are “antitrust policies”? The answer should be rather simple: It has long been established that administrative agencies responsible for economic regulation must support their decisions with sound legal and economic reasoning, rather than with cursory conclusions.<sup>45</sup> Merely stating, without more, that “competition” is a “national policy,” however, does not satisfy this burden.<sup>46</sup> Thus, as

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costs of developing innovative new products and services. To survive, they have to price well in excess of marginal cost. And, since they are making a profit at the margin on almost every unit, they often engage in price discrimination such as volume discounts, special deals, and complex pricing systems.”

<sup>44</sup> See *Reorienting Economic Analysis*, *supra* note 19, at 35-36 & n.35; Hausman, *supra* note 13 (“Because of significant economies of scale and scope, the first best prescription of setting price equal to marginal cost would require government subsidies or would lead to bankruptcy of local phone companies. In the U.S., government subsidies have not been used, and regulators have set price in excess of marginal cost for some services to allow regulated telephone companies to cover their fixed and common costs *and to provide a subsidy to basic residential service.*” (citations omitted and emphasis supplied)); see also Stephen Martin, *Industrial Economics: Economic Analysis and Public Policy* 16 (1988) (“[perfect] competition is a Shangri-La up to which no real-world market can measure”).

<sup>45</sup> See, e.g., *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 760 (6th Cir. 1995) (reversing Commission decision because the order contained no “expert economic data, or [analogies] to related industries in which the claimed anticompetitive behavior has taken place” but instead justified its conclusions as “simply ‘common sense’”).

<sup>46</sup> See *RCA Communications*, 346 U.S. at 93-95 (Frankfurter, J.) (FCC’s economic analysis may not primarily rely on a “reading of national policy” because agency’s actions were simply “too loose and too much calculated to mislead in the exercise of the discretion entrusted to it”); cf. *El Paso Elec. Co. and Central and South West Servs. Inc.*, 68 F.E.R.C. ¶ 61,181 (1994), where FERC concluded that the “national interest” was to establish a “competitive bulk power market” and that it would, therefore, “be a *detriment to the national interest* to allow mergers or consolidations that do not offer comparable  
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outlined above, because: (1) both economic regulation and antitrust are supposed to be the marriage between law and economics; and, as such, (2) the legal and economic analyses and the public policy end-goals of each discipline are the same (low prices/more services); then (3) it would therefore seem highly logical that economic regulators should look to relevant antitrust precedent (where a judge may have already grappled with a similar issue) to help guide their independent analysis, rather than reinvent what smarter people have already traveled to Stockholm and received prizes for.<sup>47</sup> (For example, the laws of supply and demand are pretty much established and cannot be ignored, regardless of any worthy motivations behind current public policy initiatives.)

### **“Other Public Interest Factors”**

The big issue rests with the definition of “other public interest factors.” If the regulatory analysis is (properly) focused on maximizing consumer economic welfare, “other public interest factors” should be limited only to those “policy-relevant” barriers to entry explained above. Providing an appropriate definition for the phrase “other public interest factors” becomes more complicated, however, whenever our society, through our elected representatives, believes that it is important to impose other “public interest” obligations—unrelated to promoting competitive rivalry—that will directly affect market structure, conduct

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transmission access,” FERC held that it could no longer “find *any newly filed merger* consistent with the public interest if the merging public utilities do not offer comparable services, *whether or not that merger results in an increase in market power.*” (Emphasis supplied.) Unfortunately, because the “voluntary” commitments imposed by FERC essentially made the deal uneconomical, the parties subsequently abandoned the transaction which, naturally, resulted in years of costly litigation.

<sup>47</sup> See, e.g., *Northern Natural Gas v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968) (“In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give ‘understandable content’ to the broad statutory concept of the ‘public interest.’”). *But cf. FERC Chair Hoecker Delivers Scary Halloween Message for Industrials*, Foster Electric Report, No. 125 (Nov. 5, 1997) (reporting that FERC Chair Hoecker argued that “regulated competition” is wholly appropriate because FERC will not “race headlong towards ‘de-regulation’ that is *based largely on untested theories about the behavior of competitive markets*” (emphasis supplied)).

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and performance.<sup>48</sup>

Now, let us be very clear here: there is absolutely nothing wrong with this concept. But what we should not do is to continue dressing up these otherwise legitimate public policies in the guise of “economic-style” rhetoric. Many of the current “public interest” policies have nothing to do with the promotion of good market performance. To the contrary, these policies—once implemented—often impose substantial detrimental effects on a properly working market by deliberately reallocating wealth to whatever the intended beneficiaries of these policies are intended to be.<sup>49</sup> Thus, just as Justice Breyer recently noted in his concurrence in *Turner*, government should be honest about its actions, rather than trying to turn economically irrational policies into something they are not.<sup>50</sup>

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<sup>48</sup> *Reorienting Economic Analysis*, *supra* note 19, at 34. See also Harold Demsetz, *Barriers to Entry*, 72 *Am. Econ. Rev.* 37-47 (1982); William J. Baumol et al., *Contestable Markets and the Theory of Industry Structure* 362 (1988).

<sup>49</sup> See Easterbrook, *supra* note 7, at 15-16 (“[P]eople demand laws just as they demand automobiles, and some people demand more effectively than others. Laws that benefit the people in common are hard to enact because no one can obtain very much of the benefit of lobbying for or preserving such laws.” As such, because “cohesive groups can get more for themselves by restricting competition and appropriating rents than by seeking rules that enhance the welfare of all . . . we should expect regulatory programs and other statutes to benefit the regulated group. . . .” Accordingly, these groups “*need not ‘capture’ the programs, because they owned them all along. The burgeoning evidence showing that regulatory programs increase prices for consumers and profits for producers supports this understanding.*” (emphasis supplied and citations omitted)); see also George Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 2-21 (1971).

<sup>50</sup> See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174, 1204 (1997) (Breyer, J., concurring) (the “anticompetitive rationale” of majority’s opinion upholding federal statute that cable companies “must carry” local broadcast stations has no economic basis; rather, Congress’s clearly articulated “public interest” objectives contained in the Cable Act of 1992 are sufficient grounds to uphold the rules); Richard Posner, *Taxation by Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 22, 47 (1971) (“[I]f we are stuck with taxation by regulation,” then agencies and reviewing courts should insist that the “amount and cost of the subsidy, together with the identity of the recipients and payors, be calculated and placed in the public record.” While this approach might “eliminate some of the more captious instances of the phenomenon; at least it would bring an important issue of public policy out in the open.”).

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Notwithstanding the above, it would be very naïve for us to ignore the reality [\*12] that government intervention into the market has been going on since the concept of government first began. In fact, the economic literature indicates that government often decides to intervene in the market—either by antitrust or economic regulation—simply because it is dissatisfied with a particular outcome or, even though markets may be working well, those who have political power are often displeased by the results or they may consider some good or service to be too important to be priced and allocated by unfettered market processes.<sup>51</sup> Given this history, many people argue that we should be reluctant to criticize the current policy paradigms (a.k.a. “the system’s bigger than me, so why rock the boat” approach). The problem with this argument, however, is that—if taken to its logical conclusion—it nearly always does not lead us down the road to good, long-term market performance, but instead only down the proverbial “primrose path.”<sup>52</sup>

That is to say, once this “economic-style” analysis becomes accepted, it is very difficult to “re-introduce” the legal and economic “heavy-lifting” necessary to get policies back on track. Public policy officials do not live in a vacuum and are continually lobbied by various constituencies to reach a resolution favorable to their interests. As such, while such an analysis may permit officials to brag to the public that government is there to help them, a weak analysis will actually harm consumers more when major players manipulate the regulatory process to have some of that re-allocated wealth sent their way. Indeed, the presence of “regulatory capture” or other political pressures on policy makers just exacerbates the tendency to make decisions without regard to the effect of government intervention on economic performance.<sup>53</sup> After

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<sup>51</sup> See Scherer & Ross, *supra* note 35, at 9.

<sup>52</sup> See Posner, *supra* note 5 (while debate over the purpose and effect of regulation usually revolves around arguments that regulation either: (a) is needed to protect captive consumers; or (b) is procured only by “politically effective groups which are assumed to be members of the regulated industry itself for their own protection,” neither view “explains an important phenomenon of regulated industries: the deliberate and continued provision of many services at lower rates and in larger quantities than would be offered in an unregulated market or, *a fortiori*, in an unregulated monopolistic one”).

<sup>53</sup> *Market Reconcentration*, *supra* note 4, at 24 & n.25; see also Easterbrook, *supra* note 7; Stigler, *supra* note 49.

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reviewing recent antitrust enforcement and restructuring initiatives, it is clear that political pressure and regulatory capture are increasingly successful in influencing policy decisions. Indeed, when examining many of the current policies, it is often difficult to discern whether the intended rationale and purpose behind government's actions are supposed to be the appropriate promotion of "competition" or instead the inappropriate promotion of "competitors." True competition means the ability to succeed *and* the ability to fail. However, because many current policies often permit inefficient firms to remain in (and are, in fact, specifically designed to prevent any possible exit of these inefficient firms from) the market, such policies add nothing more than additional impediments to the successful creation of a properly working market. If we have learned anything from history, it is that it is impossible to have "competition without change."<sup>54</sup> Accordingly, any notion that we can "protect competition by protecting competitors" is entirely flawed.<sup>55</sup>

Indeed, we all know (or should) the "golden rule" contained in the Supreme [\*13] Court's decision in *Pueblo Bowl-O-Mat: Antitrust* is supposed to protect *competition—not competitors*.<sup>56</sup> However, because many people fail to realize that this golden rule applies equally to economic regulation, regulatory proceedings should also not be used to

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<sup>54</sup> Moreover, the desire to achieve "competition without change" is not limited to the protection of inefficient rivals. In the effort to ease consumers' "transition to competition," very often regulated firms must accept "voluntary" conditions if they want to become "deregulated" so as to mitigate any potential consumer "rate shock" when prices are actually set using unfettered market forces. See *AT&T Domestic Non-Dom. Petition*, *supra* note 38, at ¶ 84.

<sup>55</sup> One of the counter-arguments to this position is the often misguided notion that the naked "protection of competitors" is analytically the equivalent to attempting to promote tangible new entry into a market currently dominated by a monopoly incumbent. It is not. As the FCC's former chief economist recently argued, it is very "important that the playing field should be leveled upwards, not downwards" because "rules that forbid a firm from exploiting efficiencies just because its rivals cannot do likewise" do nothing but harm, rather than improve, consumer welfare. Joseph Farrell, *Creating Local Competition*, 49 Fed. Comm. L.J. 201, 212 (1996).

<sup>56</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510 (1962)).

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advance the interests of competitors—through “voluntary” commitments or “involuntary” conditions—at the expense of consumer welfare.<sup>57</sup>

Hard to believe, but the Ninth Circuit recognized this basic principle nearly *sixty* years ago in *Pacific Power & Light Co. v. FPC*.<sup>58</sup> There, the Ninth Circuit specifically rejected the argument of the Federal Power Commission (FERC’s predecessor) that an applicant’s burden to show that a particular proposal is consistent with the public interest “requires something more than a showing of convenience to the applicant, and can reasonably be interpreted as indicating that the Congress intended that there be a showing that benefit to the public will result from the proposed merger of facilities before it should receive Commission approval.” In particular, the court rejected the FPC’s argument that it may reject a merger application if the parties cannot show that “the consuming public will be benefited thereby.” According to the court, the “phrase ‘consistent

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<sup>57</sup> Cf. *Ohio Edison Co. et al.*, 80 F.E.R.C. ¶ 61,039 (1997) (FERC gave merger applicants Faustian regulatory choice of either proceeding directly to a trial-type evidentiary hearing (i.e., regulatory delay) or proposing “measures to potential market power problems” (i.e., make competitors, rather than consumers, better off) such as limiting internal transmission capability for other suppliers’ use (i.e., sacrifice its own system reliability for rivals’ benefit) or building new transmission systems, *not for its own needs, but to* “substantially increase the amount of power than can be delivered to destination markets from alternative suppliers” (i.e., if you don’t have enough capacity to sacrifice to rivals without causing major power outages, then you must build this capacity for them) *without either conducting a thorough economic analysis or discussing one potential off-setting efficiency benefit of the merger*). *But cf.* *Entergy Servs., Inc. & Gulf States Utils. Co.*, 64 F.E.R.C. ¶ 61,001 (1993), where FERC specifically declined to impose “network” service as a condition (voluntary or involuntary) of a merger. According to FERC, its conditioning authority should be appropriately limited to “*remedying anticompetitive harms that result directly from the proposed merger, not mere competitive disadvantages that may have existed prior to the merger*” because it was expressly “*prohibited from conditioning a merger to affirmatively place competitors in a better position than they would be absent the merger without a showing of potential anticompetitive or other harm that would warrant a remedy*.” Absent a clear “nexus between the merger application and the alleged anticompetitive harm, if any, to the complainant,” therefore, FERC held that if it “ordered network service as a condition of the merger, [*then it*] *would not be maintaining the competitive status quo as [it is] legally required to do under section 203(a) of the F.P.A., but would, in fact, be changing the competitive status quo*” and, as such, would exceed its statutory authority to impose conditions. (Emphasis supplied and citations omitted.)

<sup>58</sup> 111 F.2d 1014, 1016 (9th Cir. 1940).

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with the public interest' does not connote a public benefit to be derived or suggest the idea of a promotion of the public interest. The thought conveyed is merely one of compatibility." As such, the court concluded that it is "enough if the applicants show that the proposed merger is compatible with the public interest. The Commission, as a condition of its approval, may not impose a more burdensome requirement in the way of proof than that prescribed by law."<sup>59</sup>

Courts have applied this rule equally to FCC decisions. For example, in *Hawaiian Telephone v. FCC*,<sup>60</sup> the D.C. Circuit found the FCC's grant of a Section 214 certificate to RCA for service between the U.S. mainland and Hawaii to be arbitrary and capricious. According to the court, a legal and economic analysis of competitive issues under the public interest standard must be more than an inquiry into "whether the balance of equities and opportunities among competing carriers suggests a change." The court reversed and remanded the Commission's decision, finding that it was "all too embarrassingly apparent that the Commission has been thinking about competition, not in terms primarily as to its benefit to the public, but specifically equalizing competition among competitors."<sup>61</sup>

Similarly, in the Commission's recent positive disposition of the AT&T/McCaw merger, various RBOC opponents argued on appeal that the Commission erred [\*14] because it did not impose on the merged entity the same MFJ restrictions that the RBOCs were subject to. The court, citing *Hawaiian Telephone*, rejected the RBOCs' argument, finding

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<sup>59</sup> *Id. But cf. Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control*, Memorandum Opinion & Order, FCC 97-286 (rel. Aug. 14, 1997) at ¶ 2, where rather than require applicants to demonstrate that a proposed merger was in the public interest because the transaction would, for example, generate efficiency savings that could be passed on to consumers, or at least make the merged entity a more effective competitor, the FCC stated that "[i]n order to find that a merger is in the public interest, we must . . . be convinced that it will *enhance competition*. A merger will be pro-competitive if the harms to competition . . . are outweighed by the benefits that *enhance competition*. If applicants cannot carry this burden, the applications must be denied." (Emphasis supplied.)

<sup>60</sup> 498 F.2d 771 (D.C. Cir. 1974).

<sup>61</sup> *Id.* at 775-76.

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that the application of the MFJ restrictions to the merged entity would “serve the interests only of the RBOCs rather than those of the public.” As such, the court made it explicitly clear that when the Commission deliberates whether a proposed merger serves the public interest, the “Commission is not at liberty . . . to subordinate the public interest to the interest of ‘equalizing competition among competitors.’ ”<sup>62</sup>

### **Current Examples of “Neo-Competition”**

#### **“Protecting Competitors Protects Competition”— Electric Utility Industry Restructuring**

An excellent example of where an economic paradigm inappropriately protects competitors over competition can be found in the current “restructuring” of the electric utility industry. Because this paradigm is essentially designed to permit one monopolist to free-ride off of another monopolist’s already constrained transmission capacity—without providing any incentive (indeed, empirical evidence demonstrates that the current paradigms are actually a *disincentive*) to construct any new, additional transmission capacity—consumers are already starting to see a diminution in service quality, including two outages that recently blacked out the entire West Coast. Moreover, because FERC requires mandatory, homogeneous transmission tariffs (so much for static and dynamic economic efficiencies) and price-posting (i.e., price *signaling*) requirements, it is very unclear how such a paradigm can actually improve market performance.<sup>63</sup> In fact, as pointed out above, FERC officials apparently want the exact opposite result.<sup>64</sup> Thus,

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<sup>62</sup> *SBC Communications*, 56 F.3d at 1491 (citing *Hawaiian Telephone*, *supra* W.U. Telephone Co. v. FCC, 665 F.2d 1112, 1122 (D.C. Cir.1981) (“equalization of competition is not itself a sufficient basis for Commission action”)).

<sup>63</sup> FERC officials have apparently unwittingly conceded this point as such. See Foster Electric Report, *supra* note 47 (reporting that FERC intends to “expand upon certain themes” such as “considering whether to revise or enlarge the pro forma tariffs *to allow for product and service innovations*”).

<sup>64</sup> See *supra* notes 47 & 57.

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rather than spur additional entry and promote competition, FERC's paradigms have appeared to do nothing more than accelerate the electric utility industry's attempts at re-concentration and cause end-user rates to rise.<sup>65</sup>

### ***“Regulation and Competition May Co-exist”— The Telecommunications Act of 1996***

As noted above, regulation and competition are supposed to be substitutes, not complements. Perhaps the classic example of the obfuscation of economic and non-economic public policy objectives is the hypocrisy of the universal service provisions contained in the 1996 Telecommunications Act. Universal service, as a general public policy, is certainly a worthy social goal. However, as mentioned above, the whole [\*15] purpose of the 1996 Act was allegedly to promote competition and lead to deregulation.<sup>66</sup> Thus, it seems a bit paradoxical that Congress rationally believed that society could have *both* “competitive” markets yet, at the same time, require firms (a) to guarantee that everyone will receive reliable service, and moreover (b) to ensure that particular sectors

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<sup>65</sup> See, e.g., Mandel et al., *supra* note 12; Cam Simpson, *Merger Mania Has Awakened Utility Industry*, The Indianapolis Star/Indianapolis News, Feb. 3, 1997; Margie Hyslop, *Electricity Dereg May Not Lower Rates*, Montgomery J., June 4, 1997, at A1; Agis Salpukas, *Utility Deregulation: Boon or Boondoggle?*, N.Y. Times, Feb. 1, 1997, at Section D; Peter Coy, *Utilities: Prognosis 1997*, Business Week, Jan. 13, 1997, at 118; Hiram Reisner, *Big Business Wins, Homeowners Lose Louisiana Competition Study Shows*, Electric Utility Business & Finance, Oct. 7, 1996, at 2 (“In terms of the economy as a whole, the benefits of expected lower prices for industrial customers do not offset the reduction in disposable income due to higher residential rates.” As such, the state should expect to see “*an overall reduction in personal income, retail sales, tax revenues, and economic output*” (emphasis supplied)); see also L. Spiwak, *Utility Entry into Telecommunications*, *supra* note 6.

<sup>66</sup> See Janet Reno et al. v. American Civil Liberties Union, 117 S. Ct. 2329, 2337-38 (1997) (Telecommunications Act of 1996 was “an unusually important legislative enactment” because its “primary purpose was to reduce regulation and . . . to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting”).

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of society will enjoy not only “reliable” service but also some sort of *subsidized* service as well.<sup>67</sup>

Moreover, despite Congress’s well-meaning intent, what many people fail to realize is that not only does a mandatory universal service requirement—and, in particular, the mandatory requirement that *all* “providers of interstate telecommunications” that offer such telecommunications “to others for a fee” must contribute substantial sums of their *gross* revenues to the universal service fund<sup>68</sup>—impose a significant dead weight efficiency loss on consumer welfare,<sup>69</sup> but, in more practical terms, such a policy also acts as a *major* barrier to entry for new firms. Because of this broad statement and the fact that neither the FCC nor the courts have yet to apply these definitions to any individual cases, it is unclear who or what will ultimately be called on to contribute to the fund. Thus, not only would “typical” providers of interstate telecommunications be required to contribute to the fund (e.g., common carriers and private line operators of telephone or wireless companies) but, more importantly, firms that just *incidentally* may be in telecommunications could be required to contribute. These types of firms could range anywhere from a utility that simply seeks to lease dark fiber to a CLEC, to a Seven-Eleven convenience store that sells phone cards. In addition, because the universal payments are characterized, as of the time of this writing, as “contributions,” these “contributions” may not be deducted on a contributing firm’s tax return.<sup>70</sup> Accordingly, if a new

<sup>67</sup> See *Reorienting Economic Analysis*, *supra* note 19, at 34 & n.20 and citations therein; see also Baumol et al., *supra* note 49. It should also be noted that the inclusion of universal service provisions into the recently concluded WTO accord was an extremely high priority for the U.S. As such, I guess we can all sleep just a little bit better knowing that with this accord, the U.S. helped ensure that all of the children of the world could sing together in the spirit of harmony and peace for years to come.

<sup>68</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report & Order, FCC 97-157 (rel. May 8, 1997) at ¶¶ 794-96.

<sup>69</sup> See Hausman, *supra* note 13.

<sup>70</sup> What is particularly disturbing about this scenario is the fact that this exact type of non-price competition is one of the major reasons why it is highly unlikely that long-distance carriers can successfully engage in some sort of tacit collusion under current market conditions. See *Reorienting Economic Analysis*, *supra* note 19, at 35.

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entrant (or even an existing firm) perceives that the costs imposed by the 1996 Act's mandatory universal service obligations and payments may actually exceed <sup>71</sup> the initial profits it hopes to receive, then entry (or a continued presence in the market) will not be economical and will not occur.<sup>72</sup>

### ***The Rise of "Neo-Mercantilism"***

Over 200 years ago, Adam Smith, in his classic treatise *The Wealth of Nations*, powerfully demonstrated that whenever government attempts to coordinate the efforts of entrepreneurs, such policies almost invariably discourage economic growth and reduce economic well-being. Smith called this system "mercantilism."<sup>73</sup> With the growing influence of the

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<sup>71</sup> Perhaps if Congress is really so concerned about wiring the schools, a direct tax *credit* may be a better way to go—i.e., there is no multi-billion dollar slush-fund floating around somewhere, there are minimum compliance, enforcement and distribution costs, we eliminate the "middle man" (i.e., another government bureaucracy) and carriers can get direct positive public-relations benefits from the whole endeavor. This approach might even *encourage* entry! I'm sorry, but a multi-billion dollar fund creates just too many incentives for nefarious behavior.

<sup>72</sup> See Scott Cleland, *Subsidy Reform—Big Skunk at the Competition Picnic?*, Telecom Watch (Wash. Research Group, Apr. 25, 1997) ("FCC's subsidy reform of universal service and access charges will prove to be a larger *impediment* to the development of local competition than most appreciate."); Samuelson, *supra* note 13 (while Universal Service's "educational benefits may be phantom . . . the higher overall phone rates needed to pay for them aren't"; moreover, while the "subsidies for the poor may be justified[, t]he rural subsidy isn't. *If people prefer to live in rural Montana, they should enjoy the pleasures and bear the costs.*" (emphasis supplied)).

<sup>73</sup> See James C. Miller et al., *Industrial Policy: Reindustrialization Through Competition or Coordinated Action?* 2 Yale J. on Reg. 1, 5 (1984).

According to Adam Smith, mercantilism "retards, instead of accelerating, the progress of the society towards real wealth and greatness; and diminishes, instead of increasing, the real value of the annual produce of its land and labour" because of two basic reasons: a tendency of special interests to turn government programs to their own narrow advantages, and a tendency of joint business efforts to result in collusion to reduce output and raise prices, especially when government willingly permits such collusion. As such, although "the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them  
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“neo-competition” school, trade considerations are now nevertheless increasingly becoming legitimate concerns in both antitrust and public interest economic analysis.<sup>74</sup> This phenomenon is appropriately described as “neo[\*16]-mercantilism.”<sup>75</sup> Yet, as trade concerns become an acceptable factor in antitrust and public interest lexicon, not one proponent of the “neo-competition” school has bothered to demonstrate what economic conditions have actually changed since Smith was alive that would merit a departure from his work.<sup>76</sup>

As a general proposition, it is very important to remember that antitrust and trade policy seek to promote *very* different goals. Antitrust policy, as just discussed, appropriately focuses on *consumers*, not competitors. Trade policy, on the other hand, by its very definition, seeks to promote *competitors* (i.e., competitors of the “domestic” sort). Thus, while antitrust is certainly one of a number of policies affecting international trade, the various national trade policies (which are very often not even in harmony with each other) may at times be in tension with antitrust policies.<sup>77</sup>

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necessary.” (Citations omitted.) It would seem, therefore, that “FCC” should not stand for “Facilitating Cartels and Collusion.”

<sup>74</sup> See Catherine Yang, *Commentary: When Protectionalism Wears Camouflage*, *Business Week*, June 2, 1997, at 60.

<sup>75</sup> See, e.g., Miller, *supra* note 16 (doctrine of “neo-mercantilism” can be characterized as the principle that “in a world of monopolies, the nation with the biggest and strongest industries and firms can reign supreme and recoup for the mother country the supra-competitive profits earned from abroad”).

<sup>76</sup> See Paul Magnusson, *Getting a Grip on Trade Sanctions*, *Business Week*, Nov. 17, 1997, at 115. Magnusson reports that in the past four years, President Clinton has signed 62 laws and executive actions targeting 35 countries. These numbers account “for more than *half* the sanctions imposed [by the U.S.] *in the past 80 years*.” Moreover, Magnusson reported that the direct cost to U.S. exporters in lost sales in 1995 alone was as high as \$20 billion, an estimated 250,000 U.S. jobs disappeared and “*no one can measure the damage to relations with angry allies*.” (Emphasis supplied.)

<sup>77</sup> See *Antitrust Law Developments (Fourth)* 991 (A.B.A. 1997).

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This reasoning should apply equally to economic regulatory paradigms. As explained in detail above, administrative agencies responsible for economic regulation must “make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations.”<sup>78</sup> As further argued above, these “other public interest considerations” should be limited to identifying and eliminating “policy-relevant” barriers to entry. Thus, because economic regulators also have the responsibility to maximize consumer welfare, and therefore these regulators—just like under antitrust jurisprudence—are similarly “not at liberty to subordinate the public interest to the interest of equalizing competition among competitors,”<sup>79</sup> trade considerations correspondingly should not be a legitimate “public interest factor” in regulatory decision-making. Unfortunately, research reveals that both the antitrust enforcement agencies and economic regulators lately often are ignoring this basic principle.<sup>80</sup>

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<sup>78</sup> See *supra* note 39.

<sup>79</sup> See *SBC Communications v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

<sup>80</sup> As noted in note 76 *supra*, the rise of neo-mercantilism is clearly originating from the Executive Branch. See generally Clay Chandler, *Will the [National Economic Council] Continue to be Clinton's Neglected Child?*, Wash. Post, Nov. 9, 1996, at H01, reporting that President Clinton often rewarded advisors seeking to circumvent the NEC and the specific advice of his chief economist, Laura D'Andrea-Tyson—e.g., when USTR Ambassador Mickey Kantor pushed Clinton directly to take a much tougher line with Japan in a dispute over auto exports. Just to refresh everyone's collective recollection, this was the dispute where, at Detroit's urging, the U.S. threatened to slap a 100% tariff on all Japanese luxury cars—thus potentially throwing thousands of Americans who work at Lexus and Infinity dealerships out of jobs—if Japan did not permit Detroit to sell its cars in Tokyo. As this passion play was carried out, however, all of the Mercedes, Porche, BMW, Saab, Volvo, Jaguar, et al. dealerships were standing in the wings, chuckling at the notion that Detroit manufacturers actually believed that only they would gain U.S. market share if the U.S. government removed their Japanese rivals from the market.

See also Bob Woodward & Ann Devroy, *An Unusual Meeting of Chief Executives*, Wash. Post, Aug. 21, 1997, at A01 (reporting that when Tyson, fearing a trade war between Washington and Tokyo, objected to private, one-on-one meeting between President Clinton and Federal Express Chairman Fred Smith (who, along with Fed Ex, coincidentally just donated \$275,000 to the Democratic National Committee) to discuss Fed Ex's trade concerns with Japan, D'Andrea-Tyson's objections were specifically (continued ...)

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*Example: Antitrust Enforcement*

For an example, consider the FTC's recent dispositions of the Staples/Office Depot and Boeing/McDonnell Douglas mergers. In the former case, the FTC actually succeeded in convincing a federal district court judge to grant a temporary restraining order against the proposed Staples/Office Depot merger, because (so argued the FTC) the proposed merger would substantially lessen competition in the market for "the sale of consumable office supplies through office superstores." Incredibly, while the judge on one hand accepted this bizarre market definition, the judge nonetheless expressed deep "regret" about his decision, finding that the defendants were being "punished for their own successes and for the benefits they have brought to consumers. In effect they have been hoisted on their own [\*17] petards."<sup>81</sup>

The fact that the judge would make this statement is both truly remarkable and truly incredulous. Indeed, what kind of message does this decision send to the market? If nascent entrepreneurs know that they will be "punished" if they succeed, then why should they even bother to try to enter the market in the first instance? Similarly, barring some substantial evidence that there are, in fact, extremely high barriers into essentially what amounts to the paper-clip market that was not presented to the court, it seems that any argument that the proposed merger of Staples and Office Depot will substantially lessen competition in the market for "the sale of consumable office supplies through office superstores" is rather like attempting to argue that a hypothetical merger between Hostess and Pepperidge Farms would substantially lessen competition in the market for "squishy, tasteless, pre-sliced and plastic-wrapped consumable bread products available through grocery superstores." Under this market definition, however, a "grocery superstore" must be more than a mere corner grocer or convenience store (which, by definition, supposedly always charge *supra*-competitive prices). Instead, a "grocery superstore" must, *inter alia*, be located in a

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overridden by former Clinton Chief of Staff and close personal friend Thomas "Mack" McLarty).

<sup>81</sup> FTC v. Staples, Inc. and Office Depot, Inc., 1997-2 Trade Cas. (CCH) ¶ 71,867 (1997).

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suburban strip-mall that, in addition to selling basic foodstuffs, must have an in-house pharmacy, bakery, butcher, fish monger, and even a magazine rack.<sup>82</sup>

In the Boeing/McDonnell Douglas merger, where the commercial airframe industry is already highly concentrated and is clearly characterized by the presence of huge sunk costs, high barriers to entry, and very inelastic supply and demand, the deal nonetheless virtually sailed through the FTC without any major problems. How did this happen? Easy: trade concerns. In other words, antitrust and other government officials apparently believed that it is wholly acceptable to further reconcentrate the U.S. airframe industry because the newly merged company will be in a stronger position to beat up the French and their European allies (a.k.a. Airbus Industries). For this reason, the U.S. and the European Union came to the brink of an all-out trade war, each openly (and completely inappropriately) using their respective antitrust enforcement agencies as foot soldiers.<sup>83</sup> By doing so, once again antitrust was improperly used to benefit competitors, not competition.<sup>84</sup>

*Example: FCC International Telecommunications Policy*

Unfortunately, trade considerations now often permeate U.S. economic regulatory decision-making as well, including FCC international telecommunications policies.<sup>85</sup> The rise of naked “neo-mercantilism” in FCC decision-making probably originated with the

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<sup>82</sup> See Thomas G. Dolan, *Editorial Commentary: The Antitrust Delusion—The Federal Trade Commission Explains it All to You*, Barrons, July 7, 1997, at 46 (FTC’s decision is nothing more than “a pathetic substitution of harassment for regulation”).

<sup>83</sup> See, e.g., Steven Pearlstein & Anne Swordson, U.S. Gets Tough to Ensure Boeing, McDonnell Merger: Retaliation Plan in Works as Europe Threatens, Wash. Post, July 17, 1997, at D1.

<sup>84</sup> See Yang, *supra* note 74 (U.S. and EU’s antitrust actions in this case acted as “a stalking horse for economic nationalism. When that happens, the first casualty is competition”).

<sup>85</sup> In fact, the FCC’s International Bureau now has its own official “International Trade Division.”

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Commission's *Foreign Carrier* (a.k.a. *ECO*) order.<sup>86</sup> Under this [\*18] order, the FCC essentially adopted a mercantile "reciprocity" approach against foreign entry into the U.S.—i.e., you can't play in my yard unless I can play in yours—all in the name of promoting the "public interest."<sup>87</sup> According to the Commission, this order was necessary to clarify its public interest analysis for international service applications and would consist of two distinct parts: (1) an "effective competitive opportunities" or *ECO* analysis;<sup>88</sup> and (2) additional "public interest factors." The

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<sup>86</sup> *In re Market Entry and Regulation of Foreign-Affiliated Entities*, FCC Docket No. 95-475 (rel. Nov. 30, 1995) ("*ECO Order*"). Without going into great detail here, one of the primary motivations behind *ECO* and its progeny are U.S. carriers' concerns that: (a) under the existing international settlement of accounts regime, the U.S. traffic imbalance effectively forces U.S. firms to subsidize—via above-cost settlement rates—foreign firms' activities; which subsidy (b) allegedly permits foreign firms to build a "full-circuit" and therefore bypass the international settlements of accounts regime (i.e., provide IMTS service at *lower cost*); and because (c) the ability for any firm to achieve lower costs must *a fortiori* be "anticompetitive," the U.S. government should make it as difficult as possible for foreign firms to enter the U.S. market. This "victim" mentality is a bit disingenuous, however, given the facts that U.S.-based carriers are not the only ones faced with large settlement imbalances. For example, Japan-based carriers have large deficits with Taiwan, the Philippines, South Korea, Singapore, and other major Asian countries. Similarly, France Telecom has large outflows to Africa, the Middle East, and even Latin America. Moreover, the same holds true for British Telecom, Deutsche Telekom, Telecom Italia, and other large overseas telephone companies. See *International Communications Survey Memorandum Re: Addressing the "Accounting Rates Challenge"*, Telecommunications Pol'y Rev., Jan. 5, 1997.

<sup>87</sup> Tragically, FERC has also adopted a naked reciprocity approach with regard to cheap Canadian hydro-electric power. See, e.g., *Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Services by Public Utilities*, 79 F.E.R.C. ¶ 61,367 (1997) ("[P]ublic interest" did not favor granting Ontario Hydro's request for stay of reciprocal "open-access" transmission tariff requirement because "a stay would unfairly permit Canadian utilities to compete in U.S. markets, but deprive U.S. utilities of the opportunity to likewise compete in Canadian markets. This unequal treatment could detrimentally affect the financial well-being of U.S. public utilities").

<sup>88</sup> The Commission stated that it would examine under the *ECO* standard: (1) whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those the foreign carrier seeks to offer in the United States; (2) whether competitive safeguards exist in the foreign county to protect against anticompetitive and discriminatory practices; including cost allocation rules to protect against cross subsidization; (3) the availability of published, non-discriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for  
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Commission stated that it would apply its new “effective competitive opportunities” standard to foreign carriers or their U.S. affiliates of IMTS service only when a foreign carrier has “market power” on the foreign end of one or more country routes.<sup>89</sup> If a foreign carrier or its U.S. affiliate fails this test, then the Commission will deny it/them permission to provide service on the particular route.<sup>90</sup>

What is particularly disturbing is how the Commission defined “market power” for purposes of *ECO*. Rather than use some commonly accepted derivation of the conventional “ability to raise prices and restrict output” mantra, the Commission instead defined “market power” as simply “the ability of [a foreign] carrier to act anticompetitively against unaffiliated U.S. carriers through the control of bottleneck services or facilities on the foreign end.”<sup>91</sup> Equally disturbing was the Commission’s express statement that “trade” is a valid public interest concern that—assuming a U.S. carrier is sufficiently aggrieved in a foreign destination market—can be sufficient to outweigh any procompetitive benefits that entry by the foreign carrier into the U.S. market may bring.<sup>92</sup> In response to the immediate and substantial criticism of this approach, the Commission was quick to explain that it

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termination and origination of international services; (4) timely and non-discriminatory disclosure of technical information needed to interconnect with carriers’ facilities; (5) the protection of carrier and customer proprietary information; and (6) whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards. See *ECO Order*, ¶ 40.

<sup>89</sup> See *ECO Order*, ¶¶ 21, 40.

<sup>90</sup> See *id.* ¶ 36.

<sup>91</sup> *Id.* (emphasis supplied). This definition of market power is especially odd given the FCC’s use of the static equilibrium properties of perfect competition as the benchmark by which to measure performance in the telecommunications industry. Any action by a firm, other than the mechanistic production of homogenous output up to the point where price equals marginal cost, is considered “anticompetitive” in the model of perfect competition. Under their own standard, “anticompetitive” behavior would therefore include advertising, quality improvements, discounted prices, and other common business activities that often enhance consumer welfare. Accord McNulty, *supra* note 2.

<sup>92</sup> *ECO Order*, ¶¶ 60-61.

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was not adopting a naked mercantile reciprocity approach. Rather, the Commission plainly stated that it was doing nothing more than “adopting a public interest analysis” to determine which U.S. carrier affiliates of foreign carriers have “the ability and incentive to discriminate against unaffiliated U.S. carriers, thereby harming U.S. consumers and businesses.”<sup>93</sup>

The Commission also stated, however, that even if it was engaging in trade issues outside of its mandate under the Communications Act, the *ECO* test is nonetheless “fully consistent, not only with our responsibility to promote the U.S. public interest, but also with the responsibility of the Executive Branch to formulate and execute U.S. international trade policy.”<sup>94</sup> Such a statement is really quite interesting, especially given the fact that under the Communications Act of 1934—and even as amended by the Telecommunications Act of 1996—the FCC is supposed to be an *independent* administrative agency.<sup>95</sup> **[\*19]**

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<sup>93</sup> *Id.* ¶ 227.

<sup>94</sup> *Id.* ¶ 240. Unfortunately, the U.S. has apparently continued this “neo-mercantilist” policy—although now slightly more sophisticatedly disguised (e.g., *ECO* is over; yet the U.S. must nonetheless look at the state of competition in foreign markets)—right through the time of this writing, in spite of the recently concluded World Trade Organization agreement on international telecommunications. See, e.g., Reed Hundt & Charlene Barshefsky, *FCC Isn't Backpedaling on Telecommunications Deal*, N.Y. Times, Aug. 17, 1997, at F36 (“We never agreed to open the American market to anticompetitive tactics by foreign carriers”); *EU Presses U.S. to Change Telecom Rules*, Reuters (Aug. 5, 1997, 8:55 am EDT) (reporting that EU issued official statement warning that U.S. “risks violating its world trading obligations” if it continues with mercantile-type policies—i.e., FCC continues policy of maintaining “broad and unclear public [interest] factors regarding foreign participation in U.S. domestic telecommunications market” and, in particular, the fact that FCC allows factors such as law enforcement, foreign policy or trade concerns to be taken into consideration, as well as accepting the ill-defined concept of “very high risk to competition” as a reason for a license refusal); Albert P. Halprin, *Two Steps Backwards on Open Markets*, N.Y. Times, July 20, 1997, at F13 (“FCC, citing the supposed requirements of Federal communications law, is . . . backpedal[ing] on major American commitments in the deal. If our nation fails to live up to its end of the bargain, so will other signatories, and this historic opportunity will be lost”).

<sup>95</sup> See Hundt & Barshefsky *supra* note 94 (“FCC will continue to show deference to the executive branch on matters concerning foreign policy and trade . . . ” and the “executive branch fully supports this view”).

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### *The Pitfalls of “Reciprocity”*

Many people nonetheless respond that there is absolutely no reason to be concerned about this recent “neo-mercantilist” influence on antitrust and “public interest” adjudications. According to the proponents of this approach, if American companies can enter foreign markets, then U.S. consumers will be better off because both shareholder value and U.S. exports will increase. The problem with this view is that given certain economic realities, it is very unclear how such a policy, in the long-run, can actually maximize U.S. consumer welfare.<sup>96</sup>

For example, a “reciprocity” approach actually *creates*—rather than eliminates— significant barriers to entry for both new firms into U.S. domestic telecommunications markets and U.S. firms into foreign markets. Specifically, by adopting an aggressive “America First” approach, both foreign governments and carriers will probably have a (if not exacerbating an existing) substantial *disincentive* to engage in good faith negotiations with U.S. carriers to enter their home markets (which, paradoxically, is supposed to be the whole goal of such an approach in the first place).<sup>97</sup>

Moreover, international commerce, by its very definition, raises far more investment risks than domestic commerce does (e.g., different or ineffective legal systems, political graft, retroactive or *post-hoc* “windfall” taxes). In order to reflect this risk, the prices for international goods that require the investment of substantial sunk costs are usually higher. An aggressive trade approach, therefore, merely exacerbates the possibility

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<sup>96</sup> See Miller et al., *supra* note 73. In fact, given the Administration's recent willingness to call out the U.S. Coast Guard to enforce reciprocity policies against Japan, somebody might even get physically hurt as well. After all, it really is rather difficult to have a true “trade war” unless some kind of violence is actually involved. See, e.g., Paul Bluestein, *U.S. Plans to Ban Ships, Pushed Japan to Act*, Wash. Post, Oct. 19, 1997, at AO1.

<sup>97</sup> See Miller, *supra* note 16; see also Halprin, *supra* note 94 (FCC simply “wants to keep its ability to treat foreign carriers worse than its own domestic carriers—though this is exactly what the United States and 68 countries in Geneva promised *not* to do”—and a policy that will “delay other nations’ entry into our market by months, if not years, while allowing identical investments by U.S. carriers to proceed immediately. *Free trade delayed is free trade denied.*” (emphasis in original and supplied)).

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that a foreign country may, in an act of trade retaliation, “nationalize” a U.S. firm’s sunk assets—often without any adequate compensation.<sup>98</sup> This “uncertainty” can raise prices for U.S. consumers in two ways. First, the greater the risk, the higher a U.S. firm’s cost of capital becomes; as a firm’s cost of capital becomes higher, end-prices for consumers increase. Second, as risk increases, a U.S. firm will have a greater incentive to *raise* its prices to ensure that it can recover its costs in the shortest time possible.

More importantly, however, it is quite unclear how lower prices and new products and services—even if provided by foreign firms—are actually *bad* for American consumers.<sup>99</sup> First, as former FTC Chairman Jim Miller noted well over ten years ago, the doctrine of neo-mercantilism fails for a number of reasons. For example, to succeed, the targeted industries must truly be able to capture monopoly rents from abroad. According to Miller, to “succeed just in the mother country is not enough. In fact, that would be counterproductive, since the losers would be that nation’s own consumers and taxpayers, who must pay higher prices and underwrite the subsidies.” Moreover, if the scheme fails, the gainers would be “the consumers, [\*20] the public, in those other nations, including the United States, whose industries have been targeted” because consumers would get the “benefits of lower prices.”<sup>100</sup> As such, Miller argues, “*Why kick Santa Claus in the fact? If other countries foolishly subsidize U.S. consumers . . . why should we object? It could only be a*

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<sup>98</sup> For example, take the hypothetical case (although loosely based on truth) where a foreign country, after nationalizing substantial sunk assets, simply informed its investors that while it is a poor country (and therefore has no money to compensate its investors with), it nonetheless wanted to compensate its investors with its leading export: canned corned-beef. As such, the country provided its investors with a large container ship filled to the brim with canned corn beef which the investors were supposed to sell on the open market for whatever amount they could get.

<sup>99</sup> See Robert Eisner, *A Free Trade Primer*, Wall St. J., Oct. 13, 1997, at A22; Glassman, *supra* note 3 (“If we make it easy for Italy to export inexpensive shoes to us, the U.S. shoemakers may have to find work in other fields. But, meanwhile, the 260 million Americans who wear shoes everyday get a bargain. The money they save can be used to buy other things and start businesses, such as software, in which Americans have a clear advantage.”).

<sup>100</sup> See Miller, *supra* note 16 (citations omitted and emphasis supplied).

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distortion of our economy if they had any chance to achieve monopoly power to recoup the subsidies we would now be enjoying.”<sup>101</sup> Yet, according to both the FCC’s own *Access Charge* and *ECO* orders, this recoupment is not about to happen anytime soon in U.S. telecommunications markets.<sup>102</sup>

Finally, a naked reciprocity approach ignores basic concepts of international comity. At the end of the day, I don’t think anyone would disagree that open markets are the best way to maximize consumer welfare. Yet there are numerous countries that are, to state it politely, a bit recalcitrant to open their markets. So long as these foreign incumbents’ monopoly power remains unchecked, therefore, they can engage in “whipsawing” and other numerous price and non-price discrimination strategies against or among U.S. carriers.

Unfortunately, in these situations, basic international law is pretty clear about enforcement options: barring evidence that one country is using its territory to stage a military attack against another, one country may not interfere in the internal domestic affairs of another.<sup>103</sup> Thus, the best way to mitigate unilateral, strategic anticompetitive conduct for

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<sup>101</sup> *Id.*

<sup>102</sup> See *Access Charge Reform*, CC Docket No. 96-262, First Report & Order, 62 Fed. Reg. 31,040 (June 6, 1997), FCC Rcd., FCC 97-158, ¶¶ 275-82 (May 16, 1997) (structure of U.S. domestic market makes recoupment unlikely); *ECO Order*, ¶¶ 69-70 (because of both the bi-lateral nature of negotiations and the competitive pressures of the international market, it is still highly unlikely that a dominant foreign firm can “set the ‘input’ accounting rate level unilaterally”; as such, “[e]ven assuming *arguendo* that a dominant foreign carrier can unilaterally set an accounting rate” the structure of the IMTS market nevertheless indicates that “above-cost accounting rates on particular routes where a carrier has an affiliate on the foreign end [cannot] realistically jeopardize the ability of unaffiliated carriers to compete on those routes or in the U.S. international services market as a whole. *Additionally, we believe the possibility of such harm is outweighed by the benefits of additional price and service competition that will result from further U.S. market entry.*” (emphasis supplied)).

<sup>103</sup> See U.N. Charter art. 2, ¶ 7; see also U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* § 3.2 & n.73 (1995) (both the DOJ and the FTC must consider the legitimate interests of other nations); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

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IMTS service is to convince the recalcitrant country to establish, *inter alia*, standard, cost-based accounting and, especially as IMTS market structure rapidly moves away from a “half circuit” toward a “full circuit” world between country-pairs, termination rates, along with transparent regulation to mitigate against non-price discrimination. This is precisely what the hard-fought WTO agreement (mainly at U.S. insistence) achieves. As such, from an economic point of view, whether a U.S.-based carrier has the ability to set up a rival network in a WTO member destination country should be irrelevant to the question of whether a foreign firm can successfully engage in strategic conduct for U.S.-originated traffic on that country-route.<sup>104</sup>

**[\*21]** Despite these critiques, nothing in the preceding discussion should be construed as an argument that I am against doing something for the home team. I am not. It is just that both economics and history demonstrate that a mercantile approach using “competition-style” buzzwords simply is not the way to accomplish this goal. Trade is, and will always continue to be, an important foreign policy priority and legitimate national interest. Yet when trade policies—especially those policies espousing naked mercantilism—are improperly cast in the guise of promoting “antitrust policies” or “public interest benefits,” such policies will contribute to achieving neither (1) antitrust’s goal of maximizing long-term U.S. consumer welfare with lower prices and more choices nor (2) trade policies’ goal of helping U.S. firms expand overseas. Rather, this approach will promote the opposite result. Accordingly, because trade goals are generally inapposite to the goals of antitrust and economic regulation, trade policy is best left for those agencies or departments responsible for implementing these objectives—not with antitrust enforcement or independent regulatory agencies responsible for protecting and promoting static and dynamic economic efficiencies and the maximization of consumer (not individual competitors’) welfare.

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<sup>104</sup> See *Market Reconcentration*, *supra* note 4, at 23 & n.26; see also Doug Galbi, Chief Economist, FCC Int’l Bureau, *Model-Based Price Standards for Terminating International Traffic*, FCC Staff Paper, Room Document No. 10, OECD Ad Hoc Meeting on International Telecommunications Charging Practices and Procedures (Sept. 17, 1997) (proposing a model that any country can use to compute economically relevant price standards for termination by its international correspondents).

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## **Conclusion: So Why Should We Be Concerned?**

In sum, neither antitrust nor economic regulation should be used to achieve some sort of a “fair” outcome or establish “a level playing field.”<sup>105</sup> “Fair,” to any self-respecting antitrust lawyer or economist, should be yet another obscene, four-letter word.<sup>106</sup> “Competition” requires *rivalry*—there is no notion of “equity” in this term.<sup>107</sup> Similarly, we should discard the irrational notion that antitrust or economic regulation should “level the playing field,” for the market never was, nor ever will be, supposed to be reduced to a zero-sum game with relatively equal competitors.<sup>108</sup> If we do not, then the only thing accomplished is

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<sup>105</sup> See Hundt & Barshefsky, *supra* note 94 (“The FCC remains committed . . . to adopting *fair rules* that live up to American international commitments, while safeguarding the public interest and insuring *full and fair competition* in telecommunications markets in the United States. The executive branch fully supports this view.” (emphasis supplied)).

<sup>106</sup> See Hazlett & Ford, *supra* note 2.

<sup>107</sup> See *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21-22 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991) (“[A] practice is not ‘anticompetitive’ simply ‘because it harms competitors’—after all, the whole purpose of competition is to ‘advance a firm’s fortunes at the expense of its competitors.’ Rather, ‘a practice is ‘anticompetitive’ only if it ‘harms the competitive process’ by obstructing the ‘achievement of competition’s basic goals—lower prices, better products and more efficient production methods.’”); see also *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 833 F.2d 1101, 113 (1st Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990) (“[T]he desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws. . . . As long as [the defendants’] course of conduct was itself legitimate, the fact that some of its executives hoped to see [the plaintiff] disappear is irrelevant.”); *Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987) (“[I]f conduct is not objectionably anticompetitive, the fact that it was motivated by hostility to competitors (‘these turkeys’) is irrelevant.”); *Hawaiian Telephone v. FCC*, 498 F.2d 771 (D.C. Cir. 1974) (“equity” considerations cannot substitute for thorough legal and economic analysis when invoking “competition” principles under the public interest standard).

<sup>108</sup> See Easterbrook, *supra* note 7 (those “who see economic transactions as zero-sum games are likely to favor ‘fair’ divisions of the gains and losses”); see also Farrell, *supra* note 55; John Berresford, *Future of the FCC: Promote Competition, Then Turn Out the Lights?* 21-22 (Economic Strategy Institute, May 1997). Berresford states that the “playing field is never ‘even’ to begin with, and bringing in a lot of regulatory landscape architects and earth-moving equipment will, in most cases, only postpone the emerging competition  
(continued ...)

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the reallocation of wealth among competitors, without producing a single benefit for consumers.<sup>109</sup>

So why should we be concerned? After all, isn't this just business as usual? The answer to this question should be a straightforward no, and let me tell you why.

While we all would like to realize the utopian goal of "private competition and public interest benefits," the word "public" in the term "public utility" cannot be stretched to such an absurd point that economic policies fail to realize that the telecommunications and electric utility industries are high stakes *businesses* as well. If [\*22] reasonable business people perceive that the costs and risks of entry outweigh the potential financial benefits, then these firms will choose not to enter, or remain in, the market. Tragically, given the recent consolidation trends in both the electric utility and telecommunications industries and the high costs associated with entry into these markets, it appears that the incentive to enter and remain in both of these markets is rapidly diminishing.

Yet, the preceding paragraph highlights the primary challenge and great oxymoron about telecommunications and electric utility industry restructurings: the simple fact that the deliberate inclusion of the word "public" in "public utilities" likewise cannot be ignored. Like it or not, we must accept the fact that American consumers consider cheap and reliable telephone and electricity (and apparently cable television as well)—unlike any other lawful business—to be some kind of an American birthright. Thus, in addition to viewing these industries from a strict

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and the benefits it would bring to consumers." Thus, once regulators start to level the playing field to be "fair" to one competitor, "all the other competitors will find something unfair to them and will want their valleys to be filled and their mountains and hills to be brought low. The process can become an endless one and, if carried to its logical conclusion, makes the regulator into a cartel manager. This guarantees jobs for the regulators, lawyers and lobbyists, and oligopoly for the so-called competitors, but it will do little for consumers."

<sup>109</sup> See also Glassman, *supra* note 3 ("We work in order to eat, not visa versa. In other words, an economy should, first and foremost, benefit consumers, not producers—individuals rather than the established interests of business and labor.").

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dollars and cents perspective, we need to view these industries (and the policies designed to restructure them) from a *societal* perspective as well.

That is to say, as explained above, in truly competitive markets, inefficient firms will be eliminated. However, while both politicians and consumers love to extol the benefits and necessity of competitive telecommunications and energy markets, if the power or phones go out, consumers tend to become quite upset. When they do, these angry consumers call their local politicians, who then call other politicians, who then call utility and telephone company CEOs and scream at them for letting some little old lady sit in a cold dark room with no way of calling: "Help, I've fallen and I can't get up!" Accordingly, because consumers consider cheap and reliable telephone, video, and electricity as an American birthright, if consumers perceive a sufficient diminution in quality or increase in price, they will demand swift and demonstrable action. When the cacophony of consumer outrage becomes sufficiently loud (and it always does), then there is a distinct and strong possibility that Congress and the States will take some kind of "punitive" action.<sup>110</sup>

As an initial, "less intrusive" measure, government and industry may work out a deal that creates the "appearance" of immediate competitive benefits, but which [\*23] will, in fact, act as a net detriment to overall consumer welfare in the long-run.<sup>111</sup> If "voluntary" commitments prove

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<sup>110</sup> See Dolan, *supra* note 82 (noting that when public criticism reaches this boiling point, "such criticism helps undermine the antitrust delusion and establishes the deeper truth that all antitrust cases are political first, based on economics last"); see also Eleanor M. Fox, *Lessons From Boeing: A Modest Proposal to Keep Politics Out of Antitrust*, Antitrust Report, Nov. 1997, at 19 ("the antitrust experts did their job, while the politicians trivialized antitrust, reinforcing the popular notion that any big case that matters is political"; moreover, "it doesn't have to be [this] way, but counteracting politicization requires heavy leaning against the wind").

<sup>111</sup> See, e.g., Salpukas, *supra* note 65 (consumers were not aware that most of the alleged savings resulting from New Hampshire's retail-marketing plan for electricity were "not the result of free-market competition or any economies of scale" that a new entrant might bring but rather stemmed "from state-mandated subsidies and from the willingness of . . . marketers to shave their profit margins to near zero to get a piece of the action." As such, monthly bills "could bounce back up if the subsidies are phased out and [the] winners of the marketing battle reward themselves by taking a profit." (emphasis supplied)); see also Scott Cleland, *The "Real Story" Behind the FCC's Subsidy Reform Decision?* Telecom Bulletin (Wash. Research Group, May 9, 1997) ("[O]nly 'escape route' possible (continued ...)")

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inadequate to alleviate political pressure, government could also impose some sort of “punitive” regulation—specifically, new regulation that will (1) be far more intrusive and costly than the system we operate under now and contribute absolutely nothing to improving consumer welfare, but (2) nonetheless make great points with voters back home.<sup>112</sup>

The problem with this approach is that given the large sunk costs required for new entry, additional new capacity (e.g., undersea cable capacity, alternative local distribution networks, cable “overbuilds,” electric utility bulk transmission lines) cannot come on line to relieve constrained facilities whenever politicians want them. These projects are both very time and capital intensive. Thus, without forward-looking policies designed to promote and encourage tangible, facilities-based

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from the ‘political trap’ of appearing to be increasing the nation’s telephone rate burden to pay for new school subsidies” was for FCC to enter into a “last minute ‘deal’ with AT&T,” which, in “return for public promises from AT&T to pass on any access charge reductions to basic consumers for the first time in years, the FCC would decrease the local telcos’ price caps by an additional \$750 million.” This “‘deal,’ combined with a slower phase-in of the new universal service fund, enabled the FCC to defensively claim ‘offsetting savings’ for both long distance and local customers to pay for the \$3 billion in new subsidies.”).

<sup>112</sup> For example, because the Cable Television Act of 1992 regulates cable companies’ rates on a *franchise-by-franchise* basis, the economic compliance costs far out-weigh any conceivable public interest benefit (i.e., actual amount of refunds achieved are often *de minimis*—generally a couple of thousand dollars). Thus, if government is really so concerned about the ability of cable monopolies to gouge consumers over a few thousand bucks, then government should simply write consumers a check for this amount instead. More disturbing, however, is that this costly regime does absolutely *nothing* to improve the overall performance of the larger MVPD market. See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report*, FCC 96-496 (rel. Jan. 2, 1997) at ¶ 4. (“Local markets for the delivery of video programming generally remain highly concentrated, and structural conditions remain in place that could permit the exercise of market power by incumbent cable systems.” Thus, it remains “difficult to determine to what extent these markets will be characterized over the long term by vigorous rivalry”). Accordingly, consumers are also pressuring lawmakers to explain why this regime has not produced any benefits. See, e.g., Ron Podell, *Cable Company Hikes Rates*, Montgomery J., May 21, 1997, at A1; *Murdoch Plans Total Local Carriage From DBS Platform*, Satellite Week, Apr. 14, 1997 (reporting that Commerce Committee Chairman Senator McCain (R-Ariz) held hearings on status of competition in MVPD market because he is “concerned that passage of the Telecom Act last year didn’t result in lower prices and more competition in the video market, particularly since telcos dropped plans to enter video distribution market”).

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entry, as demand expands and supply stays constant (or, in some cases, shifts in as outdated facilities go off line and are not replaced), consumers may very well experience an increase in price and a diminution in choices or quality of services, rather than the opposite result, which they were originally promised and fully expect to realize.<sup>113</sup> When this happens, the lives of everyone involved with the process—politicians, industry, and especially consumers—become just a little bit more miserable. Accordingly, those who advocate the “neo-competition” view that consumer welfare is best “promoted” or “protected” by increased government intervention into the market—absent any articulation on their part that such intervention is both required and specifically tailored to eliminate a clear “public policy” barrier to entry—simply cannot have their cake and eat it too.

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<sup>113</sup> As explained above, “neo-comps” *a fortiori* reject any criticisms that their policies are, in fact, barriers to entry. Well, perhaps this criticism may be over-reaching just a bit. “Neo-comps,” just like everyone else, love to proclaim that they want the doors open wide—the only problem with this statement is that they also want to say hello (and, if possible charge an entry fee) to everyone who walks by.