TELECOMMUNICATIONS: THE TRANSITION FROM REGULATION TO ANTITRUST*

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INTRODUCTION

It has become increasingly clear in recent years that whether or not to proceed with the deregulation of telecommunications is or should no longer be an active issue. For the majority of subscribers, service is no longer a natural monopoly because the competition among diverse platforms is sufficiently ubiquitous for us to envision deregulated competition as the general rule and continued regulation the exception. By the same token, we need a basis for deciding when and where that process has advanced sufficiently to justify deregulation: in Part I, I propose a comparatively simple, objective criterion.

In Part II, I discuss how to give substance to the role of the antitrust laws, to which in principle falls the responsibility for protecting and preserving the competition that makes deregulation feasible. (In view of the mammoth mergers in the industry during the last several years—including mergers across platforms—it is worth underscoring that that responsibility *precedes* as well as succeeds deregulation, both logically and chronologically. In a very real sense the different technologies embodied in different platforms may be said to compete with one another in a way that is real and highly beneficial. But to the extent that "competi-

* I should like to dedicate this paper, which reflects throughout his influence and our collaborations over the last seventy years, to the memory of Joel B. Dirlam, whose recent death I continue to mourn. I also want to acknowledge the generous advice I have received over the last few years from Professor Philip Weiser, the patient suggestions of Charles A. Zielinski and Timothy Tardiff, the research assistance of Trung Lu and the extraordinary efforts of Martha Ullberg and Marilyn Pettinga.

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tion" takes place only *within* the firm, it is merely metaphorical; it is not a sufficient substitute for competition between or among firms, as an authentic basis for deregulation.)

Finally, in Part III, I apply these considerations to the increasingly politicized and emotional issue of "network neutrality," cutting through the reasoning-by-metaphor and sloganeering to disclose that the logical core of these arguments consists in part—but only in part—in differing responses to the issues I discuss in Parts I and II. The other part is, for want of a better term, ideological—which probably explains the increasing shrillness of the debate: while talking the language of competition and monopoly, regulation and deregulation, its proponents and proposals go beyond the limits of what constitutes an effectively functioning competitive, market economy—which is not to say that they are for this reason illegitimate. To these views, I attempt to offer a bridge—or, for what it may be worth, a *partial* bridge—consistent with my views of the proper role of government in a competitive, market economy.

I. The Case and Tripping Point for Deregulation

According to the FCC,[1] 19 percent of all switched subscriber access lines in mid 2005 were served by competitive local exchange carriers (CLECs). Cable companies represent a prominent and a rapidly increasing share of these: although they have only begun offering telephony on a large scale, they already account for about 4 percent of all residential lines. In addition, more subscribers actually have cell phones than traditional landline telephone service: that ratio will almost certainly increase as we octogenarians and nonagenarians pass from the scene. These national data hardly suggest instantaneous and ubiquitous deregulation;[2]

1. Local Telephone Competition: Status as of June 30, 2005, *Report*, 2006 WL 927328 (Apr. 2006).

2. For example, according to the same FCC survey, the CLECs' share of all switched subscriber access lines ranges between 6 to 8 percent, in Hawaii and Montana, and 40 percent in Rhode Island; their share of residential between 0 to 4 percent in Hawaii, Montana, Nevada, and West Virginia and 32.6 percent in Rhode Island; and their share of business lines, between 12 to 18 percent in Wyoming, Mississippi, Missouri, Montana, Hawaii, Indiana, and Idaho and 40 to 60 percent in the New England states, New York, Pennsylvania, Delaware and the District of Columbia. *Id.* at 11.

Vinton Cerf, Vice President & "Chief Internet Evangelist" of Google, Inc., has asserted that as of 2004 only 53 percent of Americans had a choice between cable modem and DSL service and those two provided 99.5 percent of all broadband service to consumers. *Reconsidering Our Communications Laws: Ensuring Competition and Innovation: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (June 14, 2006) (statement of Vinton G. Cerf, Vice President & Chief Internet Evangelist, Google Inc) [hereinafter Cerf]. The 53 percent figure seems, however, to substantially underestimate the actual or directly potential facilities-based competition. For example, the FCC's latest broadband report, High-Speed Services for Internet Access: Status as of June 30, 2005, *Report*, 2006 WL 927327, at *3 (Apr. 2006), states that as of June 2005, cable modem service was available to 91 percent of households to whom cabut they also fail dismally to reflect how dramatic the turnaround and dissolution of the local landline-based telephone monopolies have been. In December 1999, incumbent local telephone companies served 181.3 million land lines; by June 2005, that number had declined to 144.1 million;[3] in the first quarter of 2006, it was dropping by 150,000 a week—7,500,000 a year.[4]

Newspaper reports capture these dramatic changes more quickly—and breathlessly—than official annual statistics:

> In 2005, the number of subscribers to Internet-based calling services nearly tripled from the year before, to 5.5 million . . . By 2010 [estimates are that] Internet phone providers [will have won] about a quarter of the traditional local phone business . . .
>
> In New York, Verizon recently sent letters to customers offering a calling plan that includes unlimited phone service for $35 a month, instead of $60 . . . For people signing up for service through its web site, AT&T now offers unlimited local and long distance service for $40, down from $50 a year ago.[5]

These numbers signal a dramatic change, already in process, that calls for a radical reconsideration of our inherited regulatory institutions, at once in some places and soon in others.

In 2005, the Canadian incumbent local exchange carrier (ILEC), TELUS, proposed to its regulators (the Canadian Radio-television and Telecommunications Commission—CRTC) an objective "bright-line" test, satisfaction of which would automatically call for regulatory forbearance: whenever and wherever a second, facilities-based carrier has taken over some specified percentage of the subscriber access lines of an incumbent telephone company, in a market geographically defined by the reach of the facilities of the (presumably cable) competitor.[6]

In TELUS' proposal, the "bright-line" was 5 percent—a figure that would at first glance seem absurdly low, as the CRTC indeed ultimately decided: [7] one would not ordinarily expect a market 95 percent of which

ble TV service was available and DSL was available to 76 percent of households served by ILECs. Since both ILEC and cable TV are nearly ubiquitous, this would suggest that households with a choice would be somewhere in the 70 percent range.

3. Local Telephone Competition: Status as of June 30, 2005*, supra* note 1, at 4.

4. Matt Richtel & Ken Belson, *Online Calling Heralds an Era of Lower Costs,* N.Y. TIMES, July 3, 2006, at A11.

5. *Id*.

6. Comments of TELUS Communications Inc., in *Forbearance from Regulation of Local Exchange Services*, Telecom Public Notice CRTC 2005-2, 28 April 2005 (Public Notice 2005-2).

7. Expressing the opinion that "it is the loss of customers to competitors by an applicant ILEC which best demonstrates that . . . [its] market power may be diminished," the CRTC de-

is served by a single incumbent to be effectively competitive. Justifying so small a "bright-line," however, were the following considerations:

> A. the achievement of a 5 percent share of a market so long served entirely by incumbent telephone companies would be clearly reflective of a major competitive effort;
> B. the process would be just beginning;
> C. its perpetuation and expansion within the market already reached by their facilities *would be ensured by the very large sunk investments and consequent low marginal costs*[8] of both parties in that region.[9]

In supporting testimony, I recommended adding the requirement of a third, competitive platform independent of the ILECs, presumably wireless, the presence of which was implicit in the TELUS proposal. This calls attention once more to the need for a careful assessment of widespread mergers in recent years, both among wireless companies and between them and local telephone companies.[10] In these circumstances, it

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creed, conservatively, that the applicant ILEC would have to demonstrate a loss of 25 percent of the market to be accorded regulatory forbearance. *Forbearance from the Regulation of Retail Local Exchange Services*, Telecom Decision CRTC 2006-15, 6 April 2006 ¶¶246 (Telecom Decision 2006-15).

8. As I learned first from John Maurice Clark, the high ratio of fixed to variable costs of both competitors tends further to hold down the profit-maximizing level of their charges by increasing the "margin" elasticity of demand for their respective services: the lower volume of sales associated with higher prices being only slightly offset in their effect on profits by savings in variable costs, the greater volumes associated with lower prices only slightly offset or discouraged by higher variable costs biases the choice in the direction of the latter. JOHN MAURICE CLARK, COMPETITION 148-50 (1961); *see also* Jerry A. Hausman, *Regulated Costs and Prices in Telecommunications*, *in* INTERNATIONAL HANDBOOK OF TELECOMMUNICATIONS ECONOMICS, VOLUME 2: EMERGING TELECOMMUNICATIONS NETWORKS 226 (Gary Madded ed., 2003); *From 2-G to 3-G: Wireless Competition for Internet-Related Services*, *in* BROADBAND: SHOULD WE REGULATE HIGH-SPEED INTERNET ACCESS, 126-27 (Robert W. Crandall & James H. Alleman eds., AEI-Brookings Joint Center for Regulatory Studies, 2002); Dennis L. Weisman, *When Can Regulation Defer to Competition For Constraining Market Power?: Complements and Critical Elasticities*, 2 J. COMPETITION L. & ECON. 101 (2006).

9. For essentially this reason, Bell Canada, another participant, argued that "if it were proposing a market share test for the purposes of measuring market power, measuring shares on the basis of *capacity* the ability to provide service, would be more relevant . . . ." *Forbearance from the Regulation of Retail Local Exchange Services*, *supra* note 7, at ¶ 174 (emphasis supplied).

10. *See AT&T and BellSouth Merger: What Does It Mean for Consumers? Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm. on the Judiciary,* 109th Cong. (2006) (testimony of Jonathan L. Rubin, Senior Research Fellow, American Antitrust Institute) [hereinafter Rubin]; *see also* Robert W. Crandall & Clifford Winston, *The Breakdown of 'Breakup,'* WALL ST. J., Mar. 9, 2006, at A14 (generally dismissing any concerns about the AT&T/BellSouth merger). Partly contributing to the complacency of the latter two may have been the fact that that merger does not in itself involve any repression of

seems to me important to assess the competition of non-affiliated providers of wireless services—including municipalities—and, as Jonathan Rubin, Robert Hahn and Scott Wallsten emphasize, freeing up the spectrum for others, service providers and users.[11]

Such an objective test would have many advantages. It would seem to be easily administrable: the geographic scope of the market, the definition of the services, and the tipping point market share achieved by challengers would all be determined by observation, the first two by the overlapping reach of the facilities of both competitors in which effectively competitive behavior already prevails and, because of the large sunk investments required, is highly likely to persevere; and the last by a count of subscriber lines. And it would avoid the full-fledged adversarial expert testimonies openly invited by strictly "economic" tests, such as the U.S. Horizontal Merger Guidelines—calling for attestations of economic expert witnesses to the presence of market power sufficient to "impose at least a 'small but significant and nontransitory' increase in price" as the basis for geographic and product market definitions.[12]

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wireless as a third competitor, since the two merging companies were already co-owners of Cingular. On the other hand, the apparent intention of two major cable companies, Comcast and Cox, to set up some sort of joint venture with Sprint Nextel, the largest remaining unaffiliated wireless provider, raises once again the specter, which Crandall and Winston do not consider, of three competing platforms reducing to two in the areas in which they overlap. *See* Ken Belson, *Cable Companies, Taking Aim at the Bells, Bulk Up in Wireless Phone Services,* N.Y.TIMES, Apr. 10, 2006, at C4.

How that last plan will relate to Sprint Nextel's exciting later announcement of a joint venture with Intel to spend up to three billion dollars over a two year period constructing a mobile WiMax network remains to be seen, John Markoff & Ken Belson, *Sprint Will Build an Intel-Backed Network*, N.Y. TIMES, Aug. 9, 2006, at C7; but it reminds us once again of both the dynamic competitive potential of telecom technology—*see* the optimistic interpretation of the *Wall Street Journal* and the Progress and Freedom Foundation, in the latter's blog of August 9, 2006—and the importance of keeping that competition inter- rather than merely intrafirm.

Crandall and Winston's lone argument is that this last step in the re-integration of the "long-distance" and local business of the Bells demonstrates the futility of the original dissolution of AT&T—a contention with which I agree. That proposition, however, in no way minimizes, nor could it, the enormous benefits to the public from the dissolution of the AT&T *franchised monopoly*, originally protected from competition in all aspects of its business, from consumer premises equipment to "vertical services" and long distance—a dissolution reaching back some quarter of a century before dissolution of the Company itself under the Consent Decree in the antitrust case.

11. *See* Rubin, *supra* note 10; Robert W. Hahn & Scott Wallsten, *The Economics of Net Neutrality*, 3 ECONOMISTS' VOICE 8 (2006), http://www.bepress.com/ev/vol3/iss6/art8/. For a sobering contention of the limitations of wireless as a competitor of land-line Internet service, because of the limitation of its capacity and the consequent necessity of those carriers either limiting subscriber usage or charging very high rates—something like $80 a month for unlimited data downloads, *see* Amol Sharma & Dionne Searcey, *Cell Carriers to Web Customers: Use Us, but Not Too Much*, WALL ST. J., May 11, 2006, at B1.

12. U.S. DEPT. OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 4 (April 2, 1992). *See also infra* notes 24-25 and accompanying text.

In my testimony, I observed the coincidence of the TELUS proposal with my own consistently expressed preference for an interpretation of the antitrust laws as prohibiting anti-competitive *behavior* and the intent that can reasonably be inferred from it, as opposed to economic evaluations of either the *structure* of the markets involved or of their economic *performance* or results.[13] In the present context, the only "performance" called for would be active competitive behavior, reflected in substantial market penetration by rivals. The pertinent geographic market would be defined, objectively, by the overlapping reach of the existing facilities of the two competitors, and the only relevant results would be the achievement by the challenger of a stipulated minimum share of subscriber lines.[14]

I find it impossible to read the 535-paragraph CRTC decision—which is on the critical subject of when, where, and under what protective conditions to deregulate—without comparing it with the course of airline deregulation and also without considerable introspection: Even though in that earlier case we trod the path from "regulatory reform" to complete deregulation over a period of eighteen months, without instruction from Congress,[15] why am I uncertain that I would have written a decision different from that of the CRTC in this case—carefully balancing representations by incumbent companies, competitors and interveners, splitting differences, reaching "reasonable"—yet also clearly conservative—resolutions?

One answer is that airline regulation was government cartelization, plain and simple: the only sensible reform, it rather quickly became evident, was disassembly and abandonment. The regime of telecommunications regulation, in contrast, has been much more directly aimed at the protection of captive customers from putatively natural monopolies; and, correspondingly, the introduction of competition has necessarily required regulatory intervention to ensure competitors access to putatively essen-

13. *See generally* Alfred E. Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28 (1953); *see also* discussion *infra* Part II; *see also infra* note 48 and accompanying text. For an extended, congenial exposition, *see* Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657 (2001).

14. Alfred E. Kahn, *Appendix 3 to Comments of TELUS Communications Inc., in PN 2005-2*: *Economic Justification for TELUS' Two-Facilities Bright-Line Forbearance Test*, June 22, 2005, at 23-31, *available at* http://nera.com/image/TELUS_JUNE2005.pdf. In a painfully detailed discussion, the CRTC rejected TELUS' proposed market definition and raised its proposed tripping point for forbearance from 5 to 25 percent. The proffered reasons for the first of these were largely administrative—including the availability of the requisite information. *See Forbearance from the Regulation of Retail Local Exchange Services*, *supra* note 7, at ¶¶ 24-168.

15. *See* Alfred E. Kahn, *Deregulation of Air Transportation-Getting from Here to There, in* REGULATING BUSINESS: THE SEARCH FOR AN OPTIMUM 37 (Chris Argyris ed., 1978); Alfred E. Kahn, *Applications of Economics to an Imperfect World*, 69 AM. ECON. REV. 1, 5-15 (1979).

tial facilities: simple deregulation has seemed neither feasible nor prudent.

If there is any sector of the economy most fully characterized by dynamic, technological Schumpeterian competition, however, it is this one. Technological innovation is, surely, the most powerful and productive kind of competition and underminer of thoroughgoing economic regulation. Wherever and whenever it prevails, it demands deregulation, no less sweeping than decartelization of transportation.

II. THE EXPANDED ROLE OF ANTITRUST

It is a truism—proclaimed by The Digital Age Communications Act (DACA) Project and reflected in the DeMint bill[16]—that the abandonment of direct economic regulation shifts to the antitrust laws responsibility for protecting consumers. That truism leaves indeterminate the locus of responsibility for administering those injunctions: should it be state or federal regulatory agencies, or the antitrust enforcement agencies, and if both, with what division of responsibilities and subject to what substantive interpretations of the laws?

The June 2005 DACA *Proposal of the Regulatory Framework Group* recommends an "FTC Act model"—emphasizing the Act's Section 5 prohibition of unfair methods of competition and entrusting enforcement to an administrative agency, armed with the power to order interconnection of public communications facilities in situations in which denials "pose a substantial and non-transitory risk to consumer welfare . . . ."[17] Authority over mergers would be vested exclusively in the antitrust agencies in deference to their superior expertise, a recommendation likely inspired in part by the FCC's objectionable extension of its own vague "public interest" authority in the SWB/Ameritech and Verizon/GTE mergers to exact all sorts of extraneous "public interest" requirements.[18]

16. Digital Age Communications Act of 2005, S. 2113, 109th Cong. (2005).

17. PROGRESS & FREEDOM FOUND., PROPOSAL OF THE REGULATORY FRAMEWORK WORKING GROUP RELEASE 1.0, 25 (2005), http://www.pff.org/issues-pubs/other/050617regframework.pdf. The entire discussion of interconnection authority makes clear that the recommendation reflects a compromise between an anxiety on the part of some members that the imposition of any such requirement might dilute investment incentives and an apparently stronger concern about the possible denial of interconnection as an impediment to competition.

18. *See* Alfred E. Kahn, *An Illustration of the Comparative Propensities of the Antitrust Agencies and a Regulatory Agency to Meddle*, *in* WHOM THE GODS WOULD DESTROY, OR HOW NOT TO DEREGULATE 39-45 (2001) (citing the dissents of Chairman Michael Powell and Commissioner Harold Furchtgott-Roth), *available at* http://www.aei-brookings.org/admin/authorpdfs/page.php?id=112. The FCC similarly attached certain "voluntary" commitments to its approval of the SBC/AT&T and Verizon/MCI mergers. SBC Comm. Inc. and AT&T Corp., Applications for Approval of Transfer of Control, *Memoran-*

I find these recommendations highly congenial. The central substantive emphasis on "unfair methods of competition" accords exactly with the intention of the title Joel Dirlam and I gave to our book on antitrust policy fifty-plus years ago.[19] It also accords with the clear intention of the Sherman Act itself.[20] Lodging enforcement of that injunction in the FCC responds directly (though unconsciously) to my expression of dismay at the prospect raised by *Trinko* of the re-litigation before juries of endless administrative proceedings during the previous seven years under Sections 251 and 271 of the Telecommunications Act, in which the CLECs and would-be CLECs exercised their right to complain to the Commission of asserted acts of noncompliance.[21]

That reaction was, however, in the context of continuing direct regulation rather than deregulation; and it did not take into account the far larger penalties and, presumably, deterrent effects on ILEC obstructionism provided by the treble damages remedy in the Sherman Act than

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dum Opinion & Order, 20 FCC Rcd. 18,290, app. F (2005); Verizon Comm. Inc. and MCI, Inc., Applications for Approval of Transfer of Control, *Memorandum Opinion & Order*, 20 FCC Rcd. 18,433, app. G (2005). I understand that some state public utility commissions have emulated the FCC's practice with respect to mergers involving subsidiaries subject to their jurisdiction.

19. *See generally* JOEL B. DIRLAM & ALFRED E. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY (1954).

20. *See* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY, ORIGINATION OF AN AMERICAN TRADITION 226-27 (1955), referring only to the Sherman Act:

> The government's natural role in the system of free private enterprise was that of a patrolman policing the highways of commerce. It is the duty of the modern patrolman to keep the road open for all . . . . [T]his means that occupations were to be kept open to all who wished to try their luck . . . and that hindrances to equal opportunity were to be eliminated . . .
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> There can be no doubt that the Congress felt that the ultimate beneficiary . . . was the consumer . . . . The immediate beneficiary legislators had in mind, however, was in all probability the small business . . . whose opportunities were to be safeguarded from the dangers emanating from those recently-evolving elements of business . . . strange, gigantic, ruthless and awe-inspiring.
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> This is one reason why it was natural to adopt the old doctrines of the common law, doctrines whose meaning had been established largely in cases brought by business or professional people dissatisfied with the behavior of competitors.
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> Perhaps we are even justified in saying that the Sherman Act is not to be viewed exclusively as an expression of economic policy. In safeguarding rights of the 'common man' in business 'equal' to those of the evolving more 'ruthless' . . . the Sherman Act embodies what is to be characterized as an eminently 'social' purpose.

21. ALFRED E. KAHN, LESSONS FROM DEREGULATION: TELECOMMUNICATIONS AND AIRLINES AFTER THE CRUNCH 42 (2004). My corresponding relief when that CCA Decision was overturned by the Supreme Court was thoroughly dissipated by the controlling opinion of Justice Scalia, speaking for six Justices (although the decision was unanimous), in which he used the occasion to examine and prejudge the result of an antitrust inquiry, in effect dismissing it with reasoning borrowed from *Matsushita*. *See* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398 (2004); *see infra* text accompanying notes 38 and 40.

were available to the FCC and state commissions.[22]

On the other hand, I have deep concern about the intention of the Report to define "unfair competition" as

> [P]ractices that present a threat of abuse of significant and non-transitory market power . . . consistent[ly] with the application of jurisprudential principles grounded in market-oriented competition analysis such as those commonly employed by the Federal Trade Commission and the United State Department of Justice in enforcing . . . the antitrust laws . . . .[23]

As applied to mergers or FCC-ordered interconnection, this prescription seems unexceptionable. But as applied to "unfair methods of competition"—the exclusion of other service providers from the opportunity to compete on the basis of the relative attractiveness of their offerings—it seems to suggest an intention to confine its application to actions that would violate the Sherman Act, rather than as a separate, additional occasion for regulatory intervention—suggesting thereby that the enactment of the FTC Act, 24 years after the Sherman, was or should have been superfluous; and that its prohibitions of "unfair methods of competition"—or refusals to interconnect[24]—would apply only if a "market-oriented competition analysis" demonstrated a "significant and non-transitory risk" to consumer welfare—an open invitation to combat by opposing economic consultants.

My own intention would be better conveyed by attaching to "practices" in the DACA proposal "that present a threat of substantially impairing competition"[25] *and stopping there*—in keeping with my continuing conviction, to which I have already referred, that competition is most usefully conceived of as a *process*, a kind of behavior, and that the antitrust laws were as much intended to preserve fair opportunities for com-

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22. *See* Roger D. Blair & Christine Piette, *The Interface of Antitrust and Regulation: Trinko*, 50 ANTITRUST BULL. 665, 681 n.52 (2005). ILEC obstructionism was surely intensified by the FCC's ill-advised prescription of TELRIC pricing of unbundled network elements—far below not only the historical or embedded costs, but also the long run incremental costs of the incumbents. Looking to the future, as I will point out below, a resurrection of that prescription may still be proposed, when and if, as I recommend, antitrust enforcement involves prominent recourse to the essential facilities doctrine.

23. *See* PROGRESS & FREEDOM FOUND., *supra* note 17, at 23.

24. *See* discussion *supra* note 17.

25. I had originally qualified this statement by inserting the adjective "efficient" after "impairing," in order to disavow any intention to have the antitrust laws protect less efficient competitors from—in economic terms deserved—extinction, but eventually realized how thoroughly I agree with the original intention of the antitrust laws (*see supra* note 20) to protect competitors from exclusionary tactics, and my disagreement with the increasing tendency in recent years of courts deciding whether the disadvantaged or excluded competitors were or were not deserving of survival—specifically, in cases of claimed predation. *See* discussion *infra* at notes 37-47.

petitors as to forestall demonstrable likelihood of injury to consumers. What antitrust should condemn is competitive acts or policies betraying an intent either to suppress competition or deprive rivals unfairly of the opportunity to compete—the very rule of reason explicitly declared and applied in the Supreme Court's Standard Oil decision in 1911.[26]

This distinction is, once again, illuminated by the controversies in the middle of the last century over the proper competitive standard, once it was widely recognized that neither pure nor perfect competition is either achievable or desirable—least of all in the presence of rapidly changing technology. The literature in the industrial organization and the antitrust fields at that time—inspired, in important measure, by a number of decisions of the U.S. Supreme Court that seemed to have been guided by the pure competition standard, condemning business size, integration or monopoly power *per se*—was replete with efforts to define the controlling characteristics of an attainable standard of "workable" or "effective" competition.[27] In this quest, some commentators stressed:

A. the *structure* of the markets in question—the number of competitors in a relevant market, later defined specifically in terms of a gap in the chain of substitutes sufficient to permit a single seller to set prices above cost, their relative concentration or market shares, the possibilities of competitive entry and the like—others;
B. the *behavior* of producers and suppliers, guided by the maxim that competition describes observable and meaningful rivalry, in ways beneficial to consumers; still others; and
C. the economic *performance* of the markets in question, guided by the principle that what is ultimately important and should be controlling is the observable economic results—the relation of prices to costs, the level and continuity of profits, the level of costs over time, product and process innovation.[28]

In these continuing controversies, as I have already pointed out, I have consistently expressed preference for the criterion of behavior and the intent that may reasonably be deduced from it.[29] While in no way denying the logic of the proposition that if a market is not *structurally* competitive—i.e., does not contain competitors, either actual or on the

26. *See infra* text accompanying note 47.
27. The classic statement was J.M. Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940), *reprinted in* AM. ECON. ASS'N, READINGS IN THE SOCIAL CONTROL OF INDUSTRY 452 (1942).
28. *See* DIRLAM & KAHN, *supra* note 19, at chs. 1-2.
29. *See id.*, and, for an explicit explanation that the inference of intent does not call for an exercise in psychoanalysis, Kahn, *supra* note 13, at 48-54.

very top step to an unlocked door—it is not going to be effectively competitive, I pointed out that concentrated or oligopolistic markets—from cigarettes to automobiles (before and after imports became a powerful constraining force) to electronics—could show widely diverging kinds of performance;[30] and that the definition of the relevant market would itself be subject to controversies over the relevant elasticities of demand and supply. As to the performance test, I have cited the virtual impossibility of knowing to what extent an apparently "good" performance was actually explicable by effective competition or, instead, the inherent potential of the industry's technology and, conversely, the unpredictability of the results that effective competition would produce or would have produced.

Professor George J. Stigler sagely advised us how to make such assessments:

> To determine whether any industry is workably competitive . . . simply have a good graduate student write his dissertation on the industry and render a verdict. It is crucial to this test, of course, that no second graduate student be allowed to study the industry.[31]

I do not read this sardonic observation as excluding the possibility of a rational basis for regulatory forbearance. On the contrary, it merely excludes the necessity for a thoroughgoing economic appraisal of the presence or absence of market power posing a "significant and non-transitory risk to consumer welfare." Competition is a *process*, a kind of *behavior* of participants in a market. Its results are inherently unknowable, unpredictable—hence my consistent response thirty years ago to the question, "What is the structure of the airline industry going to look like after you have deregulated it?" or, today, in view of the profound financial difficulties of the major hub-and-spoke carriers and the increasingly successful competition of the more or less point-to-point low-cost carriers, "What is the structure of the industry likely to be in, say, five

30. *See also* A.D.H. Kaplan, *Big Business in a Competitive Society*, FORTUNE, Feb. 1953.

31. George J. Stigler et al., *Report on Antitrust Policy: Discussion*, 46 AM. ECON. REV. 496, 505 (1956). Similarly, reflecting my own skepticism of the usefulness of an essentially "economic" standard—whether in appraisals of market structure or economic performance, such as was sought by some of its economist members—*see* my comment about chapter VII, "Economic Indicia of Competition in Monopoly," of the Report of the Attorney General's National Committee to Study the Antitrust Laws (of which I was a member):

> The ironic fact is that chapter VII is where it is because that is as close as the lawyers could with propriety put it to the back door, through which most of them were quite prepared to throw it. Even there, it is thoroughly hedged with statements—sometimes italicized for good measure—to the effect that any relationship between its economic discussions and the law, living or dead, was strictly coincidental." *Id.* at 500.

years?": "*If the answer to that question were knowable, there would have been no reason or need to deregulate.*"[32]

I do not suggest unqualified disagreement with the DACA Report's recommendation of a demonstrable threat to consumer welfare as the essential basis for regulatory intervention, however difficult and judgmental it would be. As I have already observed, it seems the only possible standard applicable to mergers, in which the action itself cannot flatly be labeled "fair" or "unfair," "competitive" or "anti-competitive": the judgment has to be whether the consequent change in market *structure* is or is not likely to pose a threat to the competitive process and to consumers. But it does seem to me that grafting that same standard on Section 5 of the Federal Trade Commission Act's simple prohibition of "unfair methods of competition" would defeat the valid, independent purpose of that Act.

To be sure, any suggestion that antitrust scrutiny concentrate on "unfair" or "exclusionary" methods of competition that deny competitors the opportunity to prosper or fail on the basis of their efficiency must confront the consideration that such practices may themselves—just as mergers, price discriminations, tie-ins[33] and exclusive dealing[34]—be efficient, a form of competition or conducive or promotive of it. No economist who has been involved with the airline industry can fail to recognize the essentiality as well as inevitability of price discrimination in the ubiquitous presence of fixed and common costs—including possible *rationing* of low price options—without necessarily producing monopoly profits overall, just as J.M. Clark did almost a century ago.[35] No

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32. Kahn, *Applications of Economics to an Imperfect World*, *supra* note 15, at 6:

> Our uncertainty about the outcome of the competitive struggle is no reason to prevent its taking place; the only sensible prescription is to give competitors freedom to slough off their artificial handicaps by entering and leaving markets, as they please. Moreover, if we cannot *predict* how these offsetting advantages and handicaps of the several carriers are likely to work out under a regime of free entry, it seems to me even less likely that we can hope to achieve the most efficient performance of the transportation function by *prescribing* how the thousands of markets should be served, as the proponents of the status quo would have us do. I find it difficult to see how these uncertainties tilt the balance in the direction of a reliance on predictably ignorant regulation in preference to an uncertainly predictable market process.

33. Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957).

34. I make no effort here to summarize adequately the "University of Chicago" view that vertical integrations cannot be anticompetitive and the "post-Chicago" critics of that proposition. *See*, as one example of the latter, Joseph Farrell, *Deconstructing Chicago on Exclusive Dealing*, (Competition Policy Ctr., Working Paper No. CPC05-053, 2005), *available at* http://repositories.cdlib.org/iber/cpc/CPC05-053, and, in particular relation to telecommunications, Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85 (2003).

35. J.M. CLARK, STUDIES IN THE ECONOMICS OF OVERHEAD COSTS (1923). *See also*

student of Schumpeter can fail to appreciate the legitimate role of price discrimination—or of tie-ins, as a specific form of it—in exploitation of the monopoly power (judged by the standard of pure competition) that he taught us is an essential part of the innovation process. The necessity for drawing such distinctions is inescapable.[36]

But only the economically brainwashed can deny that price discrimination has also been used as a means of predation, to the ultimate injury of consumers, however frequent routine allusions to McGee's proffered—and later refuted—demolition of the contentions of the populists about the tactics used by John D. Rockefeller[37] or the scriptures of *Matsushita*[38] and *Brooke Group*.[39] More fundamentally, I find myself on

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A.E. Kahn, *Deregulation of Air Transportation*, *supra* note 15; Michael E. Levine, *Price Discrimination Without Market Power*, 19 YALE J. ON REG. 1 (2002); WILLIAM J. BAUMOL, REGULATION MISLED BY MISREAD THEORY 29-30 (2006).

In anticipation of my discussion of the hotly contested current issue related to "network neutrality," in Part III below, it is worth emphasizing here that a very important part of the complicated price differentiations that the major air carriers introduced into their fare structures after deregulation were not discriminatory at all. The comparative unavailability of highly discounted fares at crowded airports and at times of congestion; the greater downward taper in per mile fares with greater distance, larger planes and higher load factors—as on vacation flights—are in major part not discriminatory, but reflect genuine differences in marginal (and marginal opportunity) costs thitherto suppressed by regulation. Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 343-44, 346, 349 (1990).

36. *See* JONATHAN L. RUBIN, AM. ANTITRUST INST., DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES (Mar. 30, 2006), http://www.antitrustinstitute.org/recent2/491.pdf.

37. John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1. J.L. & ECON. 137 (1958); John S. McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289 (1980); James A. Dalton & Louis Esposito, *Predatory Pricing and Standard Oil: A Re-Examination of the Trial Record*, 20 RES. L. & ECON. 22 (2006); *infra* note 39.

38. Matsushita Elec. Indus. Co. v. Zenith Radio Corp, 475 U.S. 574, 589-90 (1986).

> [T]here is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful. *Id.* at 589.
>
> [M]istaken inferences [and the resulting false condemnations]. . .are especially costly, because they chill the very conduct the antitrust laws are designed to protect. *Id*. at 594.

39. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239 (2000); Richard O. Zerbe, Jr. & Michael T. Mumford, *Does predatory pricing exist? Economic theory and the Courts After Brooke Group*, 41 ANTITRUST BULL. 949, 982 (1996) ("The courts have relied too heavily on the idea that predation is rare and even more rarely successful. This judgment is supported by neither theory nor fact. Rather it is supported by some rather *ad hoc* theorizing and a misreading of a number of important cases and instances of strategic behavior."); Malcolm R. Burns, *Predatory Pricing and the Acquisition Costs of Competitors*, 94 J. POL. ECON. 266 (1986) (an impressive empirical study); Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust*, *in* HANDBOOK OF INDUSTRIAL ORGANIZATION (R. Schmalensee & R.D. Willig eds. 1989); Joel B. Dirlam, *Marginal Cost Pricing Tests for Predation: Naïve Welfare Economics and Public Policy*, 26 ANTITRUST BULL. 769 (1981). *See also* Kenneth G. Elzinga & David E. Mills, *Predatory Pricing and Strategic Theory*, 89 GEO. L.J. 2475 (2001); Patrick Bolton et. al, *Predatory Pricing: Response*

the verge of supporting the proposition that, contrary to respectable economic opinion and Supreme Court dicta:

A. false predation positives or condemnations are *not*, in the words of Justice Scalia quoting *Matsushita*, "especially costly [i.e. worse than false negatives], because they chill the very conduct the antitrust laws are designed to protect"[40]—a bromide that fails to differentiate the *initiation* of price competition from the response that punishes and *suppresses* it and restores the status quo ante;

B. predation may well have *occurred*, *and succeeded*, even if the incumbent, while successfully restoring the pre-competitive-entry prices, failed to restore them long and high enough to earn back in excess profits what it earlier gave back in its putatively predatory prices—*with interest*.[41]

In my reckoning, a dollar of producer surplus gained or lost is *not* fully equivalent to a dollar of consumer surplus lost or gained, particularly—but not only—in terms of the purpose of the antitrust laws.[42]

As to the putative equivalence of false positives and negatives,[43] I would have it suffice for a successful charge of predation that:

A. the entrant or challenger offer some group or subgroup of customers service on terms that a sufficient number initially find attractive enough to ensure its ability to continue to offer it—thereby demonstrating that those customers were not previously enjoying service at the stand alone costs of serving them;[44]

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to Critique and Further Elaboration, 89 GEO. L.J. 2495 (2001); Alvin K. Klevorick, *The Current State of the Law and Economics of Predatory Pricing*, 83 AM. ECON. REV. 162 (1993); Aaron S. Edlin & Joseph Farrell, *The American Airlines Case: A Chance to Clarify Predation Policy* (Competition Policy Ctr., Paper CPC02-33, 2002), *available at* http://repositories.cdlib.org/iber/cpc/CPC02-033; Alfred E. Kahn, *Thinking About Predation—A Personal Diary*, 6 REV. INDUS. ORG. 137 (1991).

40. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. at 414 (quoting *Matsushita Elec. Indus. Co.*, 475 U.S. at 594).

41. "In order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices." *Brooke Group Ltd.*, 509 U.S. at 225-26 (quoting *Matsushita Elec. Indus. Co.*, 475 U.S. at 590-91).

42. *See*, *e.g.*, Richard O. Zerbe, Jr. & Donald S. Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655, 680, 688 (1982).

43. *See* Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979).

44. *See* WILLIAM J. BAUMOL ET AL., CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE 508-09 (1982), on this rule, at least at one time purportedly expatiating

B. the incumbent respond with similarly sharp reductions, pinpointed at the specific market niche that has been invaded, and especially if it also increases its capacity, demonstrating an intention to leave no room for the intruder in the market—a market expanded—only momentarily, alas—by the latter's challenge,

C. driving out the intruder or forcing it to withdraw its consumer-attracting offerings, following upon which

D. the incumbent restores its previous price levels (and presumably resumes rationing its low-price offerings).[45]

It is only by a trick of rhetoric, however frequently repeated, that the incumbent is identified as a practitioner and advocate of "hard," the repulsed intruder of "soft" competition: in the immortal words of John McEnroe, "[Justices Kennedy and Scalia], you *can't* be serious!"

Confronting just such a history in the treble damages suit of Spirit against Northwest Airlines, the District Court resolved the hotly contested, unfortunately still-critical issue of the pertinent measure of marginal costs—complicated enormously by the incumbent's sharp (and temporary) increase in capacity on the contested route—in favor of the defendant, and dismissed the suit; the Circuit Court of Appeals reversed, sending the case back for retrial.[46] One can only hope that the jury to which the Circuit Court has consigned the case will be presented with the

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on the suggestion in ALFRED E. KAHN, THE ECONOMICS OF REGULATION 142-43 (1971).

45. This definition of the offense accords in spirit precisely with William J. Baumol's proposed remedy—and preventive—fully 27 years ago, supplementing the Areeda/Turner test: that incumbent firms engaging in such patterns of behavior be—and be so informed in advance—required to maintain their predatory offerings "quasi-permanently"—which I have generally interpreted as a year or two following the departure of the object of the predation. William J. Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1 (1979). I take additional personal satisfaction from the fact that the Baumol article referred specifically to the concerted response of the major international air carriers to the Sky Train offered by Laker Airlines beginning in 1977, which I had previously persuaded my colleagues at the Civil Aeronautics Board to disallow as predatory—for which "regulatory" intervention I was widely criticized by deregulatory purists less supportive than I of the antitrust laws. *See* my fuller description of this case and of what ensued in Kahn, *Thinking About Predation—A Personal Diary*, *supra* note 39, at 138-39.

I have always been amused by the defense of accused airline parties in such circumstances that they had to increase capacity in order not to have to turn away all the customers newly attracted by their drastically reduced fares (*see*, *e.g.*, Levine, *supra* note 35, at 32, 34) and, correspondingly, to reduce their capacity when that demand abated—as though, despite their justly self-proclaimed skills in yield management, they were taken wholly by surprise by those changes and had no choice but to do whatever necessary to accommodate them. Manifestly, the fare reduction was much greater than needed to defend their previous levels of traffic and predatory in both intent and effect.

46. Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917 (6th Cir. 2005). *See also* Alfred E. Kahn, *Comments on Exclusionary Airline Pricing*, 5 J. AIR TRANSPORT MGMT. 1 (1999).

question in plain English of which side represented preservation of the competitive process, which its suppression, whether in intent or effect.

Speaking for the Supreme Court in affirming a lower court's determination that Standard Oil of New Jersey had violated Section 2 of the Sherman Act, Chief Justice White delivered the classic enunciation of the rule of reason: that the antitrust laws condemn

> All contracts or acts . . . unreasonably restrictive of competitive conditions, either from the nature . . . of the contract or act or where the surrounding circumstances were such as . . . to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce . . . .[47]

As to the judicially asserted primacy of Areeda/Turner, one aspect of its logic is compelling—that if the competition-meeting or beating prices of the incumbent exceeded its marginal costs, yet drove the intruder out, it must mean that the former was more efficient, and productive efficiency would therefore be better served by the incumbent carrying the traffic than the challenger. BUT—setting aside the sometimes extreme uncertainty about the pertinent measurements of marginal cost—if the sequence of events clearly betrayed a predatory intent and the end result was without question a huge loss of consumer surplus, that test is either superfluous or perverse.[48]

Having said all this about the airlines case, I must concede that there seems to be ample basis in the airline experience of the last decade, with the dramatic increase in the market share of low-fare competitors, for the proposition that while there may be plenty of instances in which predation was *proximately* successful, there is at least one major respect in

47. Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911). Observe the convergence of this last evidence of predatory intent with the remedy proposed by Baumol, *supra* note 45, which I have endorsed as a means of bypassing or resolving the issue of predatory intent, *see* ALFRED E. KAHN, WHOM THE GODS WOULD DESTROY, OR HOW NOT TO DEREGULATE 70 n.80 (2001), http://www.aei-brookings.org/admin/authorpdfs/page.php? id=112.

48. The other part of the Areeda/Turner logic is that if the incumbent priced below its marginal costs, suffering out-of-pocket losses on those sales, it could only have been with predatory intent—that is, in the expectation of recouping them after it had succeeded in eliminating the competition. As a teacher of elementary economics some 40 years ago, I am embarrassed to have had to be reminded by Aaron Edlin and Joseph Farrell that in the presence of impure or imperfect competition, that test would be excessively lenient: a profit-maximizing seller would offer service only up to the earlier—i.e., lower—point at which not *price*—as under Areeda/Turner—but *marginal revenue* was equated to marginal cost. In other words, a competition-meeting or -beating price equal to marginal cost—the Areeda/Turner test to the contrary—would involve actual out-of-pocket losses if, as would almost certainly be typical, sales at the competition-meeting level would cannibalize—i.e., be at the expense of—sales that could otherwise have continued to be made at or closer to pre-entry prices, as was clearly the case in Northwest Airlines' response to Spirit. Edlin & Farrell, *supra* note 39, at 14-16.

which it has been ultimately unsuccessful.

The essence of the rule of reason is its recognition that the ultimate, unexceptionable goal of antitrust—preservation of the *competitive process*—demands a distinction between essentially beneficent competitive advantages or market power stemming from a firm's "superior product, business acumen, or historical accident," from ones deriving from its "willful acquisition or maintenance ... by unlawful or exclusionary practices."[49]

In the next section I appraise the sufficiency of the prior conditions for deregulation that I advocate in Part I and of antitrust enforcement thereafter, as conceived in Part II, to resolve the intensely contested issue of network neutrality.

III. "NETWORK NEUTRALITY"

These conflicting views of the proper focus of the antitrust laws in an industry increasingly subject to deregulation are evidently coming into focus in the legislative and public arena in demands of a wide diversity of interested parties, along with a large segment of the press, for "network neutrality." I was for a long time far from having a satisfactory grasp of what exactly that means or why its advocacy has taken on an almost messianic ardor.[50]

That advocacy has apparently coalesced around the explicit concern—set off by the FCC's decision in the Brand X case[51] to exempt cable companies from common carriage obligations—that the competition among providers of broadband access, predominantly ILECs and cable companies, might be insufficient to protect either subscribers, at one end, or providers of programming or content, at the other.[52] Or to protect

49. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); *see also* United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 343-45 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

50. I take some solace from the fact that at a recent conference on telecom policy, others far more at ease than I with matters pertaining to the Internet proclaimed a similar uncertainty, if not mystification, suggesting to me that the earlier confusion may have been attributable to an excess of exposition by metaphor. *But see*, more recently, contributing to my progressive enlightenment, Hahn & Wallsten, *supra* note 11; Paul Ganely & Ben Allgrove, *Net Neutrality: A User's Guide*, 22 COMPUTER L. & SECURITY REP. (forthcoming 2006), *available at* http://ssrn.com/abstract=925693; Robert D. Atkinson & Philip J. Weiser, *A 'Third Way' on Network Neutrality*, May 30, 2006, http://www.innovationpolicy.org/pdf/netneutrality.pdf; *see also* Kim Hart & Sarah Kehaulani Goo, *Tech Faceoff: Net Neutrality in the Eye of the Beholder*, WASH. POST, July 2, 2006, at F4.

51. The FCC's decision was on appeal voided by a Circuit Court of Appeals, then ultimately sustained by the U.S. Supreme Court in Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Servs., 543 U.S. 1185 (2005).

52. *See, e.g.,* Cerf, *supra* note 2, at 2-10. Also, however, a (recently discovered) full-scale rationalization in terms at least partly of the perceived inadequacy of competition between duopolists, Michelle Chen, *Activists Bring the Digital Frontier to New Communities*,

content providers from anticompetitive vertical price squeezes, exclusion from access, or denials (or, once again, excessive charges for) the priority transmission that their signals may require—all of which practices have already been condemned by the regulatory authorities in both Canada and the United States and emphatically *should* be condemned also under the antitrust laws.[53] I understood Professor Lawrence Lessig—a most prominent advocate—to have assured an audience of which I was a member, however, that the advocacy of network neutrality is concerned with neither the effectiveness of antitrust policy nor issues of regulation and deregulation—that framing the debate in either of those terms is "counterproductive"—an assurance amply reflected in his writings.

*But **either** that is exactly what it is or should be about **or**—their rhetoric of "monopoly" and "discriminations" and squeezes notwithstanding—the advocates are really talking about social goals that cannot be achieved by a market economy, however perfectly functioning—uses of resources and distributions of income in their opinion properly subject to extra-market, political determination.*

As to the first of these conceptions—I will return eventually to the second—whatever else is involved, broadband access to the Internet is a scarce good or service; priority in transmission required for such uses as voice over the Internet and telemedical diagnosis and treatment even more so. And they can be provided in the short run only by lower priority transmission of other signals and, in the longer term, by investment. Society cannot avoid deciding in one way or other to what extent its resources are to be deployed in this way, and how the services they create are to be allotted, rationed or prioritized among potential users, at one end or the other.[54] This necessarily involves evaluation of the adequacy

MEDIACHANNEL.ORG, Jan. 3, 2005, and *supra* notes 10-11 and accompanying text.

53. *Forbearance from the Regulation of Retail Local Exchange Services*, *supra* note 7, at ¶¶265-68; Atkinson & Weiser, *supra* note 50, at 3 (citing Madison River Communications LLC, *Consent Decree*, 20 FCC Rcd. 4,295 (2005)); *see also infra* text accompanying notes 81-83.

54. *See, e.g.*, Robert E. Litan, *Catching the Web in a Net of Neutrality* (AEI/Brookings Joint Center, Pol'y Matters 06-10, May 2006), *available at* http://www.aei-brookings.org/policy/page.php?id=252.

Professor Susan P. Crawford's analogy between the control over high-speed Internet access by the telephone and cable companies and the private ownership of ocean-shore property, in a position to block access to the "ocean commons," is evocative but also revealing of the ambiguities in the goal and logic of network neutrality. Susan P. Crawford, *Network Rules*, 69 DUKE J.L. & CONTEMP. PROBS. (forthcoming 2006), *available at* http://scrawford.net/display/061406%20network%20rules.doc. "Ocean-shore property" might refer merely to the beachfront *land*, Henry George's condemnation of the private *appropriation* of the benefits of which remains impeccable. I am, for example, a strong advocate of public beaches.

In contrast, the networks that writers such as she and Professor Lessig would render "neutral" represent *capital*, which has to be created by real investment—the taxation of which George opposed. High-speed Internet access clearly falls in the latter category, not the former. The beachfront analogy is therefore either totally inapt—or it is a variant of the proposition, of our present institutions for making those decisions—unregulated competition, subject to the antitrust laws, direct regulation or extra-market, political determination.

Indeed, the very specters Professor Lessig evokes if Congress fails to mandate network neutrality—that cable and phone companies will be free to

> discriminat[e] against content providers . . . create different tiers of online service . . . sell access to the express lane to deep-pocketed corporations and relegate everyone else to the digital equivalent of a winding dirt road . . . . earn huge profits . . . slow or even block the Websites and services of their competitors or those who refuse to pay up[55]—

are, despite his assurances to the contrary, precisely specters raised by deregulation and reflect the assumption that competition subject to antitrust will be incapable of forestalling such "discriminations."

Moreover—as my use of quotation marks is intended to suggest—these dire predictions betray a failure to understand the difference between price discriminations, such as *might* be taken to reflect inadequacies of competition, and differentiations on the basis of differences in costs, such as would unequivocally be reflective of effective competition. The opposition to "tiering" as such—extra charges for "access to the express lane," "guarantee [of] quality delivery,"[56] prohibitions of which are already embodied in bills introduced by Representative Markey and Senators Wyden, Snowe and Dorgan—is economically ignorant. The costs—both short-run (the opportunity costs of giving priority to the higher-speed uses) and long-run (the costs of the investments to provide additional broadband capacity, to relieve that congestion)—are, presumably, higher for the users requiring the "express lane." It is therefore not discriminatory for those costs to be levied on the services requiring their incurrence—provided only, once again, that there be no discrimination against the independent providers in favor of the corresponding

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which deserves consideration on its own merits, that, even though broadband access requires real investment, its availability to the public should not be determined exclusively by the latter's ability and willingness to pay (*see infra* text accompanying notes 66-67). (This last is, however, evidently not the conception of Mark Cooper, a strong proponent of net neutrality—*see infra* notes 59 and 66.) That consideration apart—and that, precisely, is how it should be handled—the pertinent question would be whether the charges to end users or to providers of programming or content are or will be sufficiently constrained by competition.

55. Lawrence Lessig & Robert W. McChesney, *No Tolls on The Internet*, WASH. POST, June 8, 2006, at A23; *but see* Kyle D. Dixon, *Rhetoric vs. Reality: Lessig and McChesney on Network Neutrality*, 2006 PROGRESS & FREEDOM FOUND. PROGRESS SNAPSHOT RELEASE 2.14, http://www.pff.org/issues-pubs/ps/2006/ps_2.14_netneut_lessig.pdf.

56. Lessig & McChesney, *supra* note 55, at A23.

competing retail services of the broadband providers themselves.[57]

It is difficult for an economist to understand why if, as a *New Republic* editorial supporting a Congressional mandate of net neutrality points out, without apparent disapproval, that

> Content providers from Google and Amazon to Daily Kos and TNR Online currently pay Web-hosting companies to put their content on the Internet [and] still make money by charging homes and businesses higher fees for faster or more dependable services,

its editors should consider it objectionable that the providers of broadband Internet access

> [W]ill be able to charge content providers a fee to deliver their content to consumers and, in particular, an additional surcharge to deliver their content to consumers more quickly . . . [and] even charge lucrative fees to companies for exclusive access to the fast lane at the expense of their competitors.[58]

Or why, analogously, newspapers should not then be required to recover all of their common costs from readers, or radio and television broadcasters from listeners and viewers: yet that is exactly what some network neutrality proponents explicitly advocate.[59]

Equally ignorant, though perhaps understandable, has been the

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57. *See* Christopher S. Yoo, *Network Neutrality and the Economics of Congestion* (Vanderbilt University Law School, Working Paper Number 05-28, 2005), *available at* http://ssrn.com/abstract=825669.

58. Editorial, *Open Net*, NEW REPUBLIC, June 26, 2006, at 7. Setting aside the possibility that the fees will be—by implication, excessively—"lucrative," that is, reflective of a failure of deregulation to satisfy the precondition of effective competition; or that "exclusive access to the fast lane" might constitute an unreasonable restraint on competition properly subject to condemnation under the antitrust laws, it is difficult to understand why it would be improper or inconsistent with effective competition for those fees to vary with the quality and quantity—hence in the short run the opportunity costs and in the long run the investment costs of providing such services, about which advocates of network neutrality express particular concern, as

> [v]ideo and voice pictures, which take up more room in the Internet pipeline, clog the networks and decrease the speed for everyone.

Hart & Goo, *supra* note 50, at F4 (emphasis added). Query: is this a good so "public" in nature as to justify its subsidization?

59. For example, Mark Cooper, Director of Research of the Consumer [sic] Federation of America: "Let the consumer pay—it is the consumer that uses the network." LARRY DARBY, AM. CONSUMER INST., CONSUMER WELFARE, CAPITAL FORMATION AND NET NEUTRALITY 6 (2006), http://www.theamericanconsumer.org/Net%20Neutrality%20Study.pdf. *See* Darby's comprehensive assessment of the (negative) welfare effect of that implicit proposal to prohibit the common practice in other such two-sided markets of charging both sets of customers—such as advertisers, on the one side, and purchasers of media services containing those messages, on the other. *See generally* David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-sided Platforms* (Nat'l Bureau of Econ. Research, Working Paper No. 11603, 2005).

widespread indignation provoked by the impolitic assertion by Ed Whitacre, CEO of SBC, that

> [W]hat [Google and other Internet content providers] would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital that we have to have a return on it . . . Why should they be allowed to use my pipes?[60]

Both more politic and more illuminating was the explanation of Richard Notebaert, CEO of Qwest,

> that he views Google and Amazon as valued customers whose applications enhance the value of Qwest's DSL to consumers. He proceeded to explain that Qwest should also be able to [offer] premium services, for additional fees, that guarantee certain levels of service (such as Federal Express offers L.L. Bean for holiday shipping).[61]

As to the danger of those suppliers exploiting any residual monopoly power they may enjoy by virtue of their essential duopoly (or monopoly[62]), the pragmatic, most readily available remedy would be the ubiquitous deployment of wireless broadband services, in addition to, and independent of, telephone and cable companies—the assessment of which belongs in the domain of the decision whether or not to deregulate in the first place.

What Mr. Notebaert was emphasizing, entirely correctly, was the essential congruence of the interest of his company with that of independent offerers of content in competing for subscribers to its broadband transport service—the same congruence as between the movie houses and producers of motion pictures, between broadcasters and suppliers of programs[63]—subject, to be sure, to the possible need for government intervention to preclude vertical squeezes or other unreasonably exclusionary practices by parties with monopoly power. A provider of broadband service needs Google and e-Bay as much as they need it: consider the likely effect on the willingness of subscribers to pay a cable or phone company for broadband service if one or the other could not come to terms with those suppliers of popular content.

Analogously to the current demands for network neutrality, I recog-

60. Atkinson & Weiser, *supra* note 50, at 6 (quoting Patricia O'Connell, *At SBC, It's all about "Scale and Scope*,*"* BUS. WK. ONLINE, Nov. 7, 2005, http://www.businessweek.com/@@n34h*IUQu%207KtOwgA/magazine/content/05_45/b3958092.htm).

61. *Id.* at 7.

62. *See supra* note 2 and accompanying text.

63. *See* James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE L. ON REG. 39, 43, 87 (2000); Atkinson & Weiser, *supra* note 50*,* at 6-9.

nized some 23 years ago the logic by which cable television companies might, as beneficiaries of exclusive territorial franchises, be subjected to common carrier obligations, in order to ensure unaffiliated suppliers of programming access to audiences equal to that of affiliated ones; but recognized even at the time that such a requirement would on balance be anticompetitive.[64] By a similar logic, I was for a time sympathetic with the FCC rules—later abandoned, however, with my support—denying broadcasters the right to have a financial interest in the programs they carried and in their subsequent syndication, once again to avoid a temptation on their part to discriminate against independent suppliers in favor of their own. I eventually recognized, however—consistently in principle with the position I espouse here—that both of those policies were undermined by the increasing competition for programming among the several broadcast networks, including cable systems, and the positive competitive benefits of vertical integration—in this case the especial interest of broadcasters in ensuring the flow of "quality" programming by directly investing in its development.[65]

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64. [W]hile I have argued for substantial deregulation of the rates charged by cable TV operators, I confess to some uneasiness about the effect of their ability to produce their own programs, coupled with their comparative freedom from common carriage obligations, on the access of independent program producers to the market. . . .

> The rationale for deregulation, however, is the growing variety of alternatives available to viewers; and the case for integration of programming or program production, on the one side, and transmission, on the other, is the special incentive that a cable company has to develop an adequate flow of supply—adequate in quantity, reliability, quality, and diversity—to fill those burgeoning yawning gaps that it is its obligation to fill. In view, moreover, of the fact that the cable companies face intensifying competition from the networks, suppliers of pay TV programming like HBO and Showtime, direct satellite broadcasters, and the rest, it is difficult to see any danger that non-integrated producers will be foreclosed from a fair opportunity to market their wares.
>
> The suggestion that cable companies become mere common carriers of programs supplied by others—like the proposed confinement of the Bell Operating Companies to the provision of local exchange service and the exclusion of AT&T, after divestiture, from the origination, control, or financial participation in the information transmitted over its Long Lines—has the attraction of tidiness and the benefit of maximizing the insurance against unfair competition. But it is also anticompetitive, because it excludes the cable operator from programming, and to that extent sacrifices the dynamic benefits of integration. In the cable context, the dangers of integration seem to me insufficient to justify its prohibition.

Alfred E. Kahn, *The Passing of the Public Utility Concept: A Reprise*, *in* TELECOMMUNICATIONS REGULATION TODAY AND TOMORROW 24-25 (Eli M. Noam ed., 1983). It has of course been the FCC's recent confirmation of its exemption of cable broadband facilities from such an obligation, sustained by the Supreme Court in 2005, that has set off the network neutrality movement. *See Brand X Internet Servs.*, 543 U.S. at 1185.

65. *See* Comments of Alfred E. Kahn to *Notice of Proposed Rulemaking* in Amendment of 47 CFR § 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules, BC Dkt. No. 82-345 (1983).

This is not to exclude the possibility that—in contrast with television broadcasting or motion picture exhibition—broadband access is best treated as a public good. But public goods, strictly, are ones the use of which has a zero marginal cost and that are for this reason most efficiently subjected to no usage charges. Demonstrably, however, broadband facilities have to be created by investment, and applications requiring priority transmission impose opportunity costs on others; except as subsidized by government—a possibility I do not exclude[66]—those costs must be collected from users—subscribers to broadband services, providers of programming or content, or some combination of the two.

In the light of those realities, the advocacy of network neutrality seems at times poetic or metaphorical: it is apparently a successor or complement to the ideal of a "Commons," open and used without social cost or, therefore, charge to anyone who wishes to use it. Manifestly, Internet access does not satisfy that definition. The case for treating it nevertheless as a public good, deserving of direct governmental subsidy or provision, must rest instead on the proposition, by no means unreasonable, that it provides benefits to the public at large—external to the direct transacters—sufficient to justify public subsidy. Entirely logically, therefore, one part of Atkinson and Weiser's three-part, "Third Way" resolution of the network neutrality issue is that Congress provide financial incentives to private investments in broadband networks.[67]

Each passing day, the views and demands of the network neutrality advocates have become more hysterically apocalyptic, violently splitting the historical—and, alas, perhaps ephemeral—coalition of eighteenth and twentieth century liberals that produced the deregulations of air and surface transportation. On June 9th, the *New York Times* carried a full-page advertisement sponsored by the unlikely trio, MoveOn, a liberal advocacy organization, the Christian Coalition of America and the Gun Owners of America, "joining together to keep AT&T from controlling what you see and do on-line."[68] Presumably proceeding on the assumption

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66. That, I presume, is the logic behind Philadelphia's and San Francisco's (among others') municipal WiFi systems, which—though still of limited capacity—might be the model for a much-needed third competitor of what might otherwise be a duopoly, especially if and as wireless service providers merge with ILECs or cable companies. *See supra* notes 10 and 53. Alternatively, or additionally, such ventures are obviously being advocated as a means of extending broadband service to members of the public who could not otherwise afford it: *see* the excellent summary of "grassroots" initiatives to "bridge the digital divide and network low-income communities." Chen, *supra* note 52. I am not prepared to resolve the obvious ideological question of whether broadband access to the Internet has in the short space of a decade become such a necessity as to justify its public subsidization—or appraise the possibility that such taxpayer-subsidized offerings will significantly impair the incentives of private parties to invest in broadband facilities—that is, to answer the question of whether the two systems can coexist.

67. Atkinson & Weiser, *supra* note 50, at 14.

68. Advertisement, N.Y. TIMES, June 9, 2006, at A17.

that the specter of AT&T (which, as the provider of "the best telephone service in the world," would have been a positive factor many decades ago) would be more frightening than Verizon, Qwest, Comcast or Time Warner, the advertisement raises the inevitable question, among the even moderately informed: why would any of those offerers of broadband Internet service to end users be in a position, or find it in its interest, to limit its offerings by blocking access of non-affiliated offerers of content to its subscribers, except as would clearly invoke antitrust liability? This seems to me clearly necessary: a cable or telephone company provider of Internet access might well have the motive of "blocking access of non-affiliated offerers of content" in preference to its own; but clearly that would and should bring quick condemnation under the antitrust laws.[69]

In these controversies, the opinion of respectable economists, once the conditions for deregulation are satisfied, is necessarily one of opposition to any mandate of common carrier obligations—which would presumably have to involve also regulation of the rates charged by telephone, cable and wireless companies for use of their respective Internet access facilities—or, as the advocates of network neutrality would evidently have it, flat prohibitions of charges—or of charges for priority transmission—to suppliers of content.[70]

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69. *See infra* p. 175; *see also supra* pp. 187-188.

70. For example, from my own, moderately liberal local newspaper:

> Since the beginning of the 20th century 'common carriage' rules have required phone companies to treat all users alike. No one gets a better connection based on how much they're willing to pay . . . . It is a neutral network.
>
> Since the birth and rise of the Internet almost two decades ago, that same concept applied. Known as 'network neutrality,' the people who provide your Internet connection were barred from arbitrarily saying where you could surf. It also means all connections work the same, so the site run by some community news blogger can load just as fast as the Gannett-backed site you may be reading this editorial on today. That electronic liberty and democracy is the reason the Internet has exploded and changed American and world culture . . . .
>
> Until now.
>
> In mid 2005, the Federal Communications Commission redefined how it regulates the Internet, ending the common carriage policy for this medium. A major telecommunications overhaul making its way through Congress . . . contains no provision that secures network neutrality. The bill . . . would allow phone and cable companies to create a multi-tiered system where site operators pay more for higher speed and better service. Companies could also inhibit or block access to certain sites—say, those of a commercial competitor or some troublesome political group . . . .
>
> For the preservation of the Internet—for its own sake and in the name of the free and equal exchange of ideas that has been . . . its greatest gift to American democracy—Internet network neutrality must be preserved.

Editorial, *Internet neutrality: U.S. must defend democracy online*, ITHACA JOURNAL, May 25, 2006, at 7A, *available at* http://www.theithacajournal.com/apps/pbcs.dll/article?AID=/20060525/OPINION01/605250312/1014. Of course the *Journal*'s first sentence is incorrect: subscribers—particularly business subscribers—have always paid different rates for different

But this is where we came in—the consensus of most economists that that kind of regulation is in essential conflict with and obstructive of the developing dynamic competition among technologically different platforms and, in particular, the heavy investments of the ILECs in fiber-to-the-premises, which will enable them to offer video, in direct competition with the hitherto franchised cable companies.[71] That kind of dynamic market is the least suited for public utility-style regulation. As Christopher Yoo perceptively observes, the demand for "network neutrality" could in this way discourage the achievement of the ultimately more important "network diversity"—in particular the aforementioned competition between local telephone and cable companies in the offer of video service.[72] In that view the advocates of network neutrality are pro-

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capacities of their lines; and that is exactly the logic of the unchallenged separate charge for DSL.

See also Editorial, *supra* note 58, at 7 (an editorial to the same effect in the similarly moderately liberal *The New Republic*); and

> Congress is going to hand the operation of the Internet over to AT&T, Verizon and Comcast . . . It's a shame . . . .
>
> Telephone and cable companies own 98% of the high-speed broadband networks the public uses to go online for reading news, shopping, listening to music, posting videos or any of the thousands of other uses developed for the Internet. But that isn't enough. *They want to control what you read, see or hear online*. The companies say that they will create premium lanes on the Internet for higher fees, and give preferential access to their own services and those who can afford extra charges. The rest of us will be left to use an inferior version of the Internet.

Art Brodsky, *Congress Is Giving Away the Internet, and You Won't Like Who Gets It*, TPM CAFÉ, Apr. 23, 2006, http://www.tpmcafe.com/node/29086 (emphasis supplied).

The staid *New York Times* has been scarcely less apocalyptic. *See* Editorial, *Keeping a Democratic Web*, N.Y. TIMES, May 2, 2006, at A24; Adam Cohen, *Why the Democratic Ethic of the World Wide Web May Be about to End*, N.Y.TIMES, May 28, 2006, at D9. Cohen states:

> This democratic Web did not just happen. Sir Tim Berners-Lee, British computer scientist who invented the Web in 1989, envisioned a platform on which everyone in the world could communicate on an equal basis. But his vision is being threatened by telecommunications and cable companies, and other Internet service providers, that want to impose a new system of fees that could create a hierarchy of Web sites. Major corporate sites would be able to pay the new fees, while little-guy sites could be shut out . . . .
>
> Corporations that stand to make billions if they can push tiered pricing through have put together a slick lobbying and marketing campaign . . . .
>
> Internet service providers would like to be able to charge Web sites for access to their customers. Web sites that could not pay the new fees would be accessible at a slower speed, or perhaps not be accessible at all . . . .
>
> Customers who are used to the robust, democratic Web may not pay for one that is restricted to wealthy corporate content providers.

71. *See* ALFRED E. KAHN, LESSONS FROM DEREGULATION: TELECOMMUNICATIONS AND AIRLINES AFTER THE CRUNCH 43-45 (2004), *available at* http://www.aei-brookings.org/admin/authorpdfs/page.php? id=303 (supporting the FCC decision in February 2003 to exempt the ILECs from the obligation to share such facilities).

72. Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 48 (2005); *see also* Speta, *supra* note 63, at 43.

posing in effect to equalize the regulatory status of the competing ILECs and cable companies by bringing the latter in under the former's public utility regulatory tent—just the opposite of what turbulent Schumpeterian competition demands.[73] The advocates of regulated—or zero—charges to the providers of Internet content must respond to the challenge: by what reasoning can they justify such a proscription applied to cable and telephone companies in the process of constructing extremely expensive broadband highways—except as they are prepared to advocate government financing (such as used to be described as "taxpayer-financed," before a feckless Federal Administration found a magical way of hugely reducing taxes and increasing expenditures at the same time).

Their assumption is, evidently, that competition among Internet access providers is inadequate to protect both the consuming public and suppliers of content. There is clearly room therefore for agreement between proponents and opponents that, as I have already proposed, deregulation be conditioned on sufficient, independent competition from at least a third mode—presumably wireless, assured by freeing up more of the spectrum—while hoping for successful entry also of broadband over the ubiquitous power lines. Both the *Statement on U.S. Broadband Policy*, issued in March 2006 by 27 prominent economists,[74] and the several DACA reports add the very sensible recommendation that Congress preempt and eliminate the thousands of local franchising regulations that restrict competitive entry and provisioning of broadband access services.[75]

Ironically, more or less simultaneously with adding to the present tsunami of demands for immediate passage of legislation to preserve a

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73. *See Net Neutrality: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 109th Cong. (2006) (statement of Kyle D. Dixon, Senior Fellow & Director, Federal Institute for Regulatory Law & Economics, Progress & Freedom Foundation); *see On H.R. __, a Committee Print on the Communications Opportunity, Promotion, and Enhancement Act of 2006: Before the Subcomm. on Telecomm. & the Internet of the H. Comm. on Energy & Commerce*, 109th Cong. (2006) (statement of Randolph May, Senior Fellow & Director. of Communications Policy Studies, Progress & Freedom Foundation).

74. Elizabeth E. Bailey et al., *Economists' Statement on U.S. Broadband Policy* (AEI-Brookings Joint Center for Reg. Stud., Related Publication 06-06, March 2006), http://www.aei-brookings.org/admin/authorpdfs/page.php?id=1252 (last visited Aug. 4, 2006); *see also* Hahn & Wallsten, *supra* note 50; Thomas W. Hazlett, *Cable TV Franchises as Barriers to Video Competition* (George Mason University Law and Economics Research Paper Series 06-06, March 2006), *available at* http://ssrn.com/abstract=889406.

75. Since those local franchises typically impose public utility-type obligations to serve on the franchised entities—specifically, that they build out their facilities throughout the franchise territory at regulated rates typically diverging from interregional differences in cost, it would clearly be politically necessary to add some alternative competitively neutral methods of providing the requisite subsidies, all subsumed under the goal of "universal service"—no small matter, to be sure. *See* RAYMOND L. GIFFORD ET AL., PROGRESS & FREEDOM FOUND., DECEMBER, PROPOSAL OF THE UNIVERSAL SERVICE WORKING GROUP RELEASE 2.0 (2005), http://www.pff.org/issues-pubs/books/051207daca-usf-2.0.pdf.

"robust, democratic web"[76] to protect independent contributors to the "free and equal exchange of ideas," the *New York Times* has run a number of separate, lengthy stories describing diverse contemporaneous efforts to finance just such ventures, to expand the competing offerings of the requisite broadband access:

> In an ambitious proposal, a Silicon Valley company has asked the government to give it a band of radio spectrum for a free high-speed wireless Internet network that would cover most of the country and be supported by advertising.[77]
>
> And
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> Google is taking its first steps to go after the huge market for television advertising this week with a new service that will place video commercials on the many Web sites where it sells advertising.[78]

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76. Cohen, *supra* note 70, at D9.

77. Matt Richtel, *Company Asks U.S. to Provide Radio Space for Free Internet*, N.Y. TIMES, May 23, 2006, at C3.

78. Advertisers have been eager to buy the relatively limited supply of spaces for online commercials at prices that equal and sometimes exceed the rates charged by major networks, as measured by cost per thousand viewers . . . .

> Google's announcement came a week after AOL said that it had acquired Lighteningcast, a company that sells video advertisements on about 150 sites . . . .
>
> Google has become a powerhouse in advertising largely by selling short text advertising closely associated with topics people are researching or reading about on the Web. But it is increasingly looking to place more elaborate advertisements that are more attractive to marketers promoting product brands. Last year, it started allowing advertisers to bid to place advertisements using graphics and animation on sites it represents.

Saul Hansell, *Google Moves to Sell Space for Video Spots on Network of Web Sites*, N.Y. TIMES, May 23, 2006, at C3.

And, some two weeks later,

> Testers who volunteer to offer feedback for the Mountain View project will be able to sign up for Wi-Fi starting sometime this summer, and the service will be widely available to the public later this year, Chris Sacca, head of special initiatives at Google, said Wednesday. . . .Meanwhile, Google's free Wi-Fi service in San Francisco may or may not have advertisements, he said. 'If we get to the point that we decide that providing ads to end users is a benefit, then we might do it,' he said. Ads are 'not driving this. . .For us it is much more of an experiment and a lofty social benefit'. . . .Last year, San Francisco began a process of soliciting bids from potential providers of a free Wi-Fi service that would blanket the city's nearly 49-square miles. City officials announced in April that they had chosen the Google-EarthLink bid.

Elinor Mills, *Google forging ahead with Wi-Fi efforts*, CNET NEWS.COM, June 7, 2006, http://news.zdnet.com/2100-1035_22-6081264.html.

The excited stories continue. *See* Belson, *supra* note 10 (referring to Sprint-Nextel's planned $3 billion construction of a nationwide mobile WiMAX network); E-mail from pawlowski@telegeography.com to Professor Alfred E. Kahn, (Aug. 29, 2006) (listing more than

And, referring to Vonage,

> An Internet phone pioneer, poised to go public, has rivals at its heels ....Vonage still leads, but others offer attractive cut rate deals.[79]

CONCLUSION

In all of this, it would be foolish to imply a greater certitude than I actually feel. I suggest, however, that the following components of an integrated position are fully justified by recent experience:[80]

A. a strong belief in deregulation and the Schumpeterian competition that both prompts and is best served by it;
B. an equally firm belief in the importance of ensuring the availability of at least a third, independent broadband access option—presumably wireless—whether by application of the antitrust laws to intermodal mergers, opening up additional spectrum, subsidization or direct governmental provision—as a necessary protector of both subscribers and providers of content;
C. an unwillingness to jettison the essential facilities antitrust doctrine[81]—recalling, in particular, that the dominance of in-

200 other such ventures in TeleGeography Update) (on file with author); Matt Richtel, *A World Beyond Dial-Up, EarthLink Hurls Itself Into a Heady New Telecom Universe*, N.Y. TIMES, Aug. 18, 2006, at C1-2.

79. Ken Benson & Matt Rictel, *An Internet Phone Pioneer, Poised to Go Public, Has Rivals at Its Heels*, N.Y. TIMES, May 23, 2006, at C1.

80. There would be little point in my protesting that I had drafted these conclusions before receiving the exemplary Atkinson-Weiser article, since Professor Weiser has been my mentor in these matters during the last few years. *See* Atkinson & Weiser, *supra* note 50.

81. REZA R. DIBADJ, RESCUING REGULATION 94-98 (forthcoming October 2006) (citing MCI's successful suit against AT&T, MCI Commc'ns Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir. 1983), which might well have provided injunctive relief sufficient to make dissolution unnecessary). In brief, I think the decision in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), was the right one and would have been so even if there had not been a previous history of the Aspen Corporation's offering all-hills two-week tickets embracing the subsequently excluded Highlands. Aspen's abandonment of that collaboration clearly was a major factor convincing the Supreme Court of its attempt to monopolize that market—a market in my view sufficiently defined by its own behavior. *See also supra* note 10 and accompanying text.

Eleanor M. Fox provides powerful (and unwitting) support of my point here, in her withering contradiction of the controlling Supreme Court opinion in *Law Offices of Curtis V. Trinko, LLP,* 540 U.S. at 398*,* which dismissed the *Aspen Skiing* precedent on the ground that it hinged on the defendant's abandonment of its previous willingness to deal with Highlands. *See* Elinor M. Fox, *Is There Life In Aspen After Trinko? The Silent Revolution of Section 2 of the Sherman Act*, 73 ANTITRUST L.J. 153 (2005).

I am compelled to confess, I am unable to offer a complete reconciliation of this view with my severe criticism of the FCC's overly expansive definition of the network elements the cumbent telephone and cable companies in the broadband Internet access market traces back to their original respective monopoly franchises;[82] and

D. an especial alertness to the possibility of anticompetitive denial of access or vertical squeezing of independent suppliers of content.

As to the former, I have already alluded to the FCC and CRTC orders explicitly requiring ILECs to continue to permit competitors such as Vonage to offer VoIP over their broadband facilities.[83] As to the latter, the proponents of network neutrality may in effect be raising the familiar danger of a vertically-integrated monopolist using its control of the monopoly horizontal stratum to subject non-integrated rivals to one or another form of squeeze.[84] But the condemnation of such exclusionary tactics is part of historical antitrust doctrine, as is the corresponding requirement that suppliers of essential inputs comply with the dictates of competitive equity or (what comes to the same thing) the efficient component pricing rule: both of these hold that, whatever the *level* of the charge for the essential input, the vertically integrated monopolist must incorporate that same charge, along with its own marginal cost of performing the downstream function, in the prices it charges for the downstream product or service in the supply of which it competes with non-integrated rivals.[85]

ILECs were to be obliged to unbundle and the price it required them to charge and especially its prescribed TELRIC prices, except to observe that ensurance of competitive parity—the enforcement of which would clearly be the obligation of the agency or agencies vested with antitrust enforcement responsibilities—does not depend on the absolute level of the charge for the input: *see* the text immediately following. *See* Alfred E. Kahn et. al., *The Telecommunications Act At Three Years: An Economic Evaluation of Its Implementation by The Federal Communications Commission*, 11 INFO. ECON. & POL'Y 319 (1999); *see also infra* note 81 and accompanying text.

82. This was the basis for my original defense of mandatory line sharing by the ILECs. *See, e.g.*, Alfred E. Kahn, *Regulatory Politics as Usual* (AEI-Brookings Joint Center, Policy Matters 03-3, Mar. 2003), *available at* http://www.aei.brookings.org/policy/page.php?id=127; Atkinson & Weiser, *supra* note 50, at 9-10 (citing the continuing employment in countries such as France and Japan of a "line-sharing model," which facilitates the emergence of multiple DSL competitors and the presence of which largely moots the issue of net neutrality "because consumers ... enjoy both a greater level of competition and more band width than in the United States.").

83. *See supra* note 51 and accompanying text.

84. *See* Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41, 66-85 (2004); *see generally* Farrell & Weiser, *supra* note 34, at 85.

85. *See* Telecom Corp. of New Zealand Ltd. v. Clear Commc'ns Ltd., [1995] 1 N.Z.L.R. 385 (P.C.) (referring to my testimony on behalf of New Zealand Telecom in an antitrust proceeding before the High Court of New Zealand involving terms of interconnection with Clear, a competitive provider of local transport, April 27, 1992). In the aforementioned testimony, I stressed the corollary of that proposition—namely, that determination of the absolute level of that charge was the proper function of the regulatory (as distinguished from the antitrust) au-

In brief, the proponents of network neutrality are talking either nonsense or the—prosaic—prose of competition and monopoly, regulation, deregulation, antitrust, market efficiency and failure, for all of which there are reasonable, non-ideological resolutions amply confirmed by experience in the last half century. In any event, above all else, this period of the most welcome turbulence, both technologically and institutionally, is absolutely no time for new regulatory proscriptions or prescriptions.

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thorities. *See also* William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 YALE J. ON REG. 171 (1994); Alfred E. Kahn & William E. Taylor, *The Pricing of Inputs Sold to Competitors: A Comment*, 11 YALE J. ON REG. 225 (1994); William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors: Rejoinder and Epilogue*, 12 YALE J. ON REG. 177 (1995).

Timothy Tardiff reminds me that this is in effect the Areeda/Turner test, which I have demoted to non-essentiality as a test for predation. The difference is that the inference of predatory intent—and effect—may be drawn from the course of behavior and events in the latter situation, whereas margins below marginal costs are the essence of a squeeze and can be demonstrated only by some form of Areeda/Turner comparison.