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Consumer Welfare as the New Cornerstone for Communications Policy: The FCC Should Focus on Efficient Market Processes That Benefit Consumers

by

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A government agency's regulatory policy should reflect the overall competitive conditions of the market it is addressing. Given the increasingly competitive and dynamic conditions in the communications marketplace, it is time for the Federal Communications Commission to adopt a new regulatory approach with a consumer welfare standard at its cornerstone.

From a consumer welfare standpoint, the advanced communications market is a successful, competitive market. The market is now characterized by intermodal competition between voice, video, and data service providers. Investment-backed innovation and new technology deployments have led to significantly improved as well as entirely new product and service functionalities. In areas not subject to unnecessary or unduly costly regulation, a cursory glance at today's advanced communications market reveals a consistent upwards trajectory of increasing consumer choice at market-driven prices.

A properly conceived consumer welfare-based policy is ideally suited to this innovative and competitive market. Such a consumer welfare-based policy is premised on the idea that well-functioning markets are the best conduits for investment in innovations that enhance consumer welfare. Its purpose is to ensure that the efficiency-enhancing economic processes of the market work to serve consumers.

Consumer welfare policy draws on the insights supplied by U.S. Supreme Court antitrust jurisprudence, including the idea – famously insisted upon in the late Robert Bork's *The Antitrust Paradox* (1978) – that the single object of antitrust is consumer welfare. Antitrust's mission is to improve and reinforce efficiency-enhancing economic mechanisms that compel providers to respond to consumers. As Bork explained, productive efficiency consists in offering products and services consumers are willing to pay for. We see the manifestations of consumer welfare-enhancing efficiency when prices for goods or services are market-driven, when supplies of products or services are abundant, when competitive choices or differentiation among products or services are present, and when multiple pricing options are available.

Antitrust or antitrust-like jurisprudence offers a particular set of rules regarding the burden that must be met before marketplace freedom may be replaced by regulatory intervention. It classifies varieties of profit-maximizing behavior according to their likely effects on consumer welfare. In addition, antitrust lends itself to simple rules of substantive law, makes changes in the law predictable, and is, therefore, less likely to produce instances of unfairness.

Also, antitrust insights as well as the antitrust litigation process have been adapted to the administrative context before. For example, the Federal Trade Commission's (FTC) "unfair competition" standard draws on consumer welfare insights. The FTC is equipped with both adjudicatory and rulemaking powers to address unfair competition.

For its part, Federal Communication (FCC) regulatory powers were modeled on the regulatory approach adopted in the late 19th Century for railroads. The 1934 Communications Act, following the original Interstate Commerce Act of 1887 model, was designed so that the FCC could closely control the then-incumbent telephone monopolists. The 1996 Telecommunications Act includes mechanisms for removing regulatory barriers and restrictions as competition emerges. But the burden is invariably placed on incumbent providers to demonstrate, to the FCC's satisfaction, that competitive conditions justify deregulatory treatment.

Central to the FCC's exercise of monopoly-style regulatory powers in the face of rapid innovation and competition in the advanced communications market is the Commission's indeterminate and open-ended "public interest" standard. Coupled with the placement of the burden on any provider seeking deregulation, the malleability of the public interest standard has played a significant analytical role in maintaining legacy regulations premised on monopoly-like conditions despite the growing presence of market competition. Regrettably, it has also supplied the basis for new swaths of regulatory mandates, most notably the FCC's network neutrality regulations.

The public interest standard is especially prone to function as a competitor welfare standard. Rather than favor competition that benefits consumers, a competitor welfare standard protects certain competitors from more efficient rivals whose products and services consumers might value more highly.

The innovative and competitive conditions of the advanced communications market call for an FCC regulatory policy based on consumer welfare. Replacement of the FCC's public interest standard with a consumer welfare standard means adopting a deregulatory starting point. And its operating presumption would be that advanced communications providers can deliver products and services according to their best judgment, without regulatory intervention. Economic analysis could supply the criterion for determining whether contested market practices are detrimental to consumer welfare. Such practices could be restricted where there is actual evidence of anticompetitive conduct and existing or likely consumer harm.

If clear and convincing evidence exists that anticompetitive conduct and consumer harm is taking place or is likely, the FCC could establish rules to address such conduct. For provider conduct that isn't so cut-and-dry, administrative adjudication could allow the agency to address disputes in a case-by-case manner while offering a more expeditious route than traditional courtroom litigation.

Absent reform legislation, the FCC still has it within its discretion under the public interest standard to make consumer welfare its operating standard in specific areas where new regulation is being considered. With a new Chairman and new Commissioner now installed at the FCC, hopefully such proposals will meet with more receptiveness. Successful implementation of such an approach, even on a limited scale, could have the added benefit of making Congress more receptive to broader reforms that could roll back outdated regulation and make federal communications policy fit the 21st Century.

In the meantime, the *prima facie* evidence of dramatic technological innovation and competition in the advanced communications market renders continued legacy services regulation unjustifiable. The legacy monopoly days of the 20th Century are no more. The FCC needs a new regulatory approach that will match the market realities of 2013 and beyond.

Consumer Welfare: Making Economic Mechanisms Answerable to Consumers

Consumer welfare economics offers essential insights into the operations of markets. A market is successful to the extent it is characterized by enhanced consumer welfare. And a market is unsuccessful to the extent it is characterized by consumer harm.

A good place to begin examining consumer welfare analysis is with the late Robert Bork's *The Antitrust Paradox* (1978). Recently the subject of renewed attention on account of the author's passing, *The Antitrust Paradox* and the preceding scholarly articles upon which it was based heavily influenced U.S. Supreme Court antitrust jurisprudence, beginning with *Continental T.V. v. GTE Sylvania* (1977).[1] Bork's central thesis – that antitrust must be guided by the single goal of consumer welfare – was cited by and adopted by the Supreme Court in *Reiter v. Sonotone* (1979), characterizing the Sherman Act as a "consumer welfare prescription."[2] Supreme Court antitrust jurisprudence continues to make consumer welfare its focus.

According to Bork, "[c]onsumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit."[3] Invoking the late economist Frank H. Knight's definitions of allocative efficiency – allocation of productive forces and materials among lines of industry – and of productive efficiency – coordination of means of production in each industry into groups producing the greatest result – Bork explained: "The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[4] In other words, the mission of consumer welfare-based antitrust law is "to preserve, improve, and reinforce the powerful economic mechanisms that compel businesses to respond to consumers."[5]

Moreover:

> Since a free market system assumes that consumers define their own welfare, it follows that productive efficiency consists in offering anything, whether products or services, that consumers are willing to pay for…The relative efficiency of firms is therefore measured by their relative success in the market…Economies of scale, specialization of function, ability to obtain capital, management skill—all of these and many more are elements that contribute to the firm's ability to please consumers, but they are causes rather than manifestations of efficiency. Efficiency is at bottom a value concept, not a description of mechanical or engineering operation."[6]

From an everyday perspective, we see the manifestations of consumer welfare-enhancing efficiency when prices for goods or services are low, when supplies of products or services are abundant, when competitive choices or differentiation among products or services are present, and when multiple pricing options are available.

On the other hand, the manifestations of anticompetitive inefficiency include persistently high prices and low supplies of the same goods, by lack of competitive product or service choices and pricing options, and by technological stasis. As will be discussed further below, an agency's approach to regulation should therefore differ significantly depending on the extent to which market sectors within its jurisdictions are predominantly competitive or non-competitive.

Importantly, in the time since *The Antitrust Paradox* was published, increased attention has been given by academics and analysis to persistent innovation backed by ample financial investment as a process critical to efficiency – and, therefore, to consumer welfare. Efficiency considerations pertaining to dynamic markets and the role of innovation that were only scarcely considered by Bork have been recognized in Supreme Court antitrust jurisprudence, beginning famously in *U.S. v. General Dynamics* (1974) and continuing through decisions such as *Verizon Communications v. Curtis V. Trinko* (2004).[7] Continuous, rapid innovation drives new product and service choices to market. Technological breakthroughs can create explosive new sources of value that prompt dramatic shifts in consumer habits and disrupt the market share of existing providers. The ideas of innovators are by no means reducible to market mechanisms, but they do create critical efficiencies, benefitting consumers by driving markets forward and prompting competing providers to respond in order to maintain consumer loyalties.

Consumer Welfare-Driven Public Policy

A government agency's regulatory posture toward a market should be broadly reflective of that market's overall competitive conditions. A consumer welfare-based regulatory framework is ideally suited to a competitive market. It is premised on the idea that successful markets are the best conduits for investment in innovations that enhance consumer welfare. Market forces in isolation do not mechanically advance the well-being of consumers. Successful markets are ultimately created and driven by the first-person knowledge and risk-taking of capitalized innovative providers.

As Professor Alan Stone put it in *Regulation and its Alternatives* (1982), "regulation is best defined as a state-imposed limitation on the discretion that may be exercised by individuals or organizations, which is supported by the threat of sanction."[8] Regulation substitutes the first-person knowledge of innovators and investors with third-person decisions by government officials, embodied in proscriptive rules.

Stone accordingly observed "[t]he general tendency of regulation to preserve the status quo, or at least to retard change."[9] For instance, "specification standards involve considerable loss of flexibility and act as a disincentive to technical change because of their rigidity."[10] Providers that enjoy regulatory privileges or advantages are protected from competitive pressures to institute technological innovations.[11] Even if unintended, regulatory requirements can even function as barriers that preclude providers that might offer products and services of greater value to consumers from entering the market.[12]

A consumer welfare-based regulatory framework therefore operates with a presumption of marketplace freedom: providers can deliver products and services according to their best judgment unless demonstrable, compelling reasons exist for restricting that freedom. This presumption against regulatory intervention by an agency extends beyond the freedom of providers to meet existing consumer demand; critically, it encompasses the freedom to harness innovative ideas into new products and services in order to create new consumer demand, enhancing consumer welfare and propelling markets forward.

A presumption of marketplace freedom can also be characterized as a "presumption against regulation." Stone summarized such a presumption simply based on administrative costs of regulation. According to Stone:

> This presumption against regulation is easily established if we assume, for the moment, that regulation and the free market unaided by government intervention are equally capable of achieving identical levels of economic and social performance. Under such circumstances, free competition is obviously the preferred choice, since regulation inevitably occasions what economists term 'dead-weight loss' – economic costs that are not directed towards the production, distribution, and marketing of goods and services. At the least, salaries must be paid to those government employees who are not involved in these economic activities as well as to the employees of regulated firms who must be employed for compliance or evasion. Starting from our temporary assumption of equal performance levels, the typical citizen would be better off not paying the taxes to support government regulators, and business units would be better off either reducing costs imposed by government or utilizing resources in productive activities.
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> Thus, all other things being equal, an unfettered enterprise – whether operated privately or publicly – is preferable to a regulated enterprise; there is a presumption against regulation.[13]

Of course, Stone acknowledged that all things aren't always equal. He went on to observe that additional costs of regulation can result from priorities of legislators in adopting regulatory legislation, political influences on regulators, and other factors unrelated to the efficient production, distribution, and marketing of goods and services. And Stone's conception of "unfettered enterprise" appears to presuppose institutions such as property rights and contract rights, which also presuppose prohibitions on force or fraud. But based on the simplistic assumptions about administrative costs quoted above, Stone nonetheless concluded: "it is clear that the burden of proof lies with those who advocate regulation and that regulation should not be implemented without convincing evidence."[14]

Consumer Welfare as the Basis for Administrative Adjudications and Regulations

Antitrust supplies a consumer welfare-based regulatory framework a set of rules regarding the burden that must be met before marketplace freedom may be replaced by regulatory intervention. Here again, insights from *The Antitrust Paradox*, in particular, are useful. "To carry out its mission," wrote Bork, "antitrust must classify varieties of profit-maximizing behavior with respect to their probable impacts upon consumer welfare."

Bork elaborated:

> The task of antitrust is to identify and prohibit those forms of behavior whose net effect is output restricting and hence detrimental. It should, of course, leave untouched behavior that is beneficial or neutral. The available resources of price theory dictate the manner in which this task

> must be accomplished… [A]ntitrust analysis, if it is to be successful, must proceed primarily by elimination. We must appraise any questioned practice—say, a merger or a requirement contract—in order to determine whether it contains any likelihood of creating output restriction. If it does, and if it also contains the possibility of efficiency, we have a mixed case… If a practice does not raise a question of output restriction, however, we must assume that its purpose and therefore its effect are either the creation of efficiency or some neutral goal. In that case the practice should be held lawful.[15]

Antitrust jurisprudence regards contested trade practices that are "manifestly anticompetitive" as *per se* illegal.[16] Practices that are not so cut-and-dry in their competitive effects are subject to rule of reason analysis. In such instances, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[17]

In this way, "major distinctions" of a consumer welfare-oriented antitrust system "run along the same lines in which the businessman thinks, making lawful his attempts to be more efficient and making unlawful his attempts to remove rivalry through such improper means as cartelization, monopolistic merger, and deliberate predation."[18] Additionally, such a system lends itself to simple rules of substantive law…makes changes in the law predictable and [is] less likely to produce unfairness."[19]

Consumer welfare-based antitrust jurisprudence developed through litigation offers a fairly straightforward analog for the administrative adjudication context. In fact, the Federal Trade Commission's "unfair competition" standard also draws on consumer welfare insights.[20] Under that standard, the FTC has authority to declare unlawful an act or practice that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[21] The FTC has investigative and enforcement powers, allowing it to challenge questionable trade practices as constituting unfair competition. FTC complaints are adjudicated before administrative law judges, with decisions appealable to the full Commission. Such adjudications are typically governed by the preponderance of the evidence standard, pursuant to the Administrative Procedure Act.[22]

The FTC also has rulemaking powers shaped by a consumer welfare standard. To remedy consumer harm resulting from "prevalent" industry-wide practices, the FTC is authorized to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce."[23] The FTC Act requires that its rulemaking proceedings include opportunity for informal hearings at which interested parties have limited rights to call and cross-examine witnesses.[24] Following such hearings, regulations can only be established where the FTC shows there is "substantial evidence" supporting its proposed regulation of "prevalent" unfair and deceptive acts.[25]

FCC "Public Interest" Regulation

The Federal Communications Commission regulates advanced communications services – voice, video, and data – primarily according to the institutional structure and powers established by the 1934 Communications Act. The 1934 Act, in turn, was modeled on the regulatory approach to railroads provided in the Interstate Commerce Act of 1887.

When the 1934 Act was passed, the telephone service environment was monopolistic. And the 1934 Act was designed so that the FCC could closely control the business practices of incumbent monopolists through regulation. Thus, like the 19th Century statute on which it was modeled, the 1934 Act included common carrier regulations requiring providers to serve all customers on a nondiscriminatory basis and set just and reasonable prices and practices. Also, providers couldn't enter service or construct facilities absent regulatory approval. Tariff filings were also required of all providers. Regulation of broadcast television licensing, content, ownership and other aspects, arising from the FCC's authority over electromagnetic spectrum, also continues to this day. FCC regulation of cable video services also follows a similar pattern, with the 1992 Cable Act's assumptions that cable providers maintain distribution bottlenecks justifying various forms of price controls, forced access, and forced sharing mandates.[26]

The 1996 Telecommunications Act's updates to the FCC's regulatory authority include mechanisms for transitioning its regulatory approach and removing regulatory barriers and restrictions as competition emerges. Even so, the 1996 Act operated under the assumptions that local and long distance voice service were still largely non-competitive and that cable services were characterized by distribution bottlenecks that limited viewing content choices.

Accordingly, heavy sector-specific regulation is communications policy's default position. Relief from regulatory burdens, at least for incumbent providers, is theoretically available under the Act, including Section 10 forbearance and Section 11 regulatory review provisions.[27] But even where deregulatory treatment is a statutory possibility, the 1996 Act or FCC regulation invariably places the burden on incumbent service providers of demonstrating, to the FCC's satisfaction, that competitive conditions justify deregulatory treatment.[28]

Central to the FCC's exercise of monopoly-style regulatory powers is its "public interest" standard. The term appears over 100 times in the Communications Act, applying to FCC authority over radio communications, traditional telephony voice services, and to multichannel video programming distributors (MVPDs).[29]

Whereas a consumer welfare or unfair competition standard is informed and disciplined by economic analysis applied in antitrust cases or in other administrative forums that follow antitrust-like jurisprudence, the FCC's public interest standard is indeterminate and open-ended. The public interest standard's problematic nature from a rule of law standpoint has been thoughtfully posed by many scholars and analysts. In particular, FSF President Randolph May has criticized the FCC's public interest standard for its vagueness and the seemingly limitless discretion it confers upon the agency.[30]

Coupled with its placement of the burden on any provider seeking deregulation, the public interest standard has resulted in a decidedly pro-regulatory approach by the FCC. The public interest standard has thereby played a significant analytical role in maintaining legacy regulations premised on monopoly-like conditions despite the growing presence of market competition.

Unfortunately, the public interest standard has also been invoked by the FCC as the basis for imposing new swaths of regulatory mandates. Most notably, the FCC relied on the broad purposes of its public interest standard when it imposed network neutrality regulations on broadband Internet access providers. In its *Open Internet Order* (2010), the FCC emphatically declared:

> We… reject the argument that only "anticompetitive" discrimination yielding "substantial consumer harm" should be prohibited by our rules, We are persuaded that those proposed limiting terms are unduly narrow and could allow discriminatory conduct that is contrary to the public interest. The broad purposes of this rule—to encourage competition and remove impediments to infrastructure investment while protecting consumer choice, free expression, end-user control, and the ability to innovate without permission—cannot be achieved by preventing only those practices that are demonstrably anticompetitive or harmful to consumers. Rather, the rule rests on the general proposition that broadband providers should not pick winners and losers on the Internet—even for reasons that may be independent of providers' competitive interests or that may not immediately or demonstrably cause substantial consumer harm.[31]

The FCC thereby imposed common-carrier-like regulations on broadband Internet access services absent any showing of competitive harm or likely competitive harm that such regulations would prohibit.

Given its elastic meaning, the public interest standard is prone to collapse into a competitor welfare standard. Instead of favoring competition that benefits consumers, a competitor welfare standard effectively protects selected competitors from more efficient rivals that consumers would more highly value. In its *Open Internet Order*, the FCC imposed network neutrality regulations that restrict price discrimination business arrangements between Internet access providers and Internet content providers – including economically beneficial kinds of pricing arrangements under which heavy edge users pay more for their usage and light retail users pay less for theirs.[32] Such restrictions ensure that high-volume Internet content providers escape the possibility of incurring additional charges by Internet access providers for the amount of network resources they consume. Rather than disperse costs among Internet content providers and end user retail consumers, under the network neutrality regulations Internet access providers must instead seek return on investment and profit maximization through pricing arrangements with end user retail consumers alone.

The *Open Internet Order*, as well as FCC regulatory intrusions in other rulemaking proceedings and merger reviews, suggests that absent a major course correction, the FCC's public interest standard will have a long and active life ahead. This despite how innovative and competitive the advanced communications market currently is and how much more so it might become in the future.

The Communications Market's Mismatch with Monopoly-Era Regulations

From a consumer welfare standpoint, the advanced communications market is a successful, competitive market. A cursory glance at today's advanced communications market and a comparison with conditions 25 years ago reveals a consistent consumer welfare-enhancing trajectory. This dramatic transition in market conditions calls for a transition in the FCC's basic regulatory approach to the market.

Twenty-five years ago nearly all consumers were served by just one local telephone carrier and one long-distance carrier. Wireless service was an unreliable and rare luxury item. Also, at that time, nearly all consumers were served by just a single cable operator for subscription video services.

But the landscape of today's advanced communications market is entirely different. The market is now characterized by intermodal competition between voice, video, and data service providers.

According to the FCC's *Local Telephone Competition Report*, as of December 2013, the number of wireless subscriptions – 305 million – is more than three times the number of switched access lines – 96 million.[33] Interconnected VoIP subscriptions offered by cable providers offer another competing alternative for voice services, with 42 million subscriptions.[34] From 2009 to 2012, interconnected VoIP subscriptions increased at a compound rate of 17%, whereas switched access lines decreased by 9% annually.[35] As FCC Commissioner Ajit Pai summed up the Report's findings: "About one in seven households with copper dropped their landline last year, and 33.6 million Americans dropped their copper landlines over the past four years."[36] Telco companies are migrating their own customers to VoIP services while still under regulatory obligation to maintain increasingly expensive copper-based networks. The FCC has established a Technology Transitions Policy Task Force dedicated to examining ways to facilitate the ongoing transition from copper-based legacy telephone networks to all-IP networks.[37] When completed, this transition means the end of the public switched telephone network that was once a central focus of FCC regulatory activities.

Consumer choice for video services has also been reshaped by the entry of two nation-wide direct broadcast satellite (DBS) providers and by "telco" providers who have entered the market for multi-channel video programming distribution (MVPD).

According to the FCC's *15th Video Competition Report*, there are now approximately 101 million MVPD service subscriptions.[38] 98.6% – 130.7 million households – had access to at least three MVPDs, and 35.3% – 46.8 million households – had access to at least four MVPDs. DBS' market share increased to an estimated 33.6% at the end of June 2012.[39] And "telco" MVPD entrants' market share increased to 8.4% in 2012.[40]

In addition to offering voice services, wireless is an increasingly attractive platform to consumers of broadband services. According to the FCC's *Internet Access Services Report*, as of June 2012 there were 153 mobile broadband subscriptions and 90 million fixed-location mobile broadband connections.[41] 94% of all households lived in census tracts with wireless or wireline providers offering broadband services with at least 3MBps download and 200kbps upload speeds.[42] And 62% of households lived in tracts with wireless or wireline providers offering at least 6MBps download and 1.5MBps upload speeds.[43]

Of course, increases in the number of competing providers alone hardly convey the transformational changes in the advanced communications market over the last 25 years. Investment-backed innovation and new technology deployment have led to significantly improved as well as entirely product and service functionalities.

Voice has transitioned from analog to digital. Sophisticated smartphone devices featuring unique operating systems and countless applications were all but unimaginable just a handful of years ago. But smartphones have taken the market by storm, essentially operating as handheld computers that regard voice as just one of many apps.

Proliferation of video programming channels is only one aspect of the significant changes seen for video services. Video services have shifted from analog to digital and to hi-definition. Interactive and on-demand functions as well as whole home viewing, TV-Everywhere, and mobility capabilities such as tablet viewing are now available to video consumers.

Increasingly, broadband-enabled breakthroughs span technological platforms. Networks and ecosystems created by Apple, Amazon, Facebook, and Google enable access to content and applications across multiple devices – whether TV, PC, smartphone, or tablet device. This enables consumers to choose what platforms to use and, for growing numbers of multi-screening consumers, in what ratio.

This *prima facie* evidence of dramatic technological innovation and competition in the advanced communications market renders continued reliance on public utility-style legacy services regulation unjustifiable. The legacy monopoly days of the 20th Century are no more. A new regulatory approach is needed that will match the market realities of 2013 and beyond.

Consumer Welfare as the New Cornerstone for Communications Policy

The innovative and competitive nature of today's advanced communications market makes it ideally suited for a consumer-welfare regulatory approach. Antitrust cases applying economic insights regarding consumer welfare effects as well as the FTC's "unfair competition" adjudicatory powers and standard of proof in rulemakings offer the analytical building blocks for an updated and upgraded FCC regulatory policy that matches market realities.

Replacing its public interest standard with a consumer welfare standard entails a deregulatory starting point. Its operating presumption is that advanced communications providers can deliver products and services according to their best judgment. However, market practices could be restricted or prohibited where there is actual evidence of anticompetitive conduct and existing or likely consumer harm. Economic analysis could supply the criterion for determining whether contested practices are detrimental to consumer welfare.

As an administrative agency charged with regulating a particular group's services, the FCC could address questionable market practices through focused, targeted rulemakings as well as administrative adjudications. The FCC could rely on its annual report findings as well as notice and comment procedures to build a factual record beyond the scope of what disputing parties typically submit in adjudications and bring that record to bear. If clear and convincing evidence exists that anticompetitive conduct and consumer harm is taking place or is likely, the FCC could establish a tailored set of proscriptive rules that prohibit or restrict such conduct and harm. On the other hand, in cases that aren't so cut-and-dry, administrative adjudication could likewise allow the agency to put matters in a context larger than the immediate dispute while still offering a more expeditious route than traditional courtroom litigation.

The Digital Age Communications Act (DACA), proposed by a joint working group of scholars and analysts in 2005, formulated a consumer welfare framework for the FCC. Consistent with the foregoing analysis, DACA proposed communications-sector specific regulatory authority remain with the FCC. But "the new regime must be premised on legal principles drawn largely from competition law," and "the regulatory structure ought to pursue non-economic regulatory goals with as light a touch as possible, and, preferably, apart from the structure of economic regulation created by the statute."[44] The FCC would be governed by an FTC-like unfair competition standard with powers to address incipient harm to consumers. And the FCC would be able to impose new regulations only when it can show by clear and convincing evidence that marketplace competition is inadequate to protect consumer welfare and that benefits of such regulation to consumers and competition would outweigh the costs.

DACA was subsequently introduced in Congress.[45] Hopefully, as innovation and competition in the advanced communications market continues and as the need for a regulatory approach that matches the realities of today's market becomes more apparent, similar legislation will be considered and ultimately passed by Congress.

Consumer Welfare as a Policy Approach Under the Public Interest Standard

In the meantime, absent reform legislation, the FCC still has it within its discretion under the public interest standard to make consumer welfare its operating standard in specific areas where new regulation is being considered. In fact, the FCC was urged to take such an approach to broadband Internet network management.[46] But the FCC made the conscious policy choice to reject required demonstrations of market power and consumer harm as prerequisites to finding network management practices impermissible. As indicated above, the FCC instead contended that its public interest authority is much broader. Yet even if, for the sake of argument, the FCC's authority is so broad, the Commission could also have exercised regulatory restraint and offered a disciplined approach informed by rigorous economic analysis.

A consumer welfare regulatory approach, at least in more limited instances, therefore remains a viable option for a reform-minded FCC.

Conclusion

A consumer welfare-based policy is ideally suited to the innovative and competitive advanced communications market. Such a policy is premised on the idea that successful markets are the best conduits for investment in innovations that enhance consumer welfare. Its purpose is to ensure that the efficiency-enhancing economic processes of the market work to serve consumers. Consumer welfare policy draws on the insights supplied by U.S. Supreme Court antitrust jurisprudence.

Antitrust's mission is to improve and reinforce efficiency-enhancing economic mechanisms that compel providers to respond to consumers. It offers a set of rules regarding the burden that must be met before marketplace freedom may be replaced by regulatory intervention. Antitrust classifies varieties of profit-maximizing behavior according to their likely effects on consumer welfare. In addition, antitrust lends itself to simple rules of substantive law, makes changes in the law predictable, and is, therefore, less likely to produce instances of unfairness. Also, antitrust insights as well as the antitrust litigation process have been adapted to the administrative context, including the Federal Trade Commission.

The innovative and competitive conditions of the advanced communications market call for an FCC regulatory policy based on a consumer welfare standard. Its operating presumption is that advanced communications providers can deliver products and services according to their best judgment, absent regulatory intervention. Replacement of the FCC's open-ended and indeterminate public interest standard with a consumer welfare standard means adopting a deregulatory starting point. Economic analysis could supply the criterion for determining whether contested market practices are detrimental to consumer welfare. Such practices could be restricted where there is actual evidence of anticompetitive conduct and existing or likely consumer harm.

If clear and convincing evidence exists that anticompetitive conduct and consumer harm is taking place or is likely, the FCC could establish rules to address such conduct. For provider conduct that isn't so cut-and-dry, administrative adjudication would be available to address disputes case-by-case.

Absent reform legislation, the FCC still has it within its discretion under the public interest standard to make consumer welfare its operating standard in specific areas where new regulation is being considered. With a new Chairman and new Commissioner now installed at the FCC, it is hoped that such proposals will meet with more receptiveness. Successful implementation of such an approach, even on a limited scale, could have the added benefit of making Congress more receptive to broader reforms that could roll back outdated regulation and make federal communications policy fit the 21st Century.

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[1] 433 U.S. 36.
[2] 442 U.S. 330, 343 (citing Bork, *Paradox*, at 66).
[3] Bork, *Paradox*, at 90.
[4] *Id*. at 91.
[5] *Id*.
[6] *Id*. at 105.
[7] 416 U.S. 486; 540 U.S. 398.
[8] Alan Stone, *Regulation and its Alternatives* (1982), at 10.
[9] *Id*. at 216.
[10] *Id*. at 163.
[11] *Id*. at 138.
[12] *Id*.
[13] *Id*. at 56.
[14] *Id*.
[15] Bork, *Paradox*, at 122.
[16] *GTE Sylvania*, at 433.
[17] *Id.* at 432.
[18] Bork, *Paradox*, at 81.
[19] *Id*.
[20] 15 U.S.C. Sec. 45(a)(1).
[21] 15 U.S.C. Sec. 45(n).
[22] 5 U.S.C. § 556(d).
[23] 15 U.S.C. Sec. 57a(a)(1).
[24] 15 U.S.C. Sec. 57a(c)(2).
[25] 15 U.S.C. Sec. 57a(e)(3)(A).
[26] For a brief overview of the dynamic conditions of today's video market and the mismatch resulting from regulations based on early 1990's assumptions, *see* Randolph J. May and Seth L. Cooper, "Accelerate New Video Breakthroughs by Rolling Back Old Regulations," *Perspectives from FSF Scholars*, Vol. 7, No. 12 (June 18, 2012), available at: http://www.freestatefoundation.org/images/Accelerate_New_Video_Breakthroughs_061812.pdf. *See also* Seth L. Cooper, "FCC Report Reconfirms the Reality of the Video Market's Competitiveness," *FSF Blog* (July 25, 2013), available at: http://freestatefoundation.blogspot.com/2013/07/fcc-report-reconfirms-reality-of-video.html.

[27] For further discussion of Secs. 10 and 11 and a proposal for regulatory reform based on those provisions, *see* Randolph J. May, "A Modest Proposal for FCC Regulatory Reform: Making Forbearance and Regulatory Review Decisions More Deregulatory," *Perspectives from FSF Scholars*, Vol. 6, No. 10 (April 7, 2011), available at: http://www.freestatefoundation.org/images/A_Modest_Proposal_for_FCC_Regulatory_Reform.pdf.

[28] *See, e.g.*, Seth L. Cooper, "Giving Forbearance the Red Tape Treatment," FSF Blog (July 1, 2009), available at: http://freestatefoundation.blogspot.com/2009/07/giving-forbearance-red-tape-treatment.html.

[29] *See* Randolph J. May, *A Call For a Radical New Communications Policy: Proposals for Free Market Reform*, at 44-54 (listing provisions containing the public interest standard in the Communications Act).

[30] *See id*. at 1-43, 85-108.

[31] *Open Internet Order*, at para 78.

[32] *See id*. at paras. 50, 76. For discussion and criticism of those aspects of the FCC's order, *see* Seth L. Cooper, "Opening the Internet to Regulation: Assessing Risks of the FCC's Failure to Limit Its New Powers" *Perspectives from FSF Scholars*, Vol. 6, No. 4 (January 21, 2011), available at: http://www.freestatefoundation.org/images/Opening_the_Internet_to_Regulation_Assessing_Risks_of_the_FCC_s_Failure_to_Limit_Its_New_Powers.pdf.

[33] *Local Telephone Competition Report* (2013), at 1, available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1126/DOC-324413A1.pdf.

[34] *Id.*

[35] *Id.* at 2.

[36] "Statement of Commissioner Ajit Pai on the Release of the *2013 Local Telephone Competition Report*" (November 26, 2013), available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1126/DOC-324418A1.pdf

[37] For the views of FSF scholars about how the FCC should approach the ongoing IP transition, see Comments of the Free State Foundation, *In re* AT&T and NTCA Petitions on Transition from Legacy Transmission Platforms to Services Based on Internet Protocol, GN Docket No. 12-353 (January 28, 2013).

[38] *15th Video Competition Report* (2013), at para. 3, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-99A1.pdf.

[39] *Id*.

[40] *Id*.

[41] *Internet Access Services Report* (2013), at 1, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-321076A1.pdf.

[42] *Id*. at 10.

[43] *Id*.

[44] Digital Age Communications Act: Proposal of the Regulatory Framework Working Group, Release 1.0 (June 2005), at 10.

[45] *See, e.g.*, S. 2113 (109th Cong.), available at: https://www.govtrack.us/congress/bills/109/s2113/text.

[46] *See, e.g.*, Reply Comments of the Free State Foundation, *In re* Preserving the Open Internet and Broadband Industry Practices, GN Docket No. 09-91 and WC Docket No. 07-52 (April 7, 2010), available at: http://www.freestatefoundation.org/images/Open_Internet_Proceeding_-_Reply_Comments.pdf.