ANTITRUST OVER NET NEUTRALITY: WHY WE SHOULD TAKE COMPETITION IN BROADBAND SERIOUSLY

HON. MAUREEN K. OHLHAUSEN*

In 2015, the FCC subjected broadband Internet service providers to Title II regulation. It did so to enforce net neutrality rules, which require ISPs (internet service providers) to treat all content on their networks equally. The principal justification is to prevent ISPs, in delivering content to their subscribers, from favoring their own content or that of other creators who pay for "fast lanes." Should such discrimination flourish—the concern goes—ISPs could relegate disfavored content providers to second-tier modes of access to consumers, degrading competition.

The rationalization for net neutrality regulation, however, is hard to square with the facts. There is, after all, virtually no evidence of ISPs excluding rival content. Two reasons likely explain the paucity of anticompetitive conduct. First, market forces driven by consumer demand would punish broadband service providers that throttled or excluded desired content. And, second, antitrust would forbid efforts by ISPs with significant market power to foreclose rival content. Yet, the FCC's decision to enact broad net neutrality rules, which the D.C. Circuit subsequently upheld in 2016, repudiated the view that antitrust is a viable solution to the threat of net neutrality violations.

This Article argues, however, that net neutrality proponents too easily dismiss antitrust. Competition law can indeed protect non-economic goals like free speech and democratic participation, but only to the extent that consumers actually value those goals above others. Of course, antitrust does not promote civic discourse as an end in itself. But antitrust does not require price, output, and innovation outcomes either. Rather, it protects the competitive process, which delivers the qualities that consumers demand. Purchasers of ISP services place tremendous value on having access to the content of their choice. Were an ISP to degrade one form of de-

* Commissioner, Federal Trade Commission. The views expressed in this article are solely those of the author and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

sired content in favor of another without providing a concomitant benefit, then it would experience fierce reprisals from its customers. Other ISPs would have powerful incentives to satisfy unmet consumer demand. And if competition were insufficient to prevent or to neutralize unwanted discrimination that harms consumers, then antitrust liability would be around the corner. The lack of problematic exclusion by ISPs to date is no accident.

The real question is why competition between ISPs would not yield the non-monetary values championed by net neutrality proponents. One purported answer is that the ISP market today is insufficiently competitive, especially in last-mile distribution. Yet, it is hard to credit that conclusion absent evidence of recurring ISP discrimination that has undermined free speech or viewpoint diversity against consumers' preferences. Indeed, the latest data show that the ISP industry is becoming more, rather than less, competitive.

It seems to come down to a conflict over whose preferences should prevail. Net neutrality advocates may worry that the consuming public does not share their preferred vision for future Internet plans. Few may pine for AOL-style "walled gardens," but competitively differentiated ISP plans that guarantee the fastest access to popular content may attract a significant block of consumers. Only by market testing such offerings would we know. Rather than allow consumers to decide which ISP plans work for them, however, net neutrality takes that freedom of choice away from them. In the end, the FCC's Open Internet Order is likely to harm consumers by replacing competition with unneeded government regulation.

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INTRODUCTION

Can competition, backed up by antitrust, guard the public interest online? The net neutrality movement does not think so. Its proponents make two erroneous claims. First, they say that antitrust will not stop Internet service providers (ISPs) from using anticompetitive practices to exclude rival content. Second, they contend that market forces do not protect nonmonetary values like Internet openness, democratic participation, viewpoint diversity, and free speech. Net neutrality advocates worry that ISPs may undermine those goals, as well as competition, by disfavoring some content running through their last-mile networks. Hence, the net neutrality crowd proclaims *ex ante* regulation is essential because antitrust is not up to the job.

That conclusion is misplaced, but it has proven influential. In its 2015 Open Internet Order, the Federal Communications Commission (FCC) reclassified broadband ISPs as "common carriers" under Title II of the 1934 Communications Act.[1] Using the regulatory power thus unlocked, the FCC prohibited throttling, blocking, and paid prioritization.[2] In doing so, it rejected competitive mar-

1. *Protecting and Promoting the Open Internet*, GN. Dkt. No. 14-28, Report & Order on Remand, Declaratory Ruling, 30 FCC Rcd. 5601, 5743, para. 331 (2015) [hereinafter *2015 Open Internet Order*].

2. *Id.* at 5607, paras. 15–18; U.S. Telecomm. Ass'n v. FCC, 825 F.3d 674, 733, (D.C. Cir. 2016) (Williams, J., concurring in part and dissenting in part).

ket forces and antitrust as sufficient alternatives to regulation.

Specifically, the FCC did "not find existing laws sufficient to adequately protect consumers' access to the open Internet" and rejected the "suggest[ion] that existing antitrust laws would address discriminatory conduct of an anticompetitive nature."[3] Remarkably, the agency saw no need to evaluate ISPs' market power before rejecting the curative powers of competition. In its view, "threats to Internet-enabled innovation, growth, and competition do not depend on broadband providers having market power with respect to their end users."[4] Hence, the FCC determined that it "need not consider whether market concentration gives broadband providers the ability to raise prices."[5] Cementing its rejection of markets, the agency concluded that, "even if the mobile market were sufficiently competitive, competition alone is not sufficient to deter mobile providers from taking actions that would limit Internet openness."[6]

Net neutrality regulation reflects a lack of confidence in market forces that I do not share. Antitrust can protect the competitive sphere in which edge providers and ISPs operate. And it can also promote nonpecuniary values like openness and free speech. That last claim may strike some readers as counter-intuitive, but recall that antitrust serves a prophylactic function. It guards the competitive process, which in turn leads firms to satisfy consumers' revealed preferences. Antitrust does not dictate market outcomes, in the way that *ex ante* regulation like the 2015 Open Internet Order does. Rather, it trusts that markets—free of artificial restraints on trade and exclusionary practices—tend toward efficiency in meeting consumers' demand, including their demand for "nonpecuniary" values.[7] The FCC's move to ban all paid prioritization, among other practices, takes the form of a *per se* rule that antitrust would never countenance for such vertical restraints.

The U.S. Supreme Court has explained that the "heart of our national economic policy has been faith in the value of competition."[8] This article explains that such faith remains justified online. Competition, facilitated through effective antitrust and

3. *2015 Open Internet Order*, *supra* note 1, at 5645, para. 104 n.237.
4. *Id.* at 5633, para. 84.
5. *Id.*
6. *Id.* at 5665, para. 148.
7. This article uses the terms "nonpecuniary" and "nonmonetary" values in the context of the net neutrality debate to refer to free speech, civic participation, openness, and related goals that justify rules against blocking, throttling, and paid participation. In economic terms, however, it does not make sense to refer to qualities that consumers value—and hence would pay for—as "nonpecuniary" and "nonmonetary." This point feeds into a central argument of this article. ISP markets, overseen by active antitrust enforcement, would produce broadband access plans that satisfy consumer demand. Hence, it is erroneous to reject an antitrust market solution to net neutrality issues.
8. Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951).

consumer protection enforcement, is all the protection that ISP and edge provider markets need to operate effectively.[9] To the extent that ISP consumers value norms like openness and civic participation, it is not true that ISPs, free of net neutrality rules, would disregard them. To the contrary, competitive markets respond to consumer demand.[10] If ISP subscribers would abhor any deviation from equal treatment of data, then market outcomes should serve the nonmonetary goals that net neutrality advocates champion. Certainly, the paucity of real life examples of net neutrality violations is telling. But sometimes prioritized treatment may be of tremendous value to consumers. And that means that a liberalized, competitive market may sometimes produce outcomes in tension with net neutrality advocates' ideological vision. The 2015 Open Internet Order prevents that outcome, effectively displacing consumer demand with a political viewpoint.

Consider that it may be efficient for some ISPs to market plans that prioritize certain content. When congestion occurs, the traditional Internet norm is first in, first out. But not all content is equally valuable to all end users or equally susceptible to latency. Net neutrality is blind to content, however, requiring the same treatment of acutely important content as the banal and offensive. For instance, ISPs must treat telemedicine and pornography the same. Yet some ISP subscribers are avid gamers, who would pay a premium for guaranteed, lightning-fast connections. And others have an affinity for HD movies. There are distinctions even within those groups. In normal markets, firms would respond to varied tastes by providing services tailored to consumer demand.

But the FCC's no-discrimination rule freezes the market at the *status quo*. Its ban on paid prioritization, in particular, rejects a core premise on which all markets operate: price signals allocate scarce resources more efficiently than other systems. As the Supreme Court has long observed, "[p]rice is the 'central nervous system of the economy.'"[11] Net neutrality discards that system, condemning vertical restraints common to many competitive markets and, in the process, reveals a political disposition in some tension with the core tenets of the U.S. capitalist, market system. The 2015 Open Internet Order crystallizes content-blind "best efforts" as the governing rule, regardless of shifts in consumer de-

9. Consumer protection enforcement helps ensure ISPs provide the particular service attributes promised to consumers, whether it is speed, cost, or access to particular content.

10. This proposition is true of competitive markets across all industries. *See, e.g.*, Christopher Sprigman, *The 99¢ Question*, 5 J. ON TELECOMM. & HIGH TECH. L. 87, 92 (2006) ("In a competitive market, we ordinarily would expect firms to respond to these different forms of demand."); Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1038 (1990).

11. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940)).

mand, network capacity, or content. That shortcoming illustrates a general problem with regulation: inflexibility to changing market conditions.

In short, net neutrality proponents underestimate the ability of market forces, combined with antitrust oversight, to shield consumers from harmful ISP content discrimination. As the Supreme Court has explained, the "assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."[12] Those dynamics apply equally to ISP markets as they do to other sectors of the economy. This article makes the case for a market-based solution to ISP conduct.

Part I of this article contextualizes the 2015 Open Internet Order in light of previous efforts by the FCC to impose net neutrality rules. It explains that the FCC saw market based competition and antitrust enforcement as inadequate substitutes for *ex ante* regulation. The agency held that view, despite little evidence of net neutrality violations to date, and without analyzing ISPs' market power. Part II is the heart of this article. It argues that antitrust can shield ISP and online-content-creation markets from anticompetitive conduct, as it does in other industries. Hence, the FCC's professed goal of passing the 2015 Order to protect competition is difficult to sustain. Further, Part II argues that even "nonmonetary" goals like openness do not justify an approach that replaces competition with regulation. Competitive markets, protected by antitrust enforcement, respond to consumer demand. There is no reason why ISPs, facing competition, would disappoint their subscribers' preferences in fashioning subscription offerings and terms. A brief conclusion follows.

I. THE FCC'S NET NEUTRALITY RULES

A. *Prologue: The Courts First Rebuff the FCC's Net Neutrality Efforts*

The FCC has long sought to address concerns about potential ISP misconduct. In 2005, the FCC adopted a policy statement with four principles, which collectively expressed the agency's net neutrality position.[13] Although it did not adopt rules, the agency stated that, subject to reasonable network management:

12. *Id.* at 695.

13. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Dkt. Nos. 02-33, 01-337, 95-20, 98-10, GN Dkt. No. 00-185, CS Dkt No. 05-52, Policy Statement, 20 FCC Rcd. 14,986, 14,988, para. 4 (2005).

> (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers.[14]

The first—and to date one of the few evidenced net neutrality ISP violations—occurred the same year. Madison River Communication reportedly blocked ports for Voice over Internet Protocol (VoIP) on Madison's network. Shortly after receiving a complaint from Vonage, the FCC entered into a consent decree with Madison River, which agreed to pay $15,000 and not to prevent its customers from using VoIP applications.[15]

Questions about the FCC's regulatory authority hobbled the agency's subsequent efforts to require net neutrality. The FCC's first net neutrality related action against an ISP post-*Madison River* occurred in 2008, after Comcast allegedly interfered with its subscribers' peer-to-peer networking applications. Comcast maintained that it was simply managing its limited network capacity. The FCC issued a 2008 order, ruling that Comcast had "'significantly impeded consumers' ability to access the content and use the applications of their choice" and had alternative means to manage its network traffic without resorting to non-neutral treatment of content.[16] The agency's efforts to police the ISP's network-management practices, however, failed under scrutiny from the D.C. Circuit.[17] The court held that the FCC failed to identify statutory authority for its order.[18] Specifically, because the FCC had long classified ISPs as information services under Title I,[19] it could not rely on its ancillary authority under Section 4(i) of

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14. *Id.*

15. *Madison River Commc'ns, LLC*, File No. EB-05-IH-110, Consent Decree, 20 FCC Rcd. 4296, 4297, paras. 4–5 (2005).

16. *Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, WC Dkt. No. 07-52, Memorandum Opinion & Order, 23 FCC Rcd. 13,028, 13,058, para. 51 (2008).

17. Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

18. *Id.* at 661.

19. Starting in 2005 and until 2015, the FCC classified broadband ISPs as "information services" under Title I of the 1934 Communications Act, rather than as "telecommunications services" under Title II. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Dckt. No. 00-185, Declaratory Ruling & Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4824, para. 41 (2002); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Dkt. No. 02-33, Policy Statement, 20 FCC Rcd. 14,853, 14,862, para. 12 (2005); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Dkt. No. 07-53, Declaratory Ruling, 22 FCC Rcd. 5901, 5901–02, para. 1 (2007); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet*

the 1934 Communications Act to justify its 2008 order. In particular, there was no link between the 2008 order and "a statutory delegation of regulatory authority."[20] Further, although Section 706(a) arguably delegated regulatory authority to the FCC, the court held that the agency could not rely on that provision in light of a then-existing FCC order."[21]

The FCC tried again to implement net neutrality rules two years later in its 2010 Open Internet Order.[22] Revisiting its interpretation of Section 706(a), the agency read the provision as allowing it to take action to develop broadband infrastructure. On that basis, the FCC adopted rules on transparency, blocking, and unreasonable discrimination.[23] Under the 2010 Order, fixed (as opposed to mobile) broadband providers could not block lawful content, applications, services, or non-harmful devices. Nor could they unreasonably discriminate in transmitting lawful network traffic.[24] The FCC explained, "As a general matter, it is unlikely that pay for priority would satisfy the 'no unreasonable discrimination' standard."[25] The rules were slightly looser for mobile ISPs: they could not block lawful content or applications that compete with their voice or voice-telephone services. All ISPs had to disclose their network management practices. The agency subjected fixed and wireless ISPs to some different rules—in particular, the FCC did not apply anti-discrimination rules to mobile ISPs—because in the FCC's view the mobile space was more competitive than the fixed ISP market.[26]

The 2010 Open Internet Order, however, failed judicial review in *Verizon* in 2014.[27] The D.C. Circuit accepted the FCC's interpretation of Section 706 as granting it regulatory authority. Nevertheless, the court struck down the 2010 Order because it essentially regulated fixed broadband ISPs as common carriers. The heart of the FCC's net neutrality order—the anti-discrimination and anti-blocking rules—treated ISPs as telecommunications ser-

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Access Service as an Information Service, WC Dkt. No. 06-10, Memorandum Opinion & Order, 21 FCC Rcd. 13,281, 13,281, para. 1 (2006). Title II imposes a host of regulatory duties, including charging "just and reasonable" rates and refraining from "unjust or unreasonable discrimination." 47 U.S.C. § 201(b), 202(a) (2012). Those provisions have no analogue under Title I. Indeed, later in 2005, the Supreme Court upheld the FCC's classification of a fixed broadband provider as an information service. Nat'l Cable & Telcomm'cns Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

20. *Comcast*, 600 F.3d at 658.

21. *Id.* at 658–59 (citing *Deployment of Wireline Servs. Offering Advanced Telecomm. Capability*, CC Dkt. No. 98-147, Memorandum Opinion & Order, & Notice of Proposed Rulemaking, 13 FCC Rcd. 24,012, 24,044, para. 69 (1998)).

22. *Preserving the Open Internet*, GN Dkt. No. 09-191, Report & Order, 25 FCC Rcd. 17,905 (2010).

23. *Id.* at 17906, para. 1.

24. *Id.*

25. *Id.* at 17947, para. 76.

26. *Id.* at 17956–57, paras. 94–95.

27. Verizon v. FCC, 740 F.3d 623, 626 (D.C. Cir. 2014).

vices, even though the FCC had classified ISPs as information services under Title I. The D.C. Circuit thus vacated the FCC's anti-discrimination and anti-blocking rules.[28]

The 2014 ruling in *Verizon* created a quandary for the FCC and reignited the public debate over net neutrality regulation. Although the FCC had lost two rulings in four years in trying to enforce anti-discrimination rules against broadband ISPs, it was not all bad news for the agency. The *Verizon* court accepted Section 706 as a jurisdictional basis for regulating fixed and mobile broadband. To some net neutrality advocates, the path forward after *Verizon* was obvious: follow the court's prescribed pathway by using Section 706 authority to justify net neutrality regulation. For other advocates, the better path was for the FCC to reclassify broadband ISPs as telecommunications services and regulate them as common carriers under Title II.

ISPs, however, viewed the latter outcome as a distressing scenario. Title II means utility-style regulation by which the government has the authority (and in some cases the duty) to set rates, impose equal treatment obligations, require unbundling of network elements, and otherwise deprive private firms of the ability to operate as they would in a free market. The typical justification for common carrier regulation—natural monopoly—is absent from the broadband ISP market.[29] Further, enacted in 1934 to regulate telephone monopolies, Title II imposes some duties that are archaic and ill-suited to the realities of the modern Internet. Thus, reclassifying broadband ISPs under Title II was an extreme approach.

Shortly after *Verizon*, the FCC sparked a furor in some quarters when it proposed broadband ISP rules that would prohibit blocking and discriminating against lawful content, but would allow edge providers to pay for fast-lane access to end users if the ISP made the same opportunities available to other content providers on "commercially reasonable" terms.[30] Proponents of net neutrality denounced the proposal, arguing that favoring content providers who "pay to play" is improper discrimination. Leading a group of nearly 150 Silicon Valley firms, Google and Netflix wrote to the FCC, calling on the agency to ban paid prioritization and to reclassify broadband ISPs under Title II.[31] Most dramatically, after comedian John Oliver went on a pro net neutrality rant in

28. *Id.* at 628.

29. *See, e.g.*, Daniel F. Spulber & Christopher S. Yoo, *Rethinking Broadband Internet Access*, 22 HARV. J.L. & TECH. 1, 2–3, 21–27 (2008).

30. *Protecting and Promoting the Open Internet,* WC Dkt. No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561, 5583, para. 61 (2014).

31. *See, e.g.*, Brian Fung, *Google, Netflix Lead Nearly 150 Tech Companies in Protest of FCC Net Neutrality Plan*, WASH. POST (May 7, 2014), http://wpo.st/MBt72 [https://perma.cc/HEN7-HAT8].

June 2014 and called on viewers to tell the FCC their views, the FCC's comments website crashed after it received over 45,000 comments.[32] In November of that year, President Obama pressed the FCC to reclassify ISPs, arguing that "[c]able companies . . . can't let any company pay for priority over its competitors."[33] The FCC reversed course, adopting the Open Internet Order in February 2015.[34] In doing so, it reclassified broadband ISPs under Title II.[35]

B. *In 2015, the FCC Rejects Market Forces and Antitrust as a Net Neutrality Solution*

ISPs are now subject to the FCC's 2015 Open Internet Order, which the D.C. Circuit recently upheld.[36] The FCC imposed three "clear, bright-line rules": no blocking; no throttling; and no paid prioritization.[37] The rules apply equally to fixed and mobile Internet access providers.[38] The first two rules are subject to ISPs' right to manage their networks reasonably.[39] No similar exception applies to paid prioritization, however, suggesting that the FCC views paying for a fast lane or benefitting an affiliated entity's content as *per se* unreasonable.[40] Notably, the FCC did not subject broadband access providers to the full strictures of Title II. The agency exercised forbearance, declining to impose rate regulation, require unbundling of last-mile facilities, or mandate cost-accounting rules.[41]

The FCC's net neutrality rules focused on maintaining "Internet openness."[42] In the agency's view, that quality "fosters the edge provider innovation that drives the virtuous cycle."[43] Hence, net neutrality "promotes innovation, competition, free expression, and infrastructure deployment."[44] The FCC worried that "broadband providers—including mobile broadband providers—have the

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32. *See* Soraya Nadia McDonald, *John Oliver's Net Neutrality Rant May Have Caused FCC Site Crash*, WASH. POST (June 4, 2014), http://wpo.st/5Ct72 [https://perma.cc/G79U-K38S] ("[T]he FCC's commenting system had stopped working, thanks to more than 45,000 new comments on net neutrality likely sparked by Oliver.").

33. The White House, *President Obama's Statement on Keeping the Internet Open and Free*, YOUTUBE (Nov. 10, 2014), https://www.youtube.com/watch?v=uKcjQPVwfDk [https://perma.cc/3Q9N-YR8V].

34. *See 2015 Open Internet Order*, *supra* note 1.

35. *Id.* at 5743–44, para. 331.

36. United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016).

37. *2015 Open Internet Order*, *supra* note 1, at 5607–26, paras. 14, 110, 288.

38. *Id.* at 5607, para. 14.

39. *Id.* at 5607, paras. 15–16.

40. *Id.* at 5607–08, paras. 18 n.18, 19, 32. The Order allows a narrow exception to the ban on paid prioritization for waivers. *Id.* at 5647–58, paras. 107, 129-32.

41. *Id.* at 5612, para. 37.

42. *Id.* at 5625, para. 75.

43. *Id.*

44. *Id.* at 5625–26, paras. 75-76.

incentives and ability to" block, throttle, or favor certain content through paid prioritization deals.[45] In so concluding, the FCC explicitly rejected antitrust laws as an effective solution and determined that market forces would not prevent ISPs from pursuing harmful practices.[46]

Yet, the FCC did not determine whether ISPs enjoy market power. In its words, the agency "need not consider whether market concentration gives broadband providers the ability to raise prices."[47] Further, "threats to Internet-enabled innovation, growth, and competition do not depend on broadband providers having market power with respect to their end users."[48] And the FCC clarified that its "rules do not address, and are not designed to deal with, the acquisition or maintenance of market power or its abuse, real or potential."[49]

It is hard to square a disregard of (1) market power, (2) the competitive constraints that ISPs face, and (3) price effects with the FCC's stated desire to protect the functioning of the market. The FCC so lacks confidence in market forces that it concluded, "even if the mobile market were sufficiently competitive, competition alone is not sufficient to deter mobile providers from taking actions that would limit Internet openness."[50]

In part, the FCC's view reflects a static view of competition. The agency finds that, "regardless of the competition in the local market for broadband Internet access, once a consumer chooses a broadband provider, that provider has a monopoly on access to the subscriber."[51] Perhaps that is true, for a limited period. The Federal Trade Commission (FTC), in its report on net neutrality, explained that difficult empirical questions surround what is called the terminating-access-monopoly problem.[52] Yet, difficult questions are the ones most deserving of evidentiary analysis. The FCC brought little empirical evidence to bear on the issue. Rather, it merely concluded that, "[o]nce the broadband provider is the sole provider of access to an end user," it has the incentive and ability to "prefer [its] own or affiliated content, demand[] fees from edge providers, or plac[e] technical barriers to reaching end users." [53] But that is only a possibility theorem. The FCC proffered

45. *Id.* at 5625, para. 75; *see also id.* at 5603, para. 4.
46. *Id.* at 5633–65, paras. 84, 148, 104 n.237.
47. *Id.* at 5633, para. 84.
48. *Id.*
49. *Id.* at 5606, para. 11 n.12.
50. *Id.* at 5665, para. 148.
51. *Id.* at 5629–31, para. 80.
52. *See* FTC, BROADBAND CONNECTIVITY COMPETITION POLICY, FTC STAFF REPORT 77–79 (2007).
53. *2015 Open Internet Order*, *supra* note 1, 5629–31, paras. 78–80; *see also id.* at 5608, para. 20 ("[B]roadband providers have both the incentive and the ability to act as gatekeepers standing between edge providers and consumers. As gatekeepers, they can block access altogether; they can target competitors, including competitors to their own

virtually no evidence of real-world, net neutrality violations, let alone sustained ones that evidence ISP monopoly power.[54] It is something of a mystery, then, how the agency could find that, absent net neutrality rules, ISPs have "overwhelming incentives . . . to act in ways that are harmful to investment and innovation."[55]

But there is good reason not to *assume* that ISPs necessarily enjoy a terminating-access monopoly that gives them significant market power. Should an ISP try to leverage its subscribers' lock-in in a competitive market, then prospective customers may go elsewhere and existing subscribers would not renew their contracts.[56] And in negotiating with edge providers, ISPs have an incentive to deliver a quality service to their subscribers and would thus face real costs in throttling, blocking, or disadvantaging high value content. In that respect, ISPs face incentives that point in different directions. It is not obvious that an ISP would maximize profit in compromising the value of its network by denying consumers their preferred content. As the FTC observed in 2007, conflicting incentives makes the issue an empirical one.[57] Today, as in 2007, there is no clear explanation why ISPs would likely block or throttle content that their subscribers value. And there is at most dated and fleeting evidence that ISPs have denied their customers access to applications or content of their choosing, which in any case triggered a strong response from the FCC and the public.[58]

Without analyzing these conflicting issues, the FCC concluded that ISPs have strong incentives to harm competing content. As the agency found:

> [B]roadband providers have incentives to interfere with and disadvantage the operation of third-party Internet-based services that compete with the providers' own services. Practices that have anti-competitive effects in the market for applications, services, content, or devices would likely unreasonably interfere with or unreasonably disadvantage edge providers' ability to reach consumers in ways that would have a dampening effect on innovation, interrupting the virtuous cycle. As such, these anticompetitive practices are likely to harm consumers' and edge providers' ability to use broadband Internet access service to reach one another.[59]

video services; and they can extract unfair tolls.").

54. *See 2015 Open Internet Order*, *supra* note 1, at 5625–27, paras. 72–74.

55. *Id.* at 5645, para. 103.

56. *Id.*

57. FTC, *supra* note 53, at 75.

58. *See 2015 Open Internet Order*, *supra* note 1, at 5623–25, paras. 72–74; *see* FTC, *supra* note 53, at 38–41.

59. *2015 Open Internet Order*, *supra* note 1, at 5662, para. 140.

Those dynamics could only emerge, however, absent sufficient competition. Notably, the FCC declined to examine competitive dynamics in any depth, despite the fact that broadband ISP markets are, for the most part, not monopolies.[60]

Indeed, the ISP industry is neither a natural monopoly nor dominated by a single firm. Judged on a national basis (a metric with limited utility for a geographically based service like broadband), the market is not concentrated.[61] Local fixed-broadband markets are more concentrated. But even in those markets, the large majority of ISP subscribers can choose between competing providers for the most popular offerings.[62] A 2015 report by the FCC found that, at download speeds of three megabits per second (Mbps), 88% of U.S. households had a choice between at least two fixed broadband providers.[63] Two-thirds of American households could choose between three or more wireline ISPs.[64]At speeds of ten Mbps, at least two fixed ISPs competed for the business of 74% of U.S. households.[65] Ten Mbps is the speed that most U.S. consumers with options of even-higher speeds choose to purchase.[66]

At twenty-five Mbps—the aspirational standard that the FCC in 2015 adopted as its new benchmark for "advanced telecommunications capability"—there is less choice, with 39% of American households enjoying access to multiple providers.[67] But even in that category competition is increasing, as the number of Americans with access to fixed ISP broadband service at that high speed increased by 11 percentage points in the last two years.[68] And, of course, even if they enjoy market power, ISPs face antitrust laws that prohibit anticompetitive restraints of trade and exclusionary

60. *Id.*

61. *See* United States Telecom Ass'n v. FCC, 825 F.3d 674, 751–753 (D.C. Cir. 2016) (Williams, J., concurring in part and dissenting in part).

62. It is challenging to get up-to-date information on this issue because the FCC's annual Broadband Deployment reports no longer include how many providers offer the most common tiers of broadband service. Instead, the reports focus on the FCC's somewhat arbitrarily established 25 Mbps download and three Mbps upload as a standard. Yet, as of 2014, 88% of American households could choose from two or more providers, and that percentage has likely risen since. *See* PATRICK BROGAN, USTELECOM, BROADBAND INVESTMENT GAINS CONTINUED IN 2014 1 (2015); *see generally* DAVID N. BEEDE, U.S. DEPT. OF COMMERCE, COMPETITION AMONG U.S. BROADBAND SERVICE PROVIDERS (2014).

63. *Inquiry Concerning the Deployment of Advanced Telecomm. Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomm. Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Dkt. No. 14-126, 2015 Broadband Progress Report & Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd. 1375, 1403–1404, paras. 47–48 (2015).

64. *Id.*

65. *Id.*

66. *Id.* at 1440–1441, paras. 111–112 (dissenting statement by Commissioner Ajit Pai).

67. *Id.* at 1404, para. 48.

68. *Id.*

practices.[69]

The wireless ISP space is more competitive than fixed broadband. AT&T, Sprint, T-Mobile, and Verizon Wireless each offers a mobile wireless network that reaches over 99% of Americans.[70] And, in both wireless and wireline broadband, output in the industry continues to grow and inflation-adjusted prices are falling.[71]

It is true that U.S. broadband ISP markets are not perfectly competitive, but no market is. The key question is whether market forces have sufficient clout—in combination with antitrust enforcement—to constrain ISPs from harming the competitive process. On that critical issue, evidence from the marketplace is telling: there are almost no examples of net neutrality violations, let alone any that corrupted the competitive process. Indeed, in its 282 page order, the FCC addresses cases in which broadband providers limited openness in only a single footnote.[72] There, it identifies two specific matters: the *Madison River* and *Comcast-Bit Torrent* cases in which alleged blocking or throttling occurred in 2005 and 2007, respectively.[73] It then cites to allegations by commenters that AT&T had blocked certain Apple applications in 2012 and that Comcast had exempted its own online video service from data caps when streamed to a Microsoft Xbox.[74] None of those examples includes any showing of systemic harm to the competitive process. Moreover, none of those matters involved paid prioritization, the ban of which is the most problematic feature of the 2015 Open Internet Order from an economic-efficiency perspective.

That scant evidence is all that supports the FCC's finding that competition would not protect Internet openness. One might imagine that such limited indicia of harm would undercut, rather than support, the view that net neutrality is necessary to prevent anticompetitive effects. Yet the FCC did not concede that its order targets a hypothetical problem. Instead, it concluded that its previously existing "policy served as a deterrent to additional bad acts,"[75] thereby construing the lack of blocking, throttling, and paid prioritization as support for additional regulation. Of course, had there been pervasive evidence of neutrality violations by ISPs, the FCC would have cited it as support for its rules. This is a "heads we win, tails you lose" approach. As the next Part explains, the FCC's conclusion is all the more unfortunate because a market

69. 15 U.S.C. §§ 1, 2, 18, 45 (2012).

70. *Annual Report and Analysis of Competitive Mkt. Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Dkt. No. 13-135, Seventeenth Report, 29 FCC Rcd. 15,311, 15,317, para. 12 (2014).

71. *Id.* at 15,319–15,320, paras. 20–21.

72. *2015 Open Internet Order*, *supra* note 1, 5628, para. 79 n.123

73. *Id.*

74. *Id.*

75. *Id.*

solution to ISP conduct would be superior.

II. WHY NET NEUTRALITY? ANTITRUST PROTECTS THE COMPETITIVE PROCESS AND, IN TURN, THE NONPECUNIARY VALUES THAT ISP CONSUMERS VALUE

Part I explained that the FCC's net neutrality rules disregard market competition, as bolstered by antitrust, as an adequate constraint on ISPs. Based on that premise, the FCC banned paid prioritization—as well as blocking and throttling—on the ground that such ISP conduct would harm the competitive process, innovation, and the Internet's "ability to serve as a platform for speech and civic engagement."[76] I disagree. Market forces and antitrust policy can not only protect competition in ISP-related markets, but also safeguard nonmonetary goals like free speech and openness, at least to the extent that consumers share those values.

Ironically, the 2015 Open Internet Order may actually harm consumers because its unyielding, *per se* ban on paid prioritization is difficult—if not impossible—to square with economics. In that respect, the FCC's net neutrality rules do not merely substitute for effective antitrust enforcement. Their inflexibility makes them inferior to an antitrust solution in protecting competition within the ISP space. Is this suboptimal approach necessary to protect the goals of free speech and civic engagement? The remainder of Part II considers whether markets and antitrust would adequately protect non-pecuniary goals absent net neutrality regulation. Contrary to some opinion, I argue that an antitrust market solution is both sufficient and better.

A. *Antitrust Would Effectively Protect Competition in ISP Markets*

The FCC found that net neutrality rules are necessary to protect competition.[77] In particular, it determined that paid prioritization deals between ISPs and edge providers would harm the competitive process.[78] It maintained that view regardless of whether ISPs have market power in selling fixed or wireless broadband service to consumers.[79] That conclusion is dubious to those versed in antitrust law and economics.

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76. *Id.* at 5627, para. 77.
77. *2015 Open Internet Order*, *supra* note 1, at 5645–46, para. 104 n.237.
78. *Id.* at 5896–97, paras. 18–19; 5897–98, para. 21–23; 5913, para. 68; 5632–33, para. 82.
79. *Id.* at 5645–46, para. 104 n.237; 5633, para. 84; 5665, para. 148.

1. Lessons from Antitrust Economics: The Market Economy Relies on Vertical Restraints to Coordinate Efficient Investment and Competition

The Internet raises passionate views, which can obscure careful analysis. The FCC enacted a *per se*, *ex ante* prohibition on paid prioritization.[80] To determine whether that ban makes economic sense, consider that preferential arrangements between producers and distributors exist in almost all competitive markets.[81]

For the purposes of the 2015 Open Internet Order, paid prioritization occurs when an edge provider pays an ISP to deliver its content ahead of other data to end users.[82] Such contracts are vertical restraints, in which the creator of a product agrees with a distributor that the latter will carry its goods on particular terms.[83] Such vertical arrangements do not generally harm consumers, competition, or social welfare.[84] Hence, there is no economic basis on which to justify a categorical ban on paid prioritization. Yet, the 2015 Order enacts a *de facto*, *per se* rule against all such contracts between ISPs and content creators.[85] The antitrust profession's experience in analyzing vertical restrictions, based on learning from industrial-organization economics, sheds much light on the 2015 Open Internet Order.[86]

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80. *Id.*

81. Paid prioritization is ubiquitous throughout the economy. Distributors charge manufacturers not only for carrying their merchandise, but also for promoting it over rival goods. Supermarkets carry selected brands and give superior placement to the goods of firms that pay the most. Premium broadcast advertising slots go to those who pay for them. Shopping centers provide space to the outlets willing and able to fork up more rent than their rivals. That dynamic, though commonplace in bricks and mortar industries, is not specific to them. Online advertising, such as Google's AdWords product, allows firms that are willing to pay more to enjoy greater exposure. In all such cases, is it the case that firms lack the opportunity that their competitors enjoy simply because they cannot afford to pay as much? To take issue with the price-based allocation of scarce goods is to impugn the free market system upon which the U.S. economy rests. Outside of the Internet, few commentators object to such features of the capitalist system. Powerful efficiencies can justify paid prioritization across all manner of industries. Yet, when the FCC proposed to allow content creators to pay ISPs for faster delivery, moral outrage ensued. *See, e.g.*, *2015 Open Internet Order*, *supra* note 1, at 5606–07, para. 13; Jacob Kastrenakes, *FCC received a total of 3.7 million comments on net neutrality,* THE VERGE (Sept. 16, 2014, 6:06 PM), http://www.theverge.com/2014/9/16/6257887/fcc-net-neutrality-3-7-million-comments-made [https://perma.cc/X6K6-ZY48]; McDonald, *supra* note 32 ("[T]he FCC's commenting system had stopped working, thanks to more than 45,000 new comments on net neutrality likely sparked by Oliver.")

82. *2015 Open Internet Order*, *supra* note 1, at 5653, para. 125.

83. Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007).

84. *Id.* at 894.

85. *2015 Open Internet Order*, *supra* note 1, at 5603, para. 4; 5607, para. 14; 5609, para. 21; 5618, para. 59; 5646, paras. 107, 110; 5653 , para. 125.

86. Antitrust law has developed rules of thumb about which practices nearly always injure the competitive process, and thus justify *per se* prohibition, and which ones have the potential to harm competition and thus warrant scrutiny under the rule of reason's sliding scale. *Compare* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) (naked horizontal territorial division is illegal per se), United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) ("[P]rice-fixing agreements are

Competition law once treated vertical restraints like paid prioritization with suspicion.[87] Today, however, economists agree that such restraints often boost efficiency and competition.[88] The principal reason is that manufacturers want to minimize the cost, and to maximize the efficacy, of the distribution process.[89] Hence, when a manufacturer imposes conditions on firms that operate in its downstream supply chain, it presumptively does so to advance those procompetitive goals. Vertical restraints can spur capital investment, coordinate optimal network usage, deter free riding, and reduce Cournot competition problems that increase price and suppress output when complementary assets are disaggregated.[90]

Only in limited circumstances can vertical restraints harm competition.[91] For example, a company might use vertical restraints to facilitate a horizontal conspiracy at the upstream or downstream level.[92] Similarly, a vertically integrated firm that competes downstream with firms that it also supplies *may* have an incentive to raise its rivals' costs or to deny them a critical in-

unlawful per se."), and Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (the per se rule only attaches to restraints that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality"), *with, e.g.*, Texaco Inc. v. Dagher, 547 U.S. 1, 8 (2006) ("[T]he pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is *per se* unlawful under § 1 of the Sherman Act"). *See generally* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) (announcing the rule of reason).

87. *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (finding vertical territorial restrictions to be unlawful *per se*); Albrecht v. Herald Co., 390 U.S. 145 (1968) (deeming maximum resale prices to be illegal *per se*); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (holding minimum resale price maintenance to be *per se* illegal).

88. *See, e.g.*, Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, HANDBOOK OF ANTITRUST ECON. 391–414, 409 (Paolo Buccirossi ed., 2008) (concluding from an empirical analysis that, "when manufacturers choose to impose [vertical] restraints, not only do they make themselves better off, but they also typically allow consumers to benefit from higher quality products and better service provision. . . . The evidence thus supports the conclusion that in these markets, manufacturer and consumer interests are apt to be aligned, while [government] interference in the market is accomplished at the expense of consumers (and of course manufacturers)")(alteration in original); James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 662 (2005) ("Our review of the empirical evidence—which informs our priors—suggests that vertical restraints are likely to be benign or welfare enhancing."). The Supreme Court has adopted the prevailing economic learning. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 889–92 (2007) (discussing and embracing key insights from the economic literature); *see also* William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 CAL. L. REV. 933, 947 (1987) (expressing the "central proposition[] that all vertical arrangements should generally be presumed benign"); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 926-27, 938-39 (1979).

89. *See, e.g.*, Frank H. Easterbrook, *Vertical Arrangements and The Rule of Reason*, 53 ANTITRUST L.J. 135, 140–43, 168–69 (1984); *see also* Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. CHI. L. REV. 229, 241 (2005) (explaining the limited circumstances in which firms with "fragile monopol[ies]" can rationally use vertical restraints to foreclose competition).

90. *See generally* Cooper, *supra* note 88.

91. *Leegin*, 551 U.S. at 892–93.

92. *Id.*

put.[93] And a monopolist that faces the prospect of otherwise effective entry into a market with scale effects might sometimes use vertical contracts, like exclusive dealing requirements, to foreclose competition.[94]

Due to evidence that vertical restraints generally promote competition, antitrust law has determined that no vertical restraint should be *per se* illegal.[95] Indeed, the Supreme Court has jettisoned the *per s*e rule entirely from vertical contracts.[96] Today, manufacturers and distributors often agree for preferred delivery. Firms pay for preferred shelf placement in supermarkets, prominent locations in shopping malls, and expensive advertising opportunities. They enter into all manner of other vertical contracts. Such agreements rarely create antitrust issues. Nor do they provoke cries of foul play because less-well-capitalized rivals cannot afford to buy prime shelf space, store locations, or advertising slots. As with vertical contracts generally, such arrangements typically enhance efficiency and promote competition.

2. Understanding Opposition to Paid Prioritization

So why do so many critics passionately oppose paid prioritization deals between ISPs and edge providers? Such contracts have the same procompetitive potential as vertical contracts in other markets. In the event of scarcity—in the ISP context, congestion—paid prioritization may allow higher value content to flow more quickly to end users. That outcome may be more efficient than a system in which no edge provider can pay for prioritized delivery. The core objection to vertical restraints here may be that price does not reliably capture the value of the prioritized content or applications. But that objection carries no more weight in broad-

93. *Id.* at 893–94. That incentive, however, is a special case rather than a general one. When a firm operates an infrastructure to which firms must have access to compete downstream, the owner faces a tradeoff in deciding whether to deny rivals access. On the one hand, degraded competition may increase the platform owner's profits. On the other hand, by denying access to a product that downstream buyers favor, the firm compromises the value of its network to consumers. Depending on the context, it may be irrational for the vertically integrated firm to exclude competition from its network.

94. *See* Posner, *Vertical Restraints and Antitrust Policy*, *supra* note 89; *see also In Re* Victrex Plc., No. 141-0042, 2016 WL 3913333 (FTC July 13, 2016) (a recent example of a case in which the FTC alleged that a near monopolist used exclusive dealing to foreclose effective entry); McWane, Inc. v. FTC, 783 F.3d 814 (2015) (affirming FTC finding that a monopolist producer of domestic pipe fittings used exclusive dealing to maintain its monopoly).

95. *Leegin*, 551 U.S. at 877 (rev'd Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)); State Oil Co. v. Khan, 522 U.S. 3, 7 (1997) (rev'd *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)); Cont'l T.V. v. GTE Sylvania Inc., 433 U.S. 36, 57–58 (1977) (rev'd United States v. Arnold, Schwinn, Co., 388 U.S. 365 (1967)); *see also* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).

96. *Leegin*, 551 U.S. at 877; *State Oil Co.*, 522 U.S. at 7; *Cont'l T.V.*, 433 U.S. at 57–58.

band ISP markets than it does in any other market.

Willingness and ability to pay reflect economic value. The premise underlying the free market system is that price is a workable proxy for utility, which means that it makes sense to allocate scarce resources to those who will pay the most for them. Such price mechanisms also induce buyers to reduce consumption and firms to invest in more output during excess demand.[97] There seems to be a proclivity among commentators, however, silently to reject those axiomatic principles in the online space. It is not obvious that that distinction reflects critical thought. Or, perhaps, the Internet is a preferred battleground for an initial foray into a larger movement against a free market system for some commentators.

Nevertheless, conventional economic principles justifying vertical restraints exist in the ISP space. First, not all online content is equally valuable. Simply compare telemedicine to cat videos. Even within a particular category of content, demand varies tremendously for different offerings. Second, some content and applications consume more bandwidth than others. Video streaming like Netflix and Amazon Prime, interconnected-video communication like Skype, and interactive gaming such as Xbox Live, for instance, use more data than does email. Third, different content types have different quality requirements. For example, some are more susceptible to latency than others. The quality of a video stream suffers more from delayed delivery of data packets than email does. Fourth, congestion can occur within ISP networks and at the interconnection ports between ISPs and other networks. Finally, investment by ISPs in adding capacity to their networks and updating their interconnection points expands output and may therefore carry large social value up to the point where extra investment imposes costs that exceed the associated marginal benefit.

Those considerations show that paid prioritization may efficiently allocate scarce network capacity in the event of anticipated congestion. When demand exceeds supply in a market, price rises to the clearing point. The resulting allocation is efficient, given the prevailing supply and demand conditions, because price is a proxy for utility. In that respect, the price that an edge provider would willingly pay reflects, at least in part, the value of the relevant

97. This is a basic principle of microeconomics, which underlies our market economy. The fact that market prices lead to conservation and higher output can prove to be controversial in extreme cases, such as those involving "market shocks" following a natural disaster. Even then, however, many economists argue that free market pricing carries important benefits. *See, e.g.*, Walter E. Williams, *The Role of Prices*, WASH. TIMES (Sept. 15, 2005), http://go.shr.lc/2e1jGPJ [https://perma.cc/LT4X-KTF8]; *see, generally* David Skarbeck, *Market Failure and Natural Disasters: A Reexamination of Anti-Gouging Laws*, 37 PUB. CONT. L.J. 771 (2008).

content to consumers. Of course, the proxy is imperfect, but that is true of all markets. Nevertheless, markets rely on price mechanisms both to capitalize on market actors' unique preferences—which they may not reveal publicly—and to spur desirable incentives, thus distributing scarce resources more effectively than any other instrument. That principle holds true in the Internet space. There, as everywhere, treating all units equally can be decidedly inefficient because it lumps less-valuable units in with the most valuable ones that consumers demand.

A recurring criticism is that paid prioritization would divide the haves from the have-nots.[98] Proponents of net neutrality argue that start-ups and other less-well-financed competitors may not be able to afford to pay as much as dominant incumbents.[99] Hence, the thinking goes, paid prioritization would suppress competition and entry by less-well-capitalized edge providers.

That concern is true of all industries, however, and it is unclear why online markets are different. Further, that line of argument rests on the fiction that today's Internet is currently a world of equals where each content provider enjoys similar access to end users. The reality is anything but: many of today's largest and most well-capitalized edge providers have invested billions of dollars each in building private, content delivery networks (CDN).[100] Those CDNs enable faster delivery of their owners' content by reducing both the geographic distance that data packets must travel and the number of network hops that they have to make. In short, CDNs are already "fast lanes" that are often imbedded within ISPs' last-mile networks. The FCC's 2015 Open Internet Order will not affect them.[101] That point says nothing, of course, about the myriad of other ways in which a superior ability to pay yields heightened advantages in the marketplace, such as larger engineering, R&D, and marketing budgets. Asymmetric market positions are part of a healthy competitive process fed by

98. *See, e.g.*, *2015 Open Internet Order*, *supra* note 1, at 5653–56, paras. 126–127.

99. *Id.*

100. In order to improve the quality of their connection with ISP subscribers, edge providers often connect with ISPs via content delivery networks (CDNs), such as those that Akami and Limelight provide. CDNs can provide high-quality connections by embedding their resources within ISPs' networks. The largest content providers, however, increasingly build their own backbone networks to connect directly with ISPs. For instance, technology giants like Google, Amazon, Netflix, Apple, Facebook, and Microsoft have developed private CDNs to increase the speed with which they can deliver content to end users. *See, e.g.*, Olivier Sylvain, *Network Equality*, 67 HASTINGS L.J. 443, 478 (2016); Nia Chung Srodoski, *A Balancing Act: The Virtue of a 'Light Touch' Regulatory Framework in the 2015 Open Internet Order*, 17 MINN. J.L. SCI. & TECH., 517, 525 n.45 (2016); Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. ON TELECOMM. & HIGH TECH. L. 19, 36 (2009). Of course, not all edge providers can afford to build their own, high-speed delivery networks. Typically, only the biggest and most popular edge providers create their own backbones.

101. *2015 Open Internet Order*, *supra* note 1, at 5657, para. 128.

capital markets and fueled by incentives to compete across metrics that include private investment.

Nevertheless, the myth that net neutrality places all content providers on an equal playing field persists. Even if edge providers were otherwise identically positioned, it still may not make sense to reject market pricing principles in the Internet space. First, capital markets finance compelling ideas, content, and applications. Should a new edge provider offer content of particular value to consumers, capital will likely be available to facilitate its distribution, as the host of venture capital firms that funded Internet start-ups has shown. By contrast, it would likely be irrational to borrow against (and for investors to bestow capital for) lousy content. Second, ISPs benefit when their subscribers enjoy swift access to their preferred applications. ISPs may thus have an incentive to negotiate price and delivery terms that work with the entrant's financial situation. Even when an ISP is vertically integrated and offers rival content, the ISP will not necessarily eschew competing content. Rather, the ISP will trade-off (1) maximizing the value of its ISP network to existing and prospective subscribers and (2) maximizing the value derived from monetizing the content it created or purchased upstream. There is no reason why the second consideration will dominate the first, especially since it did not when paid prioritization was permitted.

Thus, the FCC's *per se* prohibition of paid prioritization finds little or no support in economics, which holds that vertical constraints are largely good for consumers. These analytical shortcomings might be understandable if there were direct evidence that net neutrality violations have harmed competition and consumers in the past. As already discussed, however, the FCC merely assumed market power and incentives to exclude.[102]

3. Net Neutrality Violations Can Sometimes Harm Competition

As with other vertical restraints, paid prioritization could harm competition under certain conditions. A requisite of injury to competition, of course, is significant market power. Hence, facing sufficient competition, broadband providers could not successfully block, throttle, or otherwise degrade consumers' preferred content in a bid to bolster less attractive content owned by them, their affiliates, or edge providers paying them for priority delivery. Yet, many ISPs enjoy at least some market power, potentially allowing them to disadvantage applications or content to which their consumers want access. In that setting, it may be possible for an ISP—in conjunction with its favored edge provider—to raise com-

102. *See id.* at 5607–13, paras. 14–40.

peting content providers' costs or, absent an alternative ISP, to exclude rival edge providers from local markets altogether. This means that net neutrality violations warrant scrutiny from a competition policy perspective. The key question, however, is under what antitrust standard, *per se* or rule of reason.

Possible anticompetitive outcomes are a factor to weigh against the potential benefits of paid prioritization. The choice of legal standard—(i) *per se* prohibition by an *ex ante* net neutrality rule or (ii) *ex post* evaluation under antitrust's rule of reason—turns on the potential for procompetitive and anticompetitive outcomes from paid prioritization. As such vertical contracts between ISPs and edge providers can benefit consumers, the FCC's net neutrality rules necessarily carry a Type I error cost (false positives). By contrast, the rule of reason allows more discerning analysis—albeit at greater enforcement expense—to prohibit anticompetitive paid prioritization deals and to allow others.

An important question weighing on the need for *ex ante* regulation concerns the state of competition in today's ISP markets. Under monopoly, for example, market forces may not deter anticompetitive vertical exclusion even when supported by antitrust enforcement. That consideration has long justified *ex ante* regulation in network industries that constitute natural monopolies. Indeed, the whole point of Title II was to regulate telephone monopolies that, even after partial deregulation, could suppress entry by controlling bottleneck access points. Does the same rationale apply here? The answer is no.

Although commentators debate the degree of competition to which wireline ISPs are subject, everyone can agree that ISP markets are not natural monopolies. *Hundreds* of ISPs compete in the United States today.[103] Competition between wireless broadband access providers is strong. True, wireline ISPs typically operate in concentrated markets, and some U.S. consumers enjoy limited choice between ISPs. Competition not only remains, however, it is growing.[104] And there is a dearth of evidence of paid prioritization, throttling, or exclusion that has demonstrably harmed the competitive process. Absent evidence that competition is insufficient to stop ISPs from excluding rivals, and with all signs showing that competition is on the rise, what possible justification exists for common carrier regulation to preserve the competitive process?

The FCC saw things differently. Its dismissive treatment of market forces and competition is apparent throughout its 2015 Open Internet Order. One provision, though, is particularly illuminating. The agency found that, "even if the mobile market were

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103. *See id.* at 5619–5622, paras. 61–67.
104. *Id.*

sufficiently competitive, competition alone is not sufficient to deter mobile providers from taking actions that would limit Internet openness."[105] The FCC further observed:

> [E]ven in a competitive market certain conditions could create incentives and opportunities for service providers to engage in discriminatory and unfair practices. . . . We thus reject suggestions that market forces will be sufficient to ensure that providers of broadband Internet access service do not act in a manner contrary to the public interest.[106]

Why would ISPs be a special case? One possible answer is that ISPs control a bottleneck through which content must pass to reach subscribers, meaning that ISPs could foreclose competitors. This issue is the familiar question of vertical foreclosure. Firms integrated up and down the supply chain, and which control an essential facility, can use their controlled bottleneck to exclude competition or to raise rivals' costs. It is a common problem in partially deregulated network industries, where incumbents control a piece of critical infrastructure that remains a natural monopoly. In such cases, regulations often impose licensing and unbundling requirements. But the ISP market is not a natural monopoly. And, outside of such industries, forced sharing is generally seen as counterproductive to investment and innovative by the Supreme Court and by economists.[107]

Consumers would enjoy protection in a world without net neutrality. Antitrust law is a formidable tool for promoting the public interest. If harmful exclusion, throttling, or paid prioritization by ISPs occurs, antitrust is well positioned to tackle those cases. Section 1 of the Sherman Act proscribes unreasonable restraints of trade.[108] That provision has sufficient teeth to capture vertical restraints that harm competition when entered into by parties that enjoy market power. If an edge provider is dominant, Section 2 prohibits attempted or actual monopolization.[109] If the FCC did not reclassify broadband ISPs under Title II, the FTC would have jurisdiction to challenge anticompetitive conduct under Section 5 of the FTC Act.[110] With the treble damages available to private litigants under the Clayton Act,[111] and with the FTC's and Department of Justice's dedicated missions to bring antitrust

105. *Id.* at 5665, para. 148.
106. *Id.* at 5810, para. 444.
107. Verizon Comm'cns v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407, *passim* (2004)
108. Sherman Act, 15 U.S.C. § 1 (2012).
109. *Id.* § 2.
110. 15 U.S.C. § 45 (2012).
111. 15 U.S.C. § 15 (2012).

cases in the public interest, there would be no lack of effective antitrust enforcement.

For illustrative purposes, suppose that a broadband ISP with market power decided to contract with an edge provider to exclude all competing content from its last mile network. Pursuant to the agreement, the ISP blocks or materially degrades competing content offered by other edge providers. As a result, the conspiring edge provider's market share and power increase *vis-à-vis* its rivals, while the ISP's consumers lose preferred content. The vertical boycott would likely fail scrutiny under the rule of reason unless the ISP and edge provider could proffer sufficient procompetitive justifications.

It is true that antitrust liability would not attach in every instance of throttling or paid prioritization. But that is a feature, not a bug, of antitrust scrutiny. Imagine that an edge provider offers bandwidth-heavy content for which there is great consumer demand versus alternative content. To maximize the value of its content, the edge provider partners with an ISP that agrees to prioritize its content over lesser alternatives. Is there an antitrust violation? There may not be, especially if the parties can show that the procompetitive effects of the restraint—faster delivery of content favored by consumers—outweighed the exclusionary effects. The rule of reason adopts an all-encompassing inquiry, paying close attention to the consumer benefits and downsides of the challenged practice based on the facts at hand. If that inquiry shows that a particular act of paid prioritization, throttling, or blocking enhanced consumer welfare, then that should be the end of the matter from a competition standpoint.

That outcome—allowing paid prioritization if it makes consumers better off—does not appeal to all advocates of net neutrality. This reality hints at a broader point: the real case for regulating ISPs under Title II is not to protect the competitive process, but to advance policies going beyond marketplace efficiency. In particular, some advocates call for net neutrality to protect nonmonetary goals like free speech, civic participation, and equality. In their view—and apparently in the FCC's view—competition and antitrust enforcement alone cannot sufficiently protect those virtues. The next section explores that question.

B. *Free Speech and Civic Participation: Antitrust is up to the Job*

Antitrust is a time-tested guardian of the competitive process. But, for some people, non-monetary goals like free speech, debate, and equality raise different issues. They believe that ISPs that block, degrade, or disadvantage content not to their liking harm democratic principles imbedded in the Internet with its history of

freedom and best-efforts delivery. Antitrust typically focuses on price and output effects, which are quantifiable in dollar terms. For some, those monetary values seem far removed from issues like civic participation and online freedom. The concern that antitrust fails to protect nonpecuniary values animates calls for rules to guard against "non-neutral" ISP conduct.

It might seem surprising to proffer antitrust as a meaningful guardian of goals like freedom of speech and democratic participation. The mystery dissolves, however, because consumers care about a host of qualities for Internet access, not just price, and antitrust protects market forces, which respond to consumer demand under competition.

In pivoting toward non-monetary values associated with ISPs, we must ask whether consumers hold those values. Although many ISP subscribers doubtless value neutrality, they will not always do so in every case. That possibility has important implications for the analysis of net neutrality regulation, which may elevate regulators' values over those held by consumers. But assuming for now that consumers share the full array of non-monetary values embraced by net neutrality advocates, it follows that ISPs have an incentive in contested markets to provide broadband access that caters to those values. To the extent that ISP subscribers demand neutral treatment of data flowing over the last mile, then we would expect competitive markets to produce that outcome. Antitrust is thus a viable solution to threats to non-monetary values because it guards the competitive process that makes ISPs satisfy consumer demand.

Some net neutrality advocates, however, are convinced that markets and antitrust do not protect openness, equality, and freedom.[112] That view featured prominently in a 2014 congressional hearing entitled "Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?"[113] Columbia Professor Tim Wu argued, for example, that "the Internet implicates a whole host of noneconomic values, which are simply not well-captured by antitrust processes."[114] He explained further:

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112. In addition to sources discussed below, *see, e.g.*, Joshua Stager, *Net Neutrality Hearing Examines a False Choice on Antitrust*, HILL (Mar. 25, 2015, 3:30 PM), http://thehill.com/blogs/pundits-blog/technology/236937-net-neutrality-hearing-examines-a-false-choice-on-antitrust [https://perma.cc/UQQ7-9P3Y] ("[C]ompetition alone cannot fully protect the values of Internet openness and freedom. A net neutrality regime that relies solely on antitrust analysis would be narrowly focused on pricing harms, such as those found in cartels and monopolies. Such a legal theory may prevent some paid prioritization schemes, but it cannot address the non-economic goals of net neutrality such as free speech, political participation and viewpoint diversity.").

113. *See Net Neutrality: Is Antitrust Law More Effective Than Regulation In Protecting Consumers and Innovation?*: *Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. (2014).

114. *Id.* at 70.

> I have the highest admiration for the antitrust laws and the agencies enforcing antitrust laws. But I simply don't think they are equipped to handle the broad range of values and policies that are implicated by net neutrality and by the open Internet. . . . [W]hen we consider Internet policy, what we are really considering is not merely economic policy, not merely competition policy, but also media policy, social policy, oversight of the political process, issues of free speech. There are a wide range of noneconomic values that I fear the antitrust law, despite its expertise, despite the decades, indeed, over a century of lawmaking in that area, simply does not capture.[115]

Such arguments carry superficial appeal and find recurring expression in portions of the academic literature.[116] Indeed, at least one commentator goes so far as to argue that "[a]ntitrust law, with its primary emphasis on economic efficiency, accords no value to the speech at issue—in much the same manner that it largely disregards any noneconomic consideration."[117]

Those viewpoints overlook the broader role of competition by focusing solely on the most common way that market power is measured: control over price. Thus, they skip past the critical, threshold question: do markets fail to satisfy consumer demand for ISP services that promote nonmonetary values? As noted above, there is a glaring lack of evidence of net neutrality violations to date. More importantly, the criticisms fail to ask why antitrust, in turn, cannot protect the market forces that lead firms to respond to consumer demand for attributes other than price. In that respect, it bears noting that harms to competition are not limited to static price effects. Dynamic efficiency focused on a restraint's impact on innovation is of tremendous importance, for instance, and can trump static concerns.[118] A restraint that reduces the quality of goods or services sold in a market may impose actionable anticompetitive effects.[119] And a restriction that eliminates consumers' revealed preference for a particular good or ser-

115. *Id.*

116. *See, e.g.*, Gene Kimmelman & Mark Cooper, *Antitrust and Economic Regulation: Essential and Complementary Tools to Maximize Consumer Welfare and Freedom of Expression in the Digital Age*, 9 HARV. L. & POL'Y REV. 403, 403–04 (2015); Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 B.U. L. REV. 35, 106–07 (2015); Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CALIF. L. REV. 371 (2006).

117. Hillary Greene, *Antitrust Censorship of Economic Protest*, 59 DUKE L.J. 1037, 1040 (2010).

118. *See, e.g.*, DOJ & FTC, HORIZONTAL MERGER GUIDELINES 2 (2010) ("Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation.").

119. *Id.* at 1–2.

vice may—in conjunction with other factors—inflict an antitrust injury.[120]

The overarching point—one lost on the antitrust skeptic crowd—is that the Sherman Act opposes conduct that, by restricting competition, denies consumers any benefits that they desire and would otherwise obtain. It is easy to caricature antitrust as a narrow inquiry that myopically focuses on price and nothing else. That erroneous portrayal sticks only because most forms of antitrust harm involve quantifiable monetary effects in terms of suppressed output and depressed prices.

Of course, antitrust's consumer welfare prescription is not synonymous with every facet of the public interest. But that fact does not grant the point to net neutrality advocates. Firms that fail to satisfy consumer demand create competitive openings for their rivals, a process that we have seen occur repeatedly in Internet related industries. The analysis then turns to whether the marketplace is sufficiently competitive so that firms will in fact cater to consumer demand, which calls for antitrust analysis.

One possibility is that end users place great value on equal treatment of data by ISPs, regardless of content, even if that means occasional congestion for some high-bandwidth content. Should that be consumers' preference, then woe be to the ISP that systemically degrades applications and content that its subscribers demand. There is good reason to think that active blocking or throttling of popular content would invite a furor among the consuming public. One need merely consider how the public responded to (apparently erroneous) claims that Comcast throttled Netflix in 2014, for instance. If consumer demand is indeed sharply at odds with efforts by ISPs to exclude certain content, then we should expect market forces to deter such behavior.

The last section explored the state of competition between ISPs in the fixed and wireless spaces, but there is also crucial direct evidence. In the last decade, during much of which time no net neutrality rules were in effect, ISPs almost never blocked or disfavored content. Because market forces have thus far protected free speech and civic participation norms in the Internet space, there is little basis for concluding that competition and antitrust policy are not up to the job. Maybe it is fear of what lies ahead, rather than what occurred before, that drives concerns that ISPs will harm free speech and equality online. But that puts the case for regulatory intervention backwards.

Perhaps net neutrality advocates would argue that the 2015 Open Internet Order can do no harm because it simply guarantees what the free market would provide. Indeed—someone might ar-

120. *Cf., e.g.*, *In Re* Victrex Plc., No. 141-0042, 2016 WL 3913333, paras. 5, 42 (FTC July 13, 2016).

gue—regulation does a better job because ISP markets are imperfectly competitive and antitrust, for all its benefits, is an unwieldy tool. Such arguments, however, overlook a possibility unwelcome to some net neutrality advocates: either today or in the future, some consumers may value differentiated ISP plans that prioritize certain content over others. The cost of net neutrality regulation is that it will foreclose preferred ISP plans, frustrating consumer preferences and innovation in context and its delivery.

Suppose that a population of end users consumes certain high-data content and values guaranteed, prioritized access to that content. If an ISP were to market a product designed for those customers, then antitrust would see no net anticompetitive effect, at least if competing ISPs remain free to offer alternative plans. There lies the unspoken crux of the debate. Net neutrality advocates reject an antitrust solution because they cannot accept that ISPs might offer prioritized plans that reflect consumer demand. Many supporters of net neutrality ardently and sincerely believe that deviations from equal carriage of data across the last mile to end users are wrong as a matter of principle.[121] They hold that view, regardless of whether some consumers would prefer to buy an ISP product that departs from net neutrality principles in certain ways.[122] This is the juncture at which proponents of market forces and antitrust enforcement part ways with some net neutrality advocates.

Because the law should allow consumers to decide through their own market choices what plans work best for them, the case for net neutrality to protect free speech and equality is weak. Competitive pressures, bolstered by antitrust enforcement, protect end users' interests in this respect. Of course, not everyone agrees and it is worth exploring the other argument. Take examples given by Professor Wu in support of antitrust's supposed deficiency in capturing non-monetary values unique to the Internet:

> Let me just give an example. Let's imagine we had an Internet service provider that for its own reasons decided it did not like political speakers on one or another side of the spectrum. Let's say we had a different ISP that for whatever reason believed that local news sources were less valuable than national news sources and decided to favor them. Or let's say we had an ISP that had a bias in favor of big speakers as opposed to small speakers, for whatever reasons. Or maybe just something totally irrational, like it favored one sports team, it just thought the New York Rang-

121. *See, e.g.*, Barbara van Schewick, *Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 163–66 (2015).
122. *Id.*

> ers were a better hockey team despite losing the Stanley Cup than the L.A. Kings, and so tried to adjust coverage around sports. Whatever it was, these are the kinds of issues, whether political, social, sports, whatever, you name it, that simply do not register in the antitrust analysis, because if you have political bias, it doesn't necessarily give a competitive advantage to the ISP.[123]

That critique seems to judge antitrust as a regulatory mechanism, rather than as a tool for protecting the competitive process. To ask whether antitrust is up to the job is to begin at step two. The first step is to look at consumer demand and competition in the market. Consumers likely do not want their ISPs to dictate their content options for political positions, news sources, and sports teams. ISPs face competition and thus would lose customers if they engaged in the net neutrality violations hypothesized by Professor Wu. The critical issue is whether market forces are sufficiently potent to deter such ISP conduct. Observers dispute the degree of competition in ISP markets, of course, but an evidentiary record devoid of such conduct is telling.

Antitrust would get involved if ISPs diluted the competitive process that prevents them from, in Professor Wu's examples, favoring one set of speakers, news sources, and sports teams. Were ISPs to agree to boycott certain political content, to allocate various forms of content exclusively between them, or otherwise to collude with anticompetitive effect, for example, antitrust would hold them liable. Antitrust would protect consumers from political harms not by banning those outcomes, but by guarding the process that encourages firms to respond to consumer demand. The proposition that consumer preferences—whether for ISP neutrality toward sports teams or otherwise—"simply do not register in the antitrust analysis" is wrong.[124] What Professor Wu presumably means is that antitrust is not a form of *ex ante* regulation that, in itself, prohibits net neutrality violations. That is not how one should evaluate an antitrust solution. Instead, we should first look to the strength of the competitive process to start the analysis.

The case for net neutrality thus reduces to a question of consumer preference. Do end users want guaranteed, relatively high-speed delivery of certain preferred content such as gaming or medical monitoring? If they do not want such ISP products today, might they want them tomorrow? The only way to know is to allow ISPs to experiment with plans tailored to changing content, tech-

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123. *Net Neutrality: Is Antitrust Law More Effective Than Regulation In Protecting Consumers and Innovation?*: *Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 70–71 (2014).

124. *Id.*

nology, network capacity, and consumer demand. Net neutrality rules take freedom of choice away not just from ISPs, but, more importantly, also from consumers—their end users. The result may be reduced consumer benefits stemming from the replacement of free competition and innovation with unneeded regulation and static offerings.

CONCLUSION

People are rightly passionate about the Internet, which has yielded an extraordinary array of benefits. How best to manage the complex economics of the online world is a difficult question that should concern us all. Nevertheless, the FCC's 2015 Open Internet Order may ultimately reduce consumer choice rather than protect it. Utility style regulation, even when ameliorated by "forbearance," is not an optimal mechanism for unleashing market based incentives to compete, tailor products to consumer demand, and invest in infrastructure. By banning paid prioritization, the FCC has condemned vertical restraints that offer procompetitive benefits. Such *per se* prohibitions miss the mark, particularly in markets that are far removed from the natural monopolies for which utility regulation is designed.

The common theme underlying the push for net neutrality is a rejection of market forces and antitrust oversight as sufficient means for disciplining ISPs. Although advocates of net neutrality claim that it is necessary to protect competition and facilitate innovation, that justification is threadbare. As Part II explained, market forces are likely to deter anticompetitive foreclosure of disfavored content by ISPs. Added to that constraint is an antitrust regime well-equipped to challenge improper exclusion. Finally, it is unlikely that ISPs have incentives to discriminate against content preferred by their customers, which explains the scarcity of real world instances of discrimination to date. The economic literature teaches that it often makes sense for vertically integrated network owners to maximize the value of their platforms. Compromising network quality in return for an upstream or downstream benefit may be unprofitable.

None of this is to say that anticompetitive exclusion by an ISP is impossible or even implausible. It is, rather, to observe that there are good reasons why anticompetitive discrimination would be the exception, rather than the norm, and when it materializes, antitrust enforcement is waiting. Ultimately, as a 2007 FTC report observed, the issues are empirical.[125] Given the almost complete absence of evidence of content-based ISP discrimination—and less still of discrimination that harmed the competitive pro-

125. FTC, *supra* note 52, at 77–79.

cess—the competition case for *ex ante* net neutrality regulation like the FCC's 2015 Order is thin.

The real objection is that antitrust cannot protect consumers against harm to free speech and values. That conclusion follows only if the goal is net neutrality for its own sake, rather than to promote consumer welfare. Some net neutrality advocates do not trust a free market solution, bolstered by antitrust law, because it defers to consumers the critical question of what traits they value. The FCC's move to reclassify broadband ISPs—much celebrated in net neutrality quarters—was thus not an action unequivocally in consumers' interests. *Ex ante* net neutrality regulation disenfranchises consumers from deciding for themselves what kind of Internet-access plans and content that they desire.

ISPs do not operate in a natural monopoly. Competition in the industry, though imperfect, is real and growing. Regulation that stifles innovation and compromises efficient incentives is not the right path. As is usually the case in our free-market system, the better way is competition overseen, as always, by antitrust.