FCC Reform:
Governing Requires a New Standard

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Introduction

The Telecommunications Act of 1996 (1996 Act),[(3)] the first major rewrite of the nation's basic communications law in more than sixty years, will not remain undisturbed for very long. At a minimum, a "technical corrections" bill will be introduced to fix various typos and minor problems in the 1996 legislative text. Other issues, such as advanced television spectrum and foreign ownership of telephone companies remain unresolved. But perhaps the most important pending issue is reform of the Federal Communications Commission (FCC or Commission), the federal regulatory agency created by the 1934 Communications Act.[(4)]

How should Congress reform the FCC? Cut its budget? Curb its industry oversight responsibilities? Abolish the agency altogether? While many options may be considered, it is argued herein that one simple option will effectively address both FCC reform and the transition to fully competitive communications markets that are foreseen in the 1996 Act.

It is proposed that the prudent course for Congress to take is to further hasten the demise of communications regulation by amending the "public interest" standard of the 1934 Communications Act[(5)] through incorporation of procompetitive antitrust doctrine. Arguably, a public interest standard based on competitiveness is appropriate to conditions of technological abundance and convergence, which have replaced an earlier era of communications scarcity and media separation, conditions that gave rise to regulation.

While recommendations to abolish the FCC may make headlines, and proposals to cut the FCC budget may be appealing to budget-balancing members of Congress, the option presented here recognizes that the agency has important responsibilities in the transition to full competition. At the same time, it achieves meaningful reform by removing the agency's political discretion to define the "public interest" in any manner it sees fit by majority vote.

This option is consistent with the influence of applied modern communications technology to foster competitive markets. Moreover, a review of FCC political discretion reveals that the agency has been inconsistent in defining the "public interest," whereas a review of antitrust law reveals a more certain legal framework in which to apply competitive principles.

I.Technology Meets Regulation

For more than two decades, there has been an understanding, at least among leading academics, that technological convergence is occurring in the sciences of communications and computing.[(6)] More recently, this convergence has been the subject of articles in the business and trade press:

The telephone, television and computer are rapidly merging into a single, very intelligent box--a telecomputer. . . . [which] will be linked to the rest of the world by high-capacity smart wires.[(7)]

Some observers predict that the "telecomputer" will be widely available and in use by the end of the decade. The introduction of convergent technologies linked by "smart wires" is perceived as profound, since it erodes historic technological boundaries that have long separated what once were the distinct industries of telephony, computing, broadcasting, cable television, and consumer electronics. As a result of this technological revolution, President Clinton has predicted economic and social development equal to that which accompanied the introduction of the railroads in the nineteenth century.[(8)]

The question of how government will adapt to this new condition of abundance and digital unity in communications has already prompted public debate.[(9)] The Clinton Administration's response was to establish the Information Infrastructure Task Force, with committees on telecommunications, information policy, and applications; the last having the responsibility of implementing recommendations from Vice President Gore's *National Performance Review* (also known as Reinventing Government) in the area of information technology, or the Information Superhighway.

Initial reports by Vice President Gore indicated that the Administration believed the Federal Communications Commission should be empowered to "create a unified regulatory scheme" and the scheme should combine a flexible regulatory environment together with free and open markets.[(10)] At a time when technologies are converging, and when the declining costs of computing are enabling decentralization in communications networks, it indeed made sense to argue for a policy of free and open markets. But did it make sense to argue at the same time for some sort of new "unified regulatory scheme"? Since economic regulation is a surrogate for competition, how can new regulation bring to the American consumer the benefits of converging technologies through free and open markets? Does not regulation, in fact, impede competition? These were significant questions as Congress contemplated a rewrite of the Communications Act.

At the same time, the traditional agenda of federal regulation of communications produced disturbing results. Among the many illustrations was the FCC's inflexible zoning system for the spectrum, which slows the introduction of new technologies and becomes an entry barrier to a communications service needing spectrum. Given the imperative of advancing and converging technologies, it can be argued that a regulatory scheme that both divides various communications firms and circumscribes the services they may offer is arbitrary, if not obsolete.[(11)]

As the FCC implements the provisions of the new law, what is needed is not regulation based on past precedents under the public interest standard. Rather, an amended standard is in order.

This amended standard should be based on the competitive principles of antitrust law, not the limited resource principles of regulatory law. Put differently, technological conditions of scarcity and inflexibility are changing in communications to conditions of abundance and versatility. With communications and computing costs declining, abundance increases. With spreading acceptance of digital formats, versatility abounds. These technological imperatives produce convergence which in turn creates new choices. Video programming exemplifies this. No longer do consumers at home have to rely solely on over-the-air television for video programming--cable television and VCRs are widely available. From a technological standpoint, telephone companies are capable of entering the market, and so too are multimedia computer companies. The true public interest would be to see many competing firms in the home video market; not regulation of either some who already are in the market or regulation preventing some who wish enter the market.

In sum, the federal communications act today could read as follows: The public interest is best served when the private communications system functions in competitive markets and therefore any regulatory economic intervention should be premised on the principles of antitrust law.

II.The Public Interest

The Communications Act of 1934 (1934 Act)[(12)] established the Federal Communications Commission.[(13)] The 1934 Act gave the newly created Commission broad jurisdiction to regulate "interstate and foreign communication by wire or radio."[(14)] Within this jurisdiction were common carriers (Subchapter II) and radio broadcasting (Subchapter III). Over the air and cable television did not exist at the time,[(15)] nor did computers, over which the FCC never has acquired jurisdiction.

The 1934 Act, which consolidated in one agency federal regulation of communication,[(16)] has its legal origin in the late 1800s when Congress was focused on railroad regulation and the public interest standard.[(17)] What evolved was regulation, using the public interest standard, of two related activities. One was government-granted monopolies, such as railroads, telephone companies, and electric utilities. The other was public resources made available to private entities for private gain, which again included railroads, telephone and electric companies "operating on" or "involving public lands."

Added to this list in 1910 was "wireless," as radio was then called, when Congress amended the Interstate Commerce Act[(18)] to bring interstate and foreign wire and wireless communication under federal jurisdiction. Following the tragic sinking of the *Titanic*, Congress passed the Radio Act of 1912,[(19)] which represented the first comprehensive radio legislation. Among other things, the Act adopted the international distress signal.[(20)]

The 1934 Act requires that the FCC shall determine "whether the public interest, convenience, and necessity will be served by the granting of [broadcast facility construction permits and station licenses]. . . ."[(21)] With respect to wireline common carriers, the law provides that "[n]o carrier shall undertake the construction of a new line or of an extension of any line . . . until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction . . . ."[(22)]

While the key words in the statute vary for broadcasters and common carriers, the United States Supreme Court has rejected efforts to distinguish between the terms.[(23)] Indeed, while both the agency and the courts have struggled to interpret what Congress meant by these words, as they are not defined in the 1934 Act, there is no doubt that "[t]he statutory standard . . . leaves wide discretion and calls for imaginative interpretation."[(24)]

While problems of statutory construction are common in administrative law,[(25)] a review of FCC decisions leaves no doubt that the Commission has so tortured the public interest standard through its applications in both broadcast and common carrier regulation that the "public interest" of the country in communications would be better served today by an amended standard. We begin our review with an examination of how the FCC has defined the public interest in allocating access to the radio spectrum.

III.Spectrum Scarcity

The regulatory rationale for broadcast regulation is the scarcity of frequencies. "[T]he radio spectrum simply is not large enough to accommodate everybody," Justice Frankfurter observed in 1943.[(26)] Moreover, it has been decided, that spectrum's "inherent physical limitation"[(27)] justifies the federal imposition of public service obligations in return for the "free and exclusive use of a limited and valuable" public resource.[(28)]

There are numerous problems with the scarcity rationale, which supports the regulation of broadcasting in the public interest, not the least of which is the lack of scarcity. In 1934, the country was served by 583 AM radio stations. There were no FM stations, no television stations, no cable TV, no low power TV, no video cassettes, no electronic publishing, nor any of the other present and planned technological alternatives that undermine the scarcity rationale. Meanwhile AM radio, itself, has eight times as many stations on the air today as were operating in 1934.

The environment today and in the foreseeable future is far different than that of 1927 when Congress, apprehensive that a few special interests might monopolize the radio frequencies, passed the Radio Act to safeguard the public interest.[(29)]

In recent times, the public interest standard has become controversial, most notably because the standard coupled with the scarcity rationale has been used to justify extensive governmental intrusion into the First Amendment rights of broadcast journalists. The level of intrusion has exceeded anything that would be permitted to be imposed on "the platform or the press."[(30)] Of all the intrusions, the most despised was the Fairness Doctrine,[(31)] which provoked forty years of controversy.

IV.The Fairness Doctrine

The Fairness Doctrine, which the FCC abolished on August 4, 1987,[(32)] imposed twin public interest obligations on broadcasters who were licensed to use specific frequencies of the "scarce" spectrum. "Broadcast licensees are required to provide coverage of vitally important controversial issues of interest in the community served by the licensees and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues."[(33)]

The evolution and demise of the Fairness Doctrine reveals the problematic state of the public interest standard. The slippery slope began in 1929 when the Federal Radio Commission[(34)] discussed the obligation of broadcasters to provide equal time to political candidates, as set forth in section 18 of the Radio Act.[(35)] The Commission said:

It would not be fair, indeed it would not be good service, to the public to allow a one-sided presentation of the political issues of a campaign. In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies not only to addresses by political candidates but to all discussions of issues of importance to the public.[(36)]

The Fairness Doctrine, in its modern form, became an FCC policy in 1949[(37)] and in 1969 the Supreme Court of the United States upheld the constitutionality of the personal attack component of the Doctrine in *Red Lion Broadcasting Co. v. FCC*.[(38)] The Court's approval of the Fairness Doctrine as a necessary regulation of spectrum scarcity has been frequently cited as justifying regulation of broadcast content. Moreover, Justice White, writing for a unanimous court, determined that Congress[(39)] had intended to include the Fairness Doctrine in the public interest standard when it amended the Communications Act in 1959.

This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the [F]airness [D]octrine inhered in the public interest standard.[(40)]

The implication of these words made it difficult for the FCC to later revisit the Fairness Doctrine. The Supreme Court was saying that unless the public interest standard, itself, could be eliminated, the Fairness Doctrine could not be eliminated. Therefore, in order to abolish the Fairness Doctrine, the FCC had to determine that the media marketplace had drastically changed since the *Red Lion* decision and that the Fairness Doctrine no longer served the public interest.[(41)] While the FCC's 1985 Fairness Report challenged the Doctrine on both the scarcity rationale and the First Amendment rights of broadcasters,[(42)] the Commission had to avoid the appearance that it was not following the teachings of *Red Lion.* Thus, the public interest standard was reinterpreted to state that the Doctrine inhibited, rather than encouraged, the dissemination of information.

Shortly after the issuance of the Fairness Report, the U.S. Court of Appeals for the District of Columbia Circuit held that Congress had not codified the Fairness Doctrine in its 1959 amendment to the Communications Act.[(43)]

With the demise of the Fairness Doctrine, the broadcast industry was relieved of a despised regulation. However, the FCC made it clear that broadcasters were still required to observe other programming obligations:

[T]he fact that government may not impose unconstitutional conditions on the receipt of a public benefit does not preclude the Commission's ability, and obligation, to license broadcasters in the public interest, convenience, and necessity. The Commission may still impose certain conditions on licensees in furtherance of this public interest obligation. Nothing in this decision, therefore, is intended to call into question the validity of the public interest standard under the Communications Act.[(44)]

V.Broadcast Deregulation

While continuing to acknowledge that it was mandated by Congress to regulate in the public interest, the FCC in the 1980s assumed a new agenda--deregulation of the broadcast industry. Economic efficiency and programming discretion by broadcast licensees were viewed by Fowler as a better way to serve the public interest. In a seminal article, Fowler and his legal advisor advocated that the best way to serve the public was to allow broadcasters to respond to public demand and that the historic justifications for regulation did not withstand close scrutiny.(45) They attacked scarcity head on,(46) saying it had been overtaken by abundance.

Support for the Fowler thesis could be found in the field of economics, especially among those who advocate marketplace solutions. Indeed, as Ronald Coase noted as early as 1959,(47) all resources are scarce, and the ideal way to allocate them is not through regulation, but by a market-based system that uses prices to ensure that scarce resources go to those who will make the best use of them.(48)

Fowler went further, contending that the FCC second guessed business judgment and that this discouraged risk taking and innovation by entrepreneurs.(49) The Fowler Commission, acting on this new agenda, took steps to deregulate both broadcast station ownership and operation. Multiple ownership restrictions were relaxed,(50) "trafficking" rules that limited alienation of licenses were eliminated,(51) and program content restrictions were eliminated.(52)

These regulatory changes in broadcast ownership and operation reflected Fowler's belief that the marketplace, itself, best serves the public interest.(53) In fact, however, the argument can be made that a revised public interest standard failed to address the fundamental challenge--to reassess the power of the FCC when implementing the public interest standard.

VI.An Illegitimate Standard

Professor Mayton has argued that the public interest standard used by the FCC is illegitimate in that it "implicates a derangement of constitutional structure, a structure put in place to assure that government power is used circumspectly."(54)

This is a powerful argument, drawing as it does on the truly historic precedent of the press which was deregulated by the "Regulations of Printing Acts" in 1694.(55) In the words of Blackstone, "the press properly became free, in 1694; and has ever since so continued."(56) In modern times, given technological convergence among all media, the argument is compelling that the power the FCC holds under the public interest standard should be ruled unconstitutional. As Professor Mayton sees it, all media should properly be free. The law that governs the press, he argues, should be precedent for the electronic media. This, in turn, will benefit American democracy.(57)

Mayton makes a second point with respect to FCC power. When read correctly, he argues, the Communications Act of 1934 does not delegate an open-ended public interest power to the FCC.(58) He is not alone among scholars who have contended that Congress did not delegate general power to the FCC to regulate broadcasting in the public interest. Professor Jaffe similarly argued that "[t]he use of `public interest' in the statute did not manifest a congressional intent to give the Commission general powers to `regulate' the industry or to solve any `problems' other than the problem of [radio] interference which gave rise to the legislation."(59)

In 1940 in its first decision concerning FCC power under the 1934 Communications Act, the United States Supreme Court agreed: "[T]he Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy."(60)

But three years later, in 1943, the high court opened the public interest door to expanded FCC powers. In *NBC v. United States*,(61) Justice Frankfurter combined different parts of the Communications Act to describe broad FCC authority in these words: "[t]he `public interest' to be served under the Communications Act is thus the interest of the listening public in the `larger and more effective use of the radio.'"(62)

Read together, *NBC*[(63)] and *Red Lion*[(64)] have legitimized expansive powers for the FCC under the public interest standard. Since these decisions were handed down much has changed. So much in fact that there have been efforts, starting as far back as 1976, to rewrite the Communications Act.[(65)] Meanwhile, as we have seen, the FCC has worked to redefine the public interest to reflect these changing conditions. Arguably, however, the issue is not one of redefinition; rather, as Professor Mayton argued, it is one of reassessment.

VII.Telecommunications Reregulation

When the Communications Act became law in 1934, the paradigm for regulating telephone and telegraph companies was comprised of three parts: the "utility" had a protected franchise based on the economic concept of natural monopoly; it was quarantined from entering competitive markets; and government would thoroughly regulate the company's prices, business practices, and conditions of service.[(66)]

As recently as 1984, this model has guided some government decision makers. It was then that the U.S. District Court in Washington, D.C. began regulating the Regional Bell Operating Companies following the court-approved AT&T Divestiture Decree[(67)] that created these companies. The model, however, has been significantly altered by both the FCC and a majority of state public service commissions which have adopted alternative forms of regulation by implementing rate-freeze or price-cap regulation.[(68)] The model was further eroded when the United States District Court in Alexandria, Virginia agreed with Bell Atlantic that the federal government had imposed an unconstitutional quarantine on one of its telephone companies (Chesapeake & Potomac) by banning such companies from entering the cable television business in the same area in which they provided telephone service.[(69)] The court held that the ban infringed on the company's First Amendment rights, thus indirectly challenging the inferior constitutional protection the Supreme Court afforded electronic speech in *Red Lion*.[(70)]

The principle reason for this evolution, culminating in the 1996 Act, has been the changing conditions in communications, which have given rise to increasing competition, and in turn led commentators and regulators to see economic efficiency as a primary goal of telecommunications regulation.[(71)] One commentator argues that the FCC has gone so far as to change its focus from the goal of universally available and affordable residential telephone service, to that of economic efficiency. "The federal redistributory or *equity* goal," he contends, has become "secondary to a pursuit of economic *efficiency* through reliance on a change in markets and competition."[(72)]

The FCC began to adopt the concepts of efficiency and competition in telecommunications in a series of decisions beginning with the telephone accessory equipment area. These culminated in *Carterfone* and the FCC decision to open the public telecommunications network to nontelephone company provided equipment.[(73)] In the long-distance area the Commission adopted a similar policy by opening the market to new entrants.[(74)] In addition, the FCC also encouraged the entry of new technologies into the marketplace, such as Direct Broadcast Satellites and cellular telephones.[(75)] Finally, the Commission has relaxed some of the quarantine restrictions on telephone companies in order to allow them to enter the competitive markets of "enhanced," i.e., computerized services and "customer premises," i.e., terminal equipment.[(76)]

VIII.Regulate Structure or Performance

All of the Commission's actions were initiated pursuant to the public interest standard, which, on the one hand, enabled the agency to adopt freedom of entry positions based on convergence of technology, while, on the other hand, allowed it to segregate different segments of the industry and restrict participants in one area from entering another area. Cellular telephony, for example, was authorized as an "unregulated" duopoly, with one franchise reserved for the local telephone company and the other allocated by the Commission to a competitor.[(77)] In effect, the Commission substituted formal control of market structure for deregulation of prices and quality levels. Structural regulation more and more came to performance regulation as being in the public interest.

At the same time as the FCC was placing increased reliance on marketplace forces, albeit accompanied by structural controls on entry to the market, the agency was also placing heightened emphasis on antitrust law.[(78)] An illustrative example was the 1982 staff report of the Office of Policy and Plans entitled *Measurement of Concentration in Home Video Markets*,[(79)] which stated that when local video markets (broadly defined) are reasonably competitive, the FCC's goals are realized.[(80)]

The FCC, however, was hardly embracing the consumer welfare model of antitrust law. That would have meant avoiding the imposition of structural regulations that raised barriers to market entry, to vertical integration, and to the efficient exploitation of economies of scale. The Commission implicitly reasoned that it was permissible for regulation, at times, to restrain trade. The public interest standard could accommodate such an outcome. One jurist, Judge Posner of the Seventh Circuit, reflected on this curious situation and commented:

If the Commission were enforcing the antitrust laws, it would not be allowed to trade off a reduction in competition. . . Since it is enforcing the nebulous public interest standard instead, it is permitted, and maybe even required, to make such a tradeoff--at least we do not understand any of the parties to question the Commission's authority to do so.[(81)]

The issue is not the Commission's authority. The "nebulous public interest standard" is just that--nebulous. The question then, is how the standard should be defined in light of changing conditions in communications.

IX.Regulation and Competition

Where regulation is concerned less is presumptively better, and competition is presumptively the best.[(82)] This theme was heard often during the last decade when Washington was filled with calls for regulatory reform and deregulation, and when the FCC, under Republican control, was interpreting the public interest to mean more competition and less regulation. Intellectually, the theme was fed by the "Chicago School" of economists who challenged much regulation as being economically without merit.[(83)] Furthermore, the success of the Japanese in international business reinforced the view that the competitiveness of the American economy had been weakened, in part at least, by too much regulation.

Seemingly, the FCC got caught up in this "regulatory failure" theory and sought to promote the less restrictive means of favoring competition. Arguably, what the Commission created was "regulated competition." Congress did not help, for example, by first enacting cable television deregulation legislation in 1984[(84)] and then reregulating the industry just eight years later.[(85)] The reregulation bill left implementation to the FCC and when it rolled back cable rates, not only did the industry howl, but the planned Bell Atlantic-TCI merger collapsed, thereby dealing a setback to the Clinton Administration's ambitions for an Information Superhighway built by converging industries with private moneys.[(86)]

"Our mission was to protect the public against unreasonable prices, while promoting business," Reed Hundt, the FCC chairman, commented after the decision.[(87)] The regulatory tool can be a difficult instrument to use in attempting to achieve these twin aims. Classical regulation often fails, as Justice Breyer has argued, due to a fundamental "mismatch" between the tool and the evil it is intended to fix.[(88)] A more appropriate tool in communications can be found in antitrust law, rather than the FCC precedents when applying the ill-defined public interest standard. This can be accomplished by amending the 1934 Act to define the public interest in procompetitive, antitrust terms.

By adopting this approach, Congress could correct a continuing omission, place a safeguard against infringement on the growing electronic media's First Amendment rights, and at last come to grips with the fundamental question of FCC authority. Put differently, Congress could correct a problem that former FCC General Counsel Henry Geller described as, "[In effect Congress has said to the FCC] Here is a new field, communications; we have no idea how it will develop so we leave it to you to do the best you can in the public interest."[(89)]

Today, the nation does know how the field of communications has and can develop. By defining the public interest in communications in competitive terms, the nation can have both reasonable prices and business progress.

X.The Antitrust Perspective

American telephony has been effected more by the enforcement of antitrust principles than by regulatory law.[(90)] A primary example of the impact that antitrust enforcement has had on the United States telephony industry is the 1982 AT&T Divestiture.[(91)] The AT&T monopoly, with assets worth more than those of General Motors, Ford, Chrysler, General Electric, and IBM combined,[(92)] was divested in an effort to separate the competitive aspects of AT&T's business from the remaining elements of the Bell monopoly.

Yet, even in those instances where the divestiture infused competition into the communications market, the anticompetitive restrictions of the "public interest" standard are still prohibitive. By incorporating the procompetitive theory of antitrust law into the "public interest" standard, uniformity of goals in communication's governance is furthered.

Prior to examining the value which a procompetitive standard would impart upon the communications industry and consumers, it is useful to consider the history and nature of the various antitrust laws, and their relationship to regulated industries.

XI.Traditional Regulation of Natural Monopolies

In sharp contrast to the antitrust laws, economic regulation of an industry is intended as a substitute for competition where one company has a natural monopoly.[(93)] Historically, the justification has been that the regulatory scheme protects the public interest at large because the existence of market failures prevents the market from serving the public interest.

One of the earliest American examples of government regulation came from state regulatory initiatives aimed at controlling the dominant railroad monopoly. The Supreme Court, in *Munn v. Illinois*,[(94)] upheld the right of a state to regulate pricing and licensure requirements that directly affected railroad practices. The rationale was that certain activities uniquely affected the public interest, and must therefore be constrained in order to maintain the public good. The assumption is that the public interest will be served if consumers can be assured least cost purchasing of a service. Governmental regulation strives towards this end through approximating least cost and determining regulated pricing.[(95)]

An overview of the historically regulated markets reveals quite a different story. In fact, traditional governmental regulation of the "natural monopolies" has often resulted in a failure to meet the myriad of consumer needs.[(96)] The corollary has been the modern emergence of deregulation, often as a result of procompetitive policy. This trend may be attributed to the belief that competition is more capable of bearing beneficial economic implications in a modern marketplace.[(97)] Furthermore, what might have been a justifiable regulation in 1934 may no longer be warranted because of technological changes.

XII.Deregulation of Natural Monopolies

The airline industry was deregulated in 1978.[(98)] Although the industry was initially unregulated, Congress created the Civil Aeronautics Board to regulate the industry in order to avoid the problems the railroad industry was plagued with earlier in the century.[(99)] This line of reasoning was predicated upon the theory that, like the railroad and other common carrier transportation industries, air transportation should properly be viewed as a public utility.[(100)] Prior to deregulation, the industry was fraught with an inefficient regulatory structure which ultimately led to high consumer rates and low industry profits.[(101)]

It is now recognized that the early policies upon which regulation was predicated contributed to these market inefficiencies.[102] The Airline Deregulation Act[103] attempted to curb the existing market imperfections by increasing entry opportunity to new airlines, and introducing more flexibility and discretion for individual airlines to lower and raise fares. The Civil Aeronautics Board itself was finally eliminated in 1985, although many of its administrative functions were merely transferred to the Department of Transportation.[104]

The impact of deregulation on the airline industry is, and likely always will be, debatable.[105] In fact, it is questionable whether the industry was actually deregulated. While it is too early to recognize substantive long-term effects, many of the short-term consequences of deregulation have taken shape. The introduction of intense competition into the market resulted in an overall expansion of service options at reductions in price for consumers.[106] In turn, this sudden increase in supply outpaced the demand, resulting in a number of highly publicized bankruptcies and mergers.[107] Consequently, rates have slowly begun to increase again as the airline industry has reverted to a concentrated oligopolistic structure.[108]

Noteworthy, is the absence of any antitrust jurisdiction in the hands of a specialized airline agency which could more effectively monitor the mundane day-to-day business operations. This is not to imply that airlines need not consider antitrust issues which may invariably arise, for such concerns are necessarily part of any business with substantial market power. Antitrust enforcement would be more vigorous, and thus, a more effective deterrent to anticompetitive activities if there were centralized antitrust jurisdiction within a *specialized* administrative agency.

What does exist, however, is the ability of the Department of Transportation (DOT) to authorize antitrust immunity for certain actions. Exemplary of this power is the DOT's approving and granting of antitrust immunity for a commercial cooperation and integration agreement between Northwest and KLM airlines.[109] While there are those who may conclude that this particular agreement is procompetitive, it exemplifies the type of authority which threatens to inhibit the antitrust presence that can artificially stimulate competition. Rather than granting antitrust exemptions, the focus of the overseeing federal agency should be on whether the proposed activity would have an anticompetitive impact, and hence, violate the antitrust standards.

The airline industry is not the only regulated market to have experimented with deregulation without abandoning antitrust immunity and like exemptions. Throughout the latter half of the twentieth century, the nation's railroads experienced little economic success, most notably in regards to passenger service.[110] The industry was originally regulated by the Interstate Commerce Commission for several reasons: in an attempt to minimize competition; in order to provide universal service to the public; and to protect agricultural product shippers from exploitation by the railroad cartels.[111]

Due to overall inability to compete effectively for transportation services with the airlines, the motor carriers developed and Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976,[112] and four years later the Staggers Rail Act of 1980.[113] The intent behind the deregulation was to intensify competition and allow for more pricing discretion by individual carriers.[114]

The effects of railroad deregulation have been similar in nature to those seen in airline deregulation. Of significant benefit has been the ability of the railroads to finally abandon markets[115] which were long, costly, and unprofitable, and which they were previously obligated to serve.[116] Once again, the deregulation was not adequately accompanied by active antitrust supervision in the stead of the regulatory framework.

Without worry as to antitrust concerns being monitored by a special industry agency, it is no surprise that monopolistic concentration of market power has evolved within the modern railroad industry.[117] Noteworthy, is the Interstate Commerce Commission's authority to immunize mergers of rail carriers from antitrust review when it finds the merger to be consistent with public interest.[118]

There are lessons to be gained from the regulation of the airline and railroad industries. Economists, lawyers, and industry insiders have persistently offered suggestions on how to modify the structure so as to ensure market conditions which properly balance the goals of service, quality, efficiency, and competition.[(119)] While scholars debate the economic implications of regulation, the message of the airline experience seems to have gotten lost in the mix. Accordingly, more attention should be paid to the initial structuring of the deregulatory scheme.

Market inconsistencies and variables, such as technological development and international competition, lend to the difficulty in structuring a regulatory framework for the communications industry. Absolute and instantaneous deregulation is neither competitively advantageous or politically tolerable. Consequently, the most practical strategy for those who oppose the current regulatory process may be to fortify gradual deregulation by superimposing strictly enforced antitrust principles upon the current regulatory system. This approach has the advantage of maintaining government and judicial oversight of anticompetitive conduct through the application of existing antitrust laws. As a result, a means will exist to guard against the resulting market imperfections historically associated with deregulation.

Stated another way, antitrust policies must be vigorously enforced to insure that market conditions exist after deregulation that benefit consumers and industry players equally. This is best achieved through the granting of antitrust jurisdiction to the administrative agency with the most specialized knowledge of the industry in question.[(120)] This authority should encompass the power to enjoin potential anticompetitive activities, not to grant such ventures antitrust immunity. The remedy for such an antitrust violation? Partial, if not complete, reregulation until the anticompetitive influences have been sufficiently alleviated.

Through the incorporation of antitrust principles into the public interest standard, many of the fringe applications of antitrust exemptions and defenses will be intrinsically truncated by the administrative procedure. The related antitrust concerns of time, cost, and extensive discovery are comparably diminished by such agency review, as opposed to full-blown litigation. A similar functional strategy would well serve the communications industry, and this is precisely the recommendation proposed by this article.

A delicate blending of the competitive goals and industrial freedom of the antitrust laws with fear by the business-sector of reregulation, has the greatest potential to facilitate the convergence of the public interest with market stability. In no regulated industry is this more true than in communications, in which, as discussed earlier, the existing regulatory structure has been rendered obsolete. The history of antitrust influence within the industry is well established and pervasive. Moreover, the FCC, under the leadership of Chairman Hundt, has already started to undertake the types of analysis that must be applied in antitrust cases.[(121)] One example of such an analysis is the FCC's September 1994 decision approving the AT&T-McCaw merger, in which the Commission stated:

We now address the competitive impact of the proposed merger in each of the markets we have identified. In each market we must examine, the issue is whether the proposed merger will violate antitrust policies. In the case of a proposed merger, we are particularly mindful of Section 7 of the Clayton Act, which generally proscribes mergers "where in any line of commerce in any section of the country" the effect of the merger may be "substantially to lessen competition, or to tend to create a monopoly." We also take care to examine the proposed merger for equally serious but less broad-sweeping violations of antitrust principles, such as theft of confidential information, tie-in sales, unjustified price discrimination, and other abuses of market power. The principal way in which the commentators allege that the proposed merger will violate antitrust principles is by abuses which, it is said, will flow from the combination of McCaw's "bottleneck" cellular exchange and AT&T's power in other markets. In general, after careful consideration of the voluminous antitrust arguments made by all parties, we conclude that the competitive component of our statutory public interest standard will be satisfied by the imposition of two major conditions on our approval of the proposed merger: (1) that AT&T shall not discriminate in favor of McCaw and against its other customers for cellular network equipment under existing contracts; and (2) that AT&T and McCaw shall each take appropriate steps to prevent third parties' proprietary data from falling into the other's hands.[(122)]

XIII.Antitrust Enforcement upon Regulated Industries

Threshold concerns regarding antitrust issues invariably exist in a regulatory structure which seeks to protect monopolies in order to serve the public interest. In theory, the antitrust laws are supposed to act as a check upon anticompetitive behavior by persons with market power, in order to insure competition and avoid such evils as predatory pricing and tying.[(123)]

The conflict between command and control regulations and the general antitrust laws has been met with guarded protection of the regulated industries through judicially crafted immunity exceptions to antitrust enforcement.[(124)] Because such protection offers an attractive opportunity to abuse the regulatory system, the public interest would be better served by a government regime which emphasizes open competition and discretionary pricing in conjunction with active antitrust enforcement without the illusory protection which the historical immunity doctrines have provided. This is not to say that the communications industry has not been largely shaped and influenced by the antitrust laws. Yet, while the history of the communications industry reflects episodes of active antitrust enforcement, there has been an equal amount of exception from the antitrust laws due to the pervasive application of differing immunity doctrines.

XIV.Inclusionary Antitrust Enforcement and Competitive Sustenance

When competitors enter into agreements where their conduct interferes with interstate commerce, the activity is considered a horizontal restraint.[(125)] Section 1 of the Sherman Act[(126)] concerns market behavior, such as agreements to restrict output or increase prices in order to limit or exclude competition. This sort of cartel behavior implicates section 1 by restricting the normal supply and demand functions of the marketplace.[(127)]

There has been little litigation of section 1 violations among competitors in the communications industry. Unlike other antitrust provisions, such as exclusive dealings and vertical agreements, the conduct prohibited by this provision has not been historically relevant to a communications market in which competition is severely restricted due to the natural monopoly structure, which exists as a result of the public utility regulatory scheme.[(128)]

Section 2 of the Sherman Act[(129)] prohibits predatory and exclusionary conduct by one firm with market power, or that attempts to gain market power, against any of its actual or potential competitors.[(130)] Examples of such behavior are monopolization,[(131)] attempts to monopolize, or any conspiracy to monopolize.[(132)] The concerns of section 2 go beyond mere size *per se*. In the seminal case of *United States v. Aluminum Company of America*,[(133)] Judge Learned Hand emphasized that violative firms required not just market power,[(134)] but also anticompetitive conduct.[(135)] Unlike section 1 of the Sherman Act, this provision has been the basis of a good deal of antitrust litigation within the communications industry.[(136)]

One common arrangement is the "tie-in," also referred to as a tying arrangement. This occurs when a seller's goods being sold to a buyer are conditioned upon the buyer additionally buying other goods or services from the seller.[(137)] Tying arrangements are prohibited by sections 1 and 2 of the Sherman Act,[(138)] and by section 3 of the Clayton Act.[(139)] Tying problems among regulated industries are typically attempts by a firm to bypass regulation by leveraging their market power into related but unregulated markets.[(140)]

In the communications industry, application of anti-tying enforcement was evident as early as 1962, in *United States v. Loew's, Inc.*[(141)] Loew's, a motion picture distributor, conditioned the sale of its more popular films on the additional sale of a block of films with lesser appeal. It is just this type of coercive effect that the antitrust laws are intended to eliminate from the marketplace. The nature of telephony in particular lends itself to frequent tying scrutiny since the market lines and boundaries of offered products and services are often unclear.[(142)]

There are numerous other antitrust laws and concepts that communications firms are commonly accused of violating but from which immunity has, by and large, protected them. Two of the more frequently cited complaints allege predatory pricing[(143)] and monopoly leveraging.[(144)] Should the proposed antitrust standard of this article be incorporated into the public interest convenience and necessity standard of the 1934 Act, these antitrust theories would play a more significant role in the "regulation" of the communications industry.

Application of these competition-promoting laws will take more than merely instituting a suitable antitrust archetype into existing communications law. As previously discussed, communications firms have, for the most part, been immune to the majority of antitrust jurisprudence. In order for a new governing regime to effectively achieve optimum market conditions, it will be necessary to remove these preexisting, prophylactic restrictions on antitrust enforcement. Note that in doing so, traditional antitrust oversight of industry behavior by the Department of Justice and others will not be restricted in any way. In fact, by cleansing the legal environment of many overly complicated procedural defenses, antitrust standards will likely be more focused upon actual anticompetitive effects, and less attentive to the restraining impact of inefficient governance.

XV.Exclusionary Jurisprudence and the Suppression of Competition

The degree to which the current regulatory scheme displaces the applicability of antitrust law is often related to current political trends. In one way this is a question of jurisdiction. When do the courts have jurisdiction to enforce antitrust principles against a regulated industry, and when is it solely the territorial province of the relevant agency to dictate antitrust approval? Alternatively, are there times when regulations and antitrust enforcement can coexist?

In some instances, Congress and/or the courts have granted express antitrust immunity to a specific industry.[(145)] Arguably, Congress did the same with the communications industry, at least as applied to those consolidations and mergers of telephone companies rendered within the public interest by the Commission.[(146)] This being the case, it is not necessarily true that other actions are similarly exempted from antitrust enforcement,[(147)] or that this statutory exemption has played any significant role throughout the course of modern legal history.[(148)]

A. Express Immunity

There are a number of areas in which explicit antitrust immunity has been granted to the communications industry. Generally, these exemptions stemmed from the belief that the industry was a natural monopoly and a product to which all should have universal access. Thus, competition was trumped by the public interest standard.[(149)] Additionally, the communications industry has often been viewed as a public utility in the sense that the entire economy works better if there is a global communications network. As previously discussed, technological advances have changed the common perception that the market cannot accommodate competition. Still, many express antitrust immunity provisions exist today, arguably impeding the public interest and inhibiting the facilitation of the Information Superhighway, as well as other goods and services eagerly awaited by consumers.

In *ITT World Communications, Inc. v. New York Telephone Co.*,[(150)] it was affirmed that the FCC had exclusive jurisdiction over rate-making issues within the telecommunications industry. Hence, rate matters were foreclosed from other parties wishing to assert antitrust jurisdiction. Congress expressly gave the Commission exclusive jurisdiction over mergers of telephone and telegraph companies.[(151)] Thus, regulatory approval of such a merger (typically granted on the basis of the vague, if not arbitrary, public interest standard) creates antitrust immunity for the communications firms so implicated.

B. Pervasive Regulation

In some instances, courts may grant implied immunity to an entire industry function if two conditions are met:

1) when a regulatory agency has, with congressional approval, exercised explicit authority over the challenged practice itself . . . in such a way that antitrust enforcement would interfere with regulation, *and*;

2) when regulation by an agency over an industry . . . is so pervasive that Congress is assumed to have determined competition to be an inadequate means of vindicating the public interest.[(152)]

The courts have gone so far as to allow a defense of acting in the public interest. In *Southern Pacific Communications Co. v. AT&T*,[(153)] the court ruled that when AT&T makes telephone interconnecting determinations on the basis of the public interest standard,[154] it would be contrary to public policy to subject AT&T to antitrust liability. Two further supplementary methods by which courts can currently exempt the communications industry from antitrust enforcement are the *Noerr-Pennington*[155] and State Action Doctrines.

C. The Noerr-Pennington Doctrine

Noerr-Pennington provides antitrust immunity to a firm or firms, even if competitors, which individually or in combination, petition the government with the intent of influencing the decision-making process of any agency.[156] This is frequently cited as a defense to allegations that continual tariff filings to the FCC are, in fact, attempts to restrain competition through delay and complication tactics.[157] In 1991, MCI Communications successfully utilized the *Noerr-Pennington* defense when confronted by allegations from competitor TeleSTAR that MCI's petitioning activities before the Commission were actually a subversive attempt to impede TeleSTAR's petition for a license.[158]

If, on the other hand, efforts by competitors to petition and influence the government are illusory, the defense is void. This has been appropriately labeled the "sham" exception to the *Noerr-Pennington* defense.[159]

When Litton Systems sued AT&T claiming that AT&T's tariff filings, requiring the use of special interface devices when connecting competing terminal equipment to AT&T lines, were only intended to inhibit competition, AT&T asserted the *Noerr-Pennington* defense.[160] Even though the FCC initially allowed the tariff to go into effect without questioning its reasonableness, a jury found AT&T's actions to be in bad faith.[161] On appeal, the verdict was affirmed, as the court agreed that AT&T had no bona fide expectation that the challenged tariff was reasonable.[162] AT&T had monopolized the telephone terminal equipment market, and the "mere sham" exception to the *Noerr-Pennington* doctrine was applied.[163]

D. The State Action Doctrine

The state action defense to antitrust enforcement potentially provides incidental immunity to the communications industry in a more complex manner. Broadly speaking, the doctrine is a judicially crafted precept which exempts certain state actions, such as regulations promulgated by state legislatures or by state public utility commissions, from the scope of the "federal" antitrust laws.

The doctrine was initially introduced in the landmark case of *Parker v. Brown*.[164] In *Parker*, a California statute mandated that raisin producers set their prices and output levels at industry-established standards. The plaintiff, a producer who wished to bypass the regulations and set his own levels, challenged the law as violating the Sherman Act, and therefore, the California statute was preempted by federal law.

The Court, while recognizing the conflict, refused to preempt the state law. Instead, the Court stated that the purpose of the Sherman Act was not to prohibit states from regulating their domestic economies.[165] In essence, the Court said that the Sherman Act (and other federal antitrust laws) was intended to restrain "private" individual acts which adversely affect competition, not "public" actions by the states. On the other hand, the Court made it clear that states cannot simply give blanket protection from antitrust laws to a particular industry within the state's economy. Nonetheless, the theoretical foundation upon which the Court rested its holding was the ideology of economic federalism. Inherent in a federalistic system of government is a license for states to regulate their own economies, however inefficient those regulations might be.

In 1985, the Supreme Court decided in *Southern Motor Carriers Rate Conference, Inc. v. United States*,[166] that a defendant can use state action as a defense to an antitrust suit by claiming that state policy sanctioned their activities. In *Southern Motor Carriers*, a state statute requiring a regulatory commission to set interstate common carrier rates was challenged by the federal government as a price-fixing scheme. The rate bureaus claimed that the statute authorized them, although admittedly did not expressly compel them, to agree on joint rate making.[167] As with telco entry into cable television, the rate bureaus had submitted proposals to the state public service commission and had [168] received approval.

The actions were held to be immune under the State Action Doctrine, even though the activities of the rate bureaus were not, in a strict sense, compelled by the state.(169) Instead, the Court articulated a two-prong standard where a regulatory action is presumed to be state action, and thus immune from antitrust liability, so long as the activity is (1) "clearly articulated and affirmatively expressed as state policy," and (2) that if the actor is a private party relying on state regulation, it must demonstrate that its anticompetitive conduct was actively supervised by the state.(170) While expressly rejecting a "compulsion" requirement because it reduces the "range of regulatory alternatives available to the State,"(171) the Court made sure to resurrect the federalism notion that was the foundation of the *Parker* decision. The Court noted that "[t]he *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce."(172)

Shortly after the opinion was rendered, this highly deferential new standard was frequently criticized as abstract and too easily satisfied.(173) This deference to state flexibility, however, was fleeting. The theoretical underpinnings of antitrust federalism were dealt a severe blow in the 1988 decision of *Patrick v. Burget*,(174) where the Supreme Court elected to strictly interpret the concept of "active supervision."

The Court held that in order for active supervision to exist, the State must "exercise ultimate control over the challenged anticompetitive conduct. . . .[T]he mere presence of some state involvement or monitoring does not suffice."(175) Accordingly, active supervision will only exist if the regulatory agency has statutory authority to review the substance of the peer review process, not just the proceedings. Consequently, the Court's analysis has focused on: (1) whether the state agency had the statutory authority to exercise active supervision, and (2) if so, whether the state's involvement reached the level of "active supervision." Once again, however, the Court did not address the question of what level of activity by the state is necessary in order to immunize private actions undertaken pursuant to state regulatory schemes.

This Article supports the proposition that industry participants should not be able to neglect the antitrust laws because regulatory approval was initially granted to permit a particular enterprise. Abuse of such defenses and immunities by regulated industries, including the communications sector, is a dominant reason behind the historically questionable success of much antitrust enforcement.(176)

As the status of the State Action Doctrine illuminates, there is a great need for simplicity in application of antitrust jurisprudence. Through years of tedious manipulation of the state action defense by the private sector, the goals of efficiency and competition have been rendered obscure. Unencumbered antitrust enforcement is needed in order to mold economic and jurisprudential pedagogy into market actuality.

E. Summary

The resulting doctrinal application of the state action defense to an antitrust allegation is still available to communications firms which act pursuant to state legislative or regulatory mandates. While such arguments have rarely been made in recent antitrust cases, the state action doctrine remains a potentially fruitful field for achieving the preemption of the antitrust laws as they effect the communications industry. In conjunction with explicit statutory exemptions, implied antitrust immunity, and the *Noerr-Pennington* doctrine, the state action defense acts to insulate all but the smallest percentage of anti-competitive activity in the communications marketplace.

In attempting to embark upon a new governing standard that emphasizes open markets, and to better satiate both public and private interests, these shields to effective antitrust enforcement must necessarily be alleviated. By redefining the public interest standard to be premised upon procompetitive findings, it would be counterintuitive to continue to allow communications firms to raise regulation as a defense in an antitrust lawsuit.(177)

XVI.A Proposed Administrative and Jurisdictional Composition

The FCC serves a useful function in maintaining order in the communications industry. However, for reasons explained in this Article, the premises which have historically supported the cradle-to-grave regulation of the industry through proscribed natural monopolies are quickly being forced to extinction by rapid technological progress and evolution. Antitrust principles offer the most common sense solution to governing an industry where technological converging resources offer the greatest hope of advancement.

A. Swift Congressional Fiat

The proposal of this Article would gently steer the market towards fulfilling the public interest. Ironically, no monumental government restructuring would be needed. The current regulatory framework, which apportions authority to both the FCC and state public utility commissions would remain remarkably unchanged.

In particular, nothing is proposed to alter or amend the jurisdiction of the states. Furthermore, antitrust jurisdiction would remain with the Department of Justice, the Federal Trade Commission, the state attorneys general, and private third parties. All that is necessary is to amend the wording of the "public interest" standard of the 1934 Act.[(178)] In so doing, Congress would simply be codifying the broad holding of the D.C. Circuit's opinion in the 1980 case of *United States v. FCC*.[(179)] In that case, the court held that consideration of competitive issues was a necessary part of the FCC's determinations pursuant to the public interest standard. Hence, the Commission had discharged its antitrust responsibilities when it "seriously consider[ed] the antitrust consequences of a proposal and weigh[ed] those consequences with other public interest factors."[(180)]

Congressional amendment of the 1934 Act to incorporate the competitive concepts of antitrust laws in the relevant public interest standards would dramatically facilitate the reality of an Information Superhighway. While other legislative suggestions merit attention, none are so wonderfully simplistic. Hypothetically, the amended section could read:

Competition in communications best serves the national interest. Therefore the Federal Communications Commission shall act in the public interest, convenience and necessity with respect to radio frequency licenses, and in the public interest, convenience and necessity with respect to wireline common carriers by refraining from regulation where such regulation impedes competition. Competition shall be defined in accordance with the principles of federal antitrust law.

This is not to foreclose the possibility of the FCC initiating formal rulemaking procedures in order to refine precisely how the amended section would be interpreted and applied. In so doing, the FCC and industry competitors would have an opportunity to both voice opinion and shape policy. By introducing competition, while vigorously reinforcing and affirming the interests of the general public, a compromise could be reached which benefits all interested parties.

B. Antitrust Jurisdiction

Although the FCC currently has no congressionally authorized antitrust jurisdiction, little is needed to transfer to the agency an administrative system that is functional. This is because the FCC will never litigate any antitrust allegations. Antitrust jurisdiction will remain with the Department of Justice (DOJ) and the Federal Trade Commission (FTC). The amount of antitrust jurisdiction needed at the Commission is enough to sufficiently review the activities of communications firms to insure a finding of "no anticompetitive effect." The FCC's Competition Division, which is already staffed with economists and lawyers with a strong mix of antitrust and telecommunications experience, will review licensing and/or prior approval circumstances, which are currently governed solely by the public interest standard. In short, the purpose of the FCC review is to legislatively define the public interest standard with the procompetitive concepts employed by the antitrust laws.

Such a "screening" function will provide quality agency review of questionable anticompetitive activities without unduly restraining industry behavior. Just as important, no party seeking to bring an antitrust action against a communications firm will be precluded from doing so merely because of the Commission's heightened antitrust capacity. It is also notable that the FCC, being a specialized agency, can vastly enhance competition through its ability to have rule makings and make general policy. Transaction-specific agencies such as the DOJ or FTC typically act only on specific instances of isolated conduct. Thus, the roles of the FCC and DOJ will naturally compliment each other. As will be further detailed, the FCC's "finding" will serve as persuasive evidence in federal antitrust litigation, but will not be binding in and of itself.

C. Administrative Operation

Any finding of "anticompetitive effect"--hence violative of the public interest--will be afforded an automatic right of review by an oversight bureau created by Congress. After exhausting all administrative avenues of review, the disapproved applicant may choose to petition the federal court for judicial review. Such appeals can be litigated by the DOJ, representing the federal government. Like other judicial trials reviewing the actions of a federal agency, deference will be given to the Competition Division due to its specialized insight and the technical nature of the subject matter.[(181)]

Such a procedure more than adequately equips the FCC with the needed authority to review the competitive impact of a proposed industry development without undermining the antitrust jurisdiction of the DOJ. Furthermore, keeping general purpose bodies like the DOJ and the courts in the equation will balance the administration of the laws, thus guarding against any threat of "regulatory capture."

Moreover, no alteration to the antitrust laws is necessary. Firms competing in the communications marketplace will simply be regarded as having nonregulated status in relation to practices and activities falling within the gamut of the public interest/competitiveness standard of the newly amended statutory authority.

This treatment will effectively "de-immunize" the communications industry from antitrust scrutiny which has been previously estopped. Approval by the Competition Division will not act as a form of implied immunity. It can, however, be asserted at trial as evidence of good faith and procedural compliance. This is comparable to the traditional relationship between regulatory approval and antitrust law. It has been held that in allowing a tariff to go into effect, the FCC does not contend that the tariff is needed to make the regulatory scheme work.[(182)] Thus, antitrust immunity is never insured by federal agency approval.[(183)]

Conclusion

There is little debate that competition is in the public interest. The Supreme Court itself has foreclosed inquiry into the question of whether or not competition and the public interest are compatible. In the case of *National Society of Professional Engineers v. United States*,[(184)] the Court stated that the antitrust laws reflect a judgment made by the legislature that competition is in the public interest because it will ultimately result in lower consumer prices, higher quality goods and services, and a consistently productive economic environment. While addressing the Sherman Act in particular, the Court observed, "[e]ven assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad."[(185)]

Even if antitrust law cannot be guaranteed to provide the ideal economic market on an everyday basis, the ancillary benefits still greatly outweigh whatever slight imperfections that may exist. As the Supreme Court remarked in *Brown Shoe Co. v. United States*: "But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."[(186)]

Although the Supreme Court has expressly rejected the assertion that the public interest standard conflicts with the procompetitive standard of antitrust laws,[(187)] the multitude of regulations and antitrust exemptions has severely limited their application to the communications industry. What is called for is a new regime--one which finally provides boundaries to the public interest standard. These boundaries are best defined by incorporating procompetitive antitrust concepts into the 1934 Communications Act. This well-developed body of antitrust jurisprudence will provide guidance and certainty to a standard which has for so long been the target of cynical debate.

More importantly, as a vehicle for progress, the new standard will permit the private and public sectors to unite in an effort to assert America's technological prowess in the world communications market, while providing consumers the opportunity to avail themselves to quality goods and services for the fair prices an open and competitive market will yield.

The conclusion then, is that consideration of FCC reform need not be limited to neither modest options such as budget cutting, nor radical options such as abolition. The option of Congress better defining the standard under which the Commission administers its responsibilities offers the prospect of agency reform that is both substantive and oriented to procompetitive results.

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3. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, (to be codified in scattered sections of 47 U.S.C.).

4. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. 151 (1994).

5. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. 307(a), 309(a) (1994)).

6. *See generally* Anthony G. Oettinger et al., High and Low Politics: Information Resources for the 80s (1977).

7. George Gilder, *Cables' Secret Weapon*, Forbes, Apr. 13, 1992, at 80, 84.

8. William J. Clinton & Albert Gore Jr., Technology for America's Economic Growth, A New Direction to Build Economic Strength 16 (1993).

9. *See, e.g.*, Peter W. Huber, *Telecommunications Regulation: The Beginning of the End*, 10 Issues in Sci. and Tech. 50 (1993); American Enterprise Institute for Public Policy Research, Telecommunications Deregulation (Research Project Prospectus, Feb. 1993).

10. *Gore Rides the Highway*, Wash. Tech., Jan. 13, 1994, at 21.

11. *See* Michael K. Kellogg et al., Federal Telecommunications Law ch. 1 (1992).

12. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. 151-609 (1994)).

13. *Id*. at 47 U.S.C. 151.

14. *Id*.

15. Television was not mentioned in the 1934 Act; however, the service uses radio frequencies. The FCC asserted jurisdiction over cable television. *In re* Amendment of the Comm'n's Rules and Regs. on Cable TV, *Cable Television Report and Order*, 36 F.C.C.2d 143, para. 117, 24 Rad. Reg. 2d (P & F) 1501 (1972), *amended in part*, *Report and Order*, 49 F.C.C.2d 1090, 32 Rad. Reg. 2d (P & F) 123 (1974) (proceeding terminated), *further amended in part*, *Clarification*, 59 F.C.C.2d 984, 37 Rad. Reg. 2d (P & F) 643 (1976).

16. Jurisdiction of wire and radio communication was split among three federal agencies: the Federal Radio Commission, the Interstate Commerce Commission, and the Postmaster General. *See* Sydney W. Head, Broadcasting in America 133 (3d ed. 1976).

17. Munn v. Illinois, 94 U.S. 113 (1876). The Supreme Court held that states may regulate the use of private property when the use was "affected with the public interest." *Id.* at 126 (citation omitted).

18. Interstate Commerce Act, ch. 309, sec. 7, 1, 36 Stat. 539, 544-45 (1910).

19. Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (1912).

20. *Id.*, 4, 37 Stat. at 305.

21. 47 U.S.C. 309(a) (1994).

22. 47 U.S.C. 214(a) (1994).

23. Interstate Commerce Comm'n v. Railway Labor Executives Ass'n, 315 U.S. 373, 376 (1942).

24. FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953).

25. *See, e.g.*, Federal Power Commission, 16 U.S.C. 797(g), 800(a) (1982); Interstate Commerce Commission, 49 U.S.C. 1(18) (1976).

26. NBC v. United States, 319 U.S. 190, 213 (1943).

27. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973).

28. Office of Comm. of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

29. *See generally In re* Deregulation of Radio, *Notice of Inquiry and Proposed Rulemaking*, 73 F.C.C.2d 457, 46 Rad. Reg. 2d (P & F) 237 (1979).

30. *NBC*, 319 U.S. at 213.

31. 47 C.F.R. 73.1910, 76.209 (1987).

32. In Re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, *Memorandum Opinion and Order*, 2 FCC Rcd. 5043, 63 Rad. Reg. 2d (P & F) 541 (1987) [hereinafter *Syracuse Order*].

33. *In re* Inquiry into Section 73.1910 of the Comm'n's Rules and Regs. Concerning the Gen. Fairness Doctrine Obligations of Brdcst. Licensees, *Report*, 102 F.C.C.2d 143, para. 3, 58 Rad. Reg. 2d (P & F) 1137 (1985) [hereinafter *Fairness Reports*].

34. Federal Radio Act, Pub. L. No. 69-0632, 44 Stat. 1162 (1927).

35. *Id.*, 18, 44 Stat. at 1170.

36. *In re* Great Lakes Brdcst. Co., 3 F.R.C. Ann. Rep. 32, 33 (1929), *aff'd*, 37 F. 2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

37. *In re* Editorializing by Brdcst Licensees, *Report of the Commission*, 13 F.C.C. 1246 (1949).

38. *Red Lion*, 395 U.S. 367 (1969).

39. Act of Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 557 (1959) (amending Communications Act of 1934 to provide that the equal time provisions with respect to candidates for public office shall not apply to news and other similar programs).

40. *Red Lion*, 395 U.S. at 380.

41. *See Syracuse Order*, 2 FCC Rcd. 5043, paras. 66-72, 63 Rad. Reg. 2d (P & F) 541 (1987).

42. 40. *Fairness Reports,* 102 F.C.C.2d 145, para. 5-6, 58 Rad. Reg. 2d (P & F) 1137 (1985).

43. Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501 (D.C. Cir. 1986).

44. *Syracuse Order*, 2 FCC Rcd. 5043, para. 81, 63 Rad. Reg. 2d (P & F) 541.

45. *See generally* Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207 (1982).

46. *Id.* at 221-226.

47. Ronald Coase, *The Federal Communications Commission*, 2 J. L. & Econ. 1, 14 (1959).

48. Fowler & Brenner, *supra* note 43, at 221.

49. Fowler, *Foreword*, 32 Cath. U. L. Rev. 523, 524-26 (1983).

50. *In re* Amendment of Section 73.3555 of the Comm'n's Rules, the Brdcst. Multiple Ownership Rules, *Second Report and Order*, 4 FCC Rcd. 1741, para. 1, 65 Rad. Reg. 2d (P & F) 1589 (1988).

51. *In re* Amendment of Section 73.3597 of the Comm'n's Rules (Applications for Voluntary Assignments or Transfers of Control), *Order on Reconsideration*, 52 Rad. Reg. 2d (P & F) 1081 (1982).

52. *In re* Deregulation of Radio, *Report and Order*, 84 F.C.C.2d 968, 49 Rad. Reg. 2d (P & F) 1 (1981) (proceeding terminated); *In re* Revision of Programming and Commercialization Policies, *Report and Order*, 98 F.C.C.2d 1076, para. 2, 56 Rad. Reg. 2d (P & F) 1005 (1984) (proceeding terminated).

53. Fowler's philosophy and policy were controversial. *See, e.g.*, Cass R. Sunstein, *Preferences and Politics*, 20 Phil. & Pub. Aff. 3, 28-29; Comment, *Deregulating Commercial Television: Will the Marketplace Watch Out for Children?*, 34 Am. U. L. Rev. 141, 143 (1984); Case Comment, *Radio Deregulation and the Public Interest:* Office of Communication of the United Church of Christ v. Federal Communications Commission, 4 Cardozo Arts & Ent. L.J. 169 (1985).

54. William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 Emory L.J. 715, 715 (1989).

55. *Id.* at 720.

56. *Id.* at 720, *citing* 4 Blackstone, Commentaries on the Laws of England 152 n.(a).

57. *See* Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1938); Schneider v. New Jersey, 308 U.S. 147, 164 (1939); Grosjean v. American Press Co., 297 U.S. 233, 245-48 (1936); Near v. Minnesota, 283 U.S. 697, 713-16 (1931).

58. Mayton, *supra* note 52, at 763.

59. Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 Harv. L. Rev. 1183, 1192 (1954).

60. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

61. *NBC*, 319 U.S. 190 (1943).

62. *Id.* at 216.

63. *Id.*

64. *Red Lion*, 395 U.S. 367 (1969).

65. *See* Erwin G. Krasnow et al., The Politics of Broadcast Regulation 240-69 (3d ed. 1982).

66. Kellogg et al., *supra* note 9, at 1-2.

67. United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 103 S. Ct. 1240 (1983).

68. While price cap regulation is preferred by telecommunications companies to the more comprehensive rate-of-return regulation, it is not without problems. *See* Ronald R. Braeutigam & John Panzar, *Effects of the Change from Rate-of-Return to Price-Cap Regulation*, 83 Am. Econ. Rev. 191 (1993).

69. Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993).

70. *Red Lion*, 395 U.S. 367 (1969).

71. *See*, *e.g.*, William J. Baumol & J. Gregory Sidak, Toward Competition in Local Telephony (1994).

72. Eli M. Noam, *Federal and State Roles in Telecommunications: The Effects of Deregulation*, 36 Vand. L. Rev. 949, 950 (1983).

73. *See* Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956); *In re* Use of the Carterfone Device in Message Toll Tel. Serv., *Decision*, 13 F.C.C. 2d 420, 13 Rad. Reg. 2d (P & F) 597 (1968); *In re* Proposals for New or Revised Classes of Interstate and Foreign Message Toll Tel. Serv. (MTS) and Wide Area Tel. Serv. (WATS), *First Report and Order*, 56 F.C.C. 593 (1975), *aff'd sub nom.* North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir. 1977); *In re* Jordaphone Corp. v. AT&T, *Decision*, 18 F.C.C. 644 (1954); *In re* Use of Recording Devices in Connection with Tel. Serv., *Report of the Commission*, 11 F.C.C. 1033 (1947).

74. The FCC began cautiously in *In re* Allocation of the Frequencies in the Bands Above 890 Mc, *Report and Order*, 27 F.C.C. 359, 18 Rad. Reg. (P & F) 1767 (1959), but ten years later in In Re Applications of Microwave Communications, Inc., *Decision*, 18 F.C.C. 2d 953, 16 Rad. Reg. 2d (P & F) 1037 (1969), the FCC put federal regulation on a successively liberalized road to market entry.

75. *In re* Inquiry into the development of Direct Broadcast Satellite regulatory policy, *Report and Order*, 90 F.C.C. 2d 676, 55 Rad. Reg. 2d (P & F) 1341 (1982); *In re* An Inquiry Into the Use of the Bands 825-845 MHz & 870-890 MHz for Cellular Comm. Sys., *Report and Order*, 86 F.C.C. 2d 469, 49 Rad. Reg. 2d (P & F) 809 (1981).

76. *In re* Amendment of Section 64.702 of the Comm'n's Rules and Regs., *Report and Order*, 104 F.C.C.2d 958, 60 Rad. Reg. 2d (P & F) 603 (1986). *See also* Third Computer Inquiry, 50 Fed. Reg. 33,581, 33,602 (1985) (codified at 47 C.F.R. pt. 64).

77. *See In re* An Inquiry into the Use of the Bands, 825-845 MHz & 870-890 MHz for Cellular Comm. Sys., *Report and Order*, 86 F.C.C. 2d 469, 49 Rad. Reg. 2d (P&F) 809.

78. *See* Michael Botein, *New Communications Technology: The Emerging Antitrust Agency*, 3 Hastings Comm. & Ent. L.J. 685 (1981).

79. Levy & Setzer, Federal Communications Commission Office of Plans and Policy, Measurements of Concentration in Home Video Markets 81, Dec. 23, 1982.

80. *Id.*

81. Schurz Comm., Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992) (citing FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); FCC v. Pacifica Found., 438 U.S. 726 (1978); NBC v. United States, 319 U.S. 190,

226-27 (1943)).

82. *See* Stephen G. Breyer, Regulation and Its Reform (1982) 184-88.

83. *See*, *e.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci., 3, 54 (1971).

84. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.).

85. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

86. *See* Clinton & Gore, *supra* note 8; *Gore Rides the Highway*, *supra* note 6.

87. Mary Lu Carnevale, *Stance on Bell-TCI Suggests That FCC's Chief Will Be Tough Force in Industry Battles to Come*, Wall St. J., Mar. 2, 1994 at A16.

88. Breyer, *supra* note 80.

89. Henry Geller, A Modest Proposal to Reform the Federal Communications Commission 31 (1974).

90. Kellogg et al., *supra* note 9.

91. United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 103 S. Ct. 1240 (1983).

92. *See* Disconnecting Bell: The Impact of the AT&T Divestiture vii (Harry M. Shooshan III ed. 1984).

93. A "natural monopoly" is a market structure in which one firm can satisfy the demand in a market at a lower cost than could two or more firms. *See* Marshall Howard, Antitrust and Trade Regulation 7 (1983); F.M. Scherer & David Ross, Industrial Market Structure & Economic Performance 111 (3d ed. 1990).

94. *Munn*, 94 U.S. 113 (1876).

95. *See* Kenneth M. Parzych, Public Policy and the Regulatory Environment 150 (1993).

96. Again, the failure of the government or the courts to adequately and consistently provide a definition for "public interest" accounts for why the standard is nearly impossible to satisfy.

97. *See generally* Regulating for the Future: The Creative Balance (Carol Tucker Foreman ed. 1991).

98. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

99. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, *repealed by* Federal Aviation Act of 1958, 1401(b), 72 Stat. 731, 806.

100. *See* George W. James, Airline Economics 169 (1982); Paul S. Dempsey, *Airline Deregulation and Laissez-Faire Mythology: Economic Theory in Turbulence*, 56 J. Air L. & Com. 305, 309-312 (1990); *see also* Paul S. Dempsey, *The Rise and Fall of the Civil Aeronautics Board--Opening Wide the Floodgates of Entry*, 11 Transp. L.J. 91, 95 (1979).

101. Elizabeth E. Bailey et al., Deregulating the Airlines (1985) (although it is true that standard services were provided to a number of smaller markets which would be considered inefficient in an economy of scale rationale).

102. *See* Parzych, *supra* note 93, at 176-180.

103. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 95 Stat. 1705.

104. Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 898 (codified as amended in scattered sections of 31 U.S.C. and 49 U.S.C.).

105. The vast quantity of materials written since the deregulation of the airline industry are exemplary of the differing schools of economic and regulatory theorists that exist. Since the airline industry was the first major regulated industry to undergo massive deregulation, it is only natural that it has provided a fertile ground for all commentators interested to critique and examine its development and subsequent consequences. Whether deregulation is ultimately successful will not likely deter critics of deregulation as an alternative public policy.

106. David G. Monk, *The Lessons of Airline Regulation and Deregulation: Will We Make the Same Mistakes in Space?*, 57 J. Air L. & Com. 715, 720 (1992).

107. Parzych, *supra* note 93, at 179.

108. Paul S. Dempsey, The Social and Economic Consequences of Deregulation: The Transportation Industry in Transition 18 (1989).

109. *See Acquisition of Northwest Airlines by Wings Holdings, Inc*., D.O.T. Order No. 93-1-11, at 1 (1993); *see also* James T. McKenna, *Northwest/KLM Package Challenges Competition*, Aviation Wk. & Space Tech., Feb. 15, 1993, at 31.

110. Brian K. Krumm, *High Speed Ground Transportation Systems: A Future Component of America's Intermodal Network?*, 22 Transp. L.J. 309, 310 (1994).

111. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified in scattered sections of 49 U.S.C.).

112. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified as amended in scattered sections of 45 U.S.C.).

113. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 49 U.S.C.).

114. Michael Billiel, *Fine-Tuning Deregulation: The Interstate Commerce Commission's Use of Its General Rail-Exemption Power*, 53 Geo. Wash. L. Rev. 827 (1985).

115. While this might bring to mind concerns of "universal service" in the telecommunications market, it is important to recognize that technological advances have made the provision of near-universal service more cost-efficient to provide than ever before.

116. *See* Parzych, *supra* note 93, at 175-178.

117. *Id.* at 177.

118. *See* Penn Central Merger and N & W Inclusion Cases, 389 U.S. 486 (1968).

119. *See*, *e.g.*, Bruce B. Wilson, *Railroads, Airlines, and the Antitrust Laws in the Post-Regulatory World: Common Concerns and Shared Lessons*, 60 Antitrust L.J. 711 (1991); Michael E. Levine, *Airline Deregulation: A Perspective*, 60 Antitrust L.J. 687 (1991); Richard D. Cudahy, *The Coming Demise of Deregulation*, 10 Yale J. on Reg. 1 (1993); Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight A Revolution*, 57 U. Chi. L. Rev. 521 (1990).

120. The granting of antitrust jurisdiction should only be enough to review industry activities. It is meant as a supplemental device by which the FCC may coordinate its actions with the currently existing antitrust jurisdiction of the DOJ, the FTC, state attorney generals, and private parties. In no way should the granting of antitrust authority to the FCC subtract any amount of antitrust jurisdiction from these groups. In fact, all of these potential players in

antitrust litigation will retain their currently existing roles. The FCC will merely act as a "screening bureau" for industry activities.

121. The FCC has addressed issues such as mergers, product and geographic market definition, and identifying barriers to entry. *See*, *e.g.*, *In re* Competition, Rate Deregulation and the Comm'n's Policies Relating to the Provision of Cable TV Serv., *Report*, 6 FCC Rcd. 2 (1990); Proposed Final Judgment and Competitive Impact Statement; United States v. AT&T Corp. and McCaw Cellular Communications, 59 Fed. Reg. 44,158 (1994).

122. In re Applications of McCaw and AT&T, For Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, *Memorandum Opinion and Order*, 9 FCC Rcd. 5836, para. 20, 75 Rad. Reg. 2d (P&F) 1345 (1994) (emphasis in original) (citations omitted).

123. *See infra* Part XV (discussing predatory pricing principles associated with section 2 of the Sherman Act).

124. This is not to say that there are not moments when regulations and antitrust co-exist. The theory of "contestable markets" argues that the appropriate market structure consists of competition for control of a market rather than within a market. Under such a notion, pricing within the market is influenced by both actual and potential competition. *See*, *e.g.*, Steven A. Morrison & Clifford Winston, *Empirical Implications and Tests of the Contestability Hypothesis*, 30 J.L. & Econ. 53 (1987).

125. *See generally* E. Thomas Sullivan & Jeffery L. Harrison, Understanding Antitrust and Its Economic Implications (1988).

126. Section 1 reads:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. 1 (1994).

127. National Soc'y of Prof'l Engineers v. United States, 435 U.S. 679 (1978).

128. Such antitrust provisions stand to become increasingly relevant, however, as the natural monopoly structure gives way to open competition in the near future. Faced with multiple market entrants vying for previously protected market shares, the historically dominant firms may be tempted to enter into violative agreements in order to fend off new competitors.

129. Section 2 reads:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. 2 (1994).

130. Sullivan & Harrison, *supra* note 123, at 94.

131. Monopolization has been defined by the Supreme Court in *United States v. Grinnell Corp.* as consisting of two elements: (1) The possession of monopoly power in the relevant market, and; (2) the willful acquisition or maintenance of that power as distinguished from the growth or development of a superior product, business acumen, or historic

accident. *Grinnell*, 384 U.S. 563, 570-71 (1966).

132. *See* Sullivan & Harrison, *supra* note 123, at 207.

133. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

134. Market power has been explained and defined in a myriad of ways since the inception of antitrust jurisprudence. The context-based analysis is fact sensitive and subject to differing economic probes. The Supreme Court, in the case of *United States v. Du Pont de Nemours & Co.*, defined it as "the power to control prices or exclude competition." *Du Pont*, 351 U.S. 377, 391-92 (1956). *See generally* William B. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981).

135. This second element is even more slippery than the concept of market power. Although no singular standard has evolved, it seems to require a minimum of conduct which, independent of competitive merit, has as its primary purpose the predatory elimination of competition. The Supreme Court, in *Grinnell* stated that such behavior must exhibit a "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* at 570-571.

136. *See*, *e.g.*, Phonetele, Inc. v. AT&T, 664 F.2d 716 (9th Cir. 1981); Television Signal Co. v. AT&T, 617 F.2d 1302 (8th Cir. 1980); MCI Comm. Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983); Mid-Texas Comm. Sys. v. AT&T, 615 F.2d 1372 (5th Cir. 1980); Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966); Northeastern Tel. Co. v. AT&T, 651 F.2d 76 (2d Cir. 1981).

137. Kellogg et al., *supra* note 9, at 185.

138. 15 U.S.C. 1-2 (1994).

139. Section 3 reads:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. 14 (1994).

140. Jefferson Parish Hospital v. Hyde, 466 U.S. 2 (1984). *See also* Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum. L. Rev. 515 (1985).

141. United States v. Loew's, Inc., 371 U.S. 38 (1962).

142. Kellogg et al., *supra* note 9, at 141.

143. This is commonly understood as occurring when one firm, with market power and the possibility of recoupment, reduces its prices with the intent not to compete for customers but to injure or destroy a competitor. *See*, *e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 584-85 n.8 (1986).

144. This occurs when a firm which competes in several markets, and has monopoly power in one but not another, leverages the monopoly power in one market to gain a competitive advantage in a market in which no monopoly power exists. *See* United States v. Griffith, 334 U.S. 100 (1948).

145. Examples include insurance, railroads, agriculture and fisheries. *See* Sullivan & Harrison, *supra* note 123, at 52-55.

146. Section 221(a) of the Communications Act of 1934 reads, in relevant part:

If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts by Congress making the proposed transaction unlawful shall not apply.

47 U.S.C. 221(a) (1994).

147. *See* Mid-Texas Comm. Sys., Inc. v. AT&T, 615 F.2d 1372, 1378 n.3 (5th Cir. 1980) ("The existence of an explicit exemption in one part of the Act does not provide authority for the proposition that other actions not directly covered are impliedly exempt."); *see also* Industrial Comm. Sys., Inc. v. Pacific Tel. & Tel. Co., 505 F.2d 152, 156 (9th Cir. 1974).

148. In fact, the statutory exemption referred to has rarely been utilized since the 1920s. Yet, the exemption exists as a matter of law, and, therefore, enforcement of the statute by a court may only be a matter of a party premising its case upon the exemption.

149. *See generally* David C. Hjelmfelt, Antitrust And Regulated Industries 9.15 (1985).

150. ITT World Comm., Inc. v. New York Tel. Co., 381 F. Supp. 113 (S.D.N.Y. 1974).

151. 47 U.S.C. 221 (1994).

152. United States v. AT&T, 461 F. Supp. 1314, 1322-23 (D.D.C. 1978) (citations omitted).

153. Southern Pacific Comm. Co. v. AT&T, 740 F.2d 980 (D.C. Cir. 1984).

154. 47 U.S.C. 201(a) (1994).

155. Noerr Motor Freight v. Eastern R.R. Presidents Conference, 273 F.2d 218 (3d Cir. 1959); UMW v. Pennington, 381 U.S. 657 (1965).

156. *Pennington*, 381 U.S. 657.

157. *See generally* Lars Noah, *Sham Petitioning as a Threat to the Integrity of the Regulatory Process*, 74 N.C. L. Rev. 1 (1995).

158. TeleSTAR, Inc. v. MCI Communications Corp., 1991-2 Trade Cas. (CCH) 69,654 (10th Cir. 1991).

159. City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991).

160. Litton Systems v. AT&T, 700 F.2d 785 (2d Cir. 1983).

161. *Id.* at 786.

162. *Id.*

163. *See generally id.*

164. Parker v. Brown, 317 U.S. 341 (1943).

165. *Id.* at 350.

166. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).

167. *Id.* at 51-55.

168. *Id.*

169. *Id.* at 66.

170. *Id.* at 60 (internal quotations omitted).

171. *Id.* at 61.

172. *Id.* at 56.

173. *See* M. Shawn McMurray, *The Perils of Judicial Legislation: The Establishment and Evolution of the Parker v. Brown Exemption to the Sherman Antitrust Act*, 20 N. Ky. L. Rev. 249 (1993).

174. Patrick v. Burget, 486 U.S. 94 (1988).

175. *Id.* at 101 (citations omitted).

176. This is not to infer, however, that when and where states actually do "supervise" the communications industry that there should not be a defense. Then again, this would not be an issue at all if the states would not interfere with the industry.

177. Again, it must be emphasized that this concept extends only to those activities directly related to the new standard. The traditional exemptions must still be available in those areas of regulation that have not as yet incorporated the antitrust doctrines.

178. 47 U.S.C. 201(a) (1994).

179. United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc).

180. Id. at 88-90.

181. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

182. Phonetele, Inc. v. AT&T, 664 F.2d 716, 733 (9th Cir. 1981).

183. *See*, *e.g.*, United States v. RCA, 358 U.S. 334 (1959) (in which the DOJ brought an antitrust action against the swapping of television stations in different cities by NBC and Westinghouse even though prior approval of the exchange had been granted by the FCC).

184. *National Soc'y of Prof'l Engineers*, 435 U.S. 679 (1978).

185. *Id.* at 695.

186. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

187. *See* Sound, Inc. v. AT&T, 631 F.2d 1324 (8th Cir. 1980).

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