

THE IMPORTANCE OF AGENCY DESIGN FOR SUCCESSFUL COMPETITION POLICY IN BROADBAND

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INTRODUCTION

Relatively few agency heads spend much time discussing the implications of agency design on policy outcomes. But examples of a strong correlation between good design and good outcomes abound. The Constitutional framework of the federal government is perhaps the most famous, with the three branches of government thoughtfully designed with specific checks and balances on the exercise of power. Agency design and its relationship to policy successes and failures is something I have spent many years studying—from advising FTC Commissioner Swindle in the 1990s to working on the retrospective evaluation of performance in the *FTC at 100 Report* in the 2000s to my present tenure

* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. I am grateful to my advisor, Alexander Okuliar, for his invaluable assistance in preparing this article.

as a Commissioner of the Federal Trade Commission (“FTC”).¹ My years of reflection and analysis, along with the brilliant and tireless academic work of people like former FTC Chairman, now-Professor, William Kovacic, have uncovered factors for predicting the likely potential success of an agency’s policies based on a study of its design features.

These tools could help shed some light on the current debate about competition policy in the telecommunications sector—and network neutrality, as it is typically identified, relates mainly to competition. By analyzing the respective designs of the FTC and the Federal Communications Commission (“FCC”), including aspects of their respective enabling laws, and applying factors for agency success, this article considers how the FCC’s new rules for network neutrality are likely to fare. The article concludes that the most successful approach would be to adopt a new statutory design better suited to the modern telecommunications business that contemplates greater flexibility in enforcement and incorporates the teachings of modern antitrust doctrine.

I. WHAT IS SUCCESS?

What do we mean by agency success? Former Chairman Kovacic and Professor David Hyman believe the three most important factors in predicting the success of agency design include: consistent political support of the agency over time, a coherent approach to the agency’s policies, and the capacity and capability to handle the agency’s mission.² Applying these metrics, the FTC over its history has generally, though not always, been successful in explaining and then fulfilling its complementary missions to protect competition and consumers. To the contrary, the FCC, which has some considerable strengths as an agency, nonetheless appears to have struggled in articulating and executing on a cohesive regulatory vision for competition in the provision of broadband services.

I think the deviation between the agencies comes down to small but significant structural differences within them. In particular, the statutory design of the FCC is relatively inflexible; it rests on an early twentieth century understanding of the media environment, and blends empirically-

1. WILLIAM E. KOVACIC, CHAIRMAN, FED. TRADE COMM’N, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY, THE CONTINUING PURSUIT OF BETTER PRACTICES (2009), <http://www.ftc.gov/reports/federal-trade-commission-100-our-second-century-continuing-pursuit-better-practices-report>.

2. David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design, Agency Performance, the CFPB and PPACA* 36 (Univ. of Ill. Program in Law, Behavior and Soc. Sci. Paper No. 14-11, Geo. Wash. Law Sch. Pub. Law and Legal Theory Paper No. 2014-2, Geo. Wash. Legal Studies Research Paper No. 2014-2, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2319466.

grounded competition concerns with more subjective issues like freedom of speech.³ The FTC is designed to pursue a more flexible enforcement approach focused on analytically complementary concepts of competition and consumer protection.⁴ I will examine each of these factors below.

A. Political Support

1. The FTC

As a threshold matter, an agency needs consistent and strong political support. Kovacic and Hyman note:

An agency is doomed if it lacks a supportive constituency, or if the performance of its duties generates crippling political opposition. More broadly, an agency will not be able to operate effectively if its structure raises serious doubts about its legitimacy or increases the vulnerability to political pressure that the performance of its duties will arouse.⁵

This first factor speaks directly to the FTC's origins and the stability of its structure as a bipartisan entity. The FTC was born out of early twentieth century dissatisfaction with the relatively lax way in which the Department of Justice and the courts were interpreting and enforcing the Sherman Act.⁶ In the years preceding the FTC's creation in 1914, the country underwent a tremendous wave of corporate consolidation.⁷ In the decade straddling the turn of the twentieth century there were forty-two deals that resulted in companies with over seventy percent market share in their respective industries.⁸ At the crest of this wave, in the years from 1898 to 1902, at least 303 companies disappeared each year and in 1899, over 1,208 were merged out of existence.⁹ For several years, the government offered essentially no meaningful response.

The concept of antitrust that evolved during these early years, particularly from 1890 to 1900, initially represented more a "movement" of "public agitation" at the growth of industrial enterprise and concentration of wealth during the Gilded Age.¹⁰ When President

3. See *infra* Section I.A.2 and accompanying text and footnotes.

4. See *infra* Section I.A.1 and accompanying text and footnotes.

5. Hyman & Kovacic, *supra* note 2, at 36.

6. David A. Hyman & William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 FORDHAM L. REV. 2163, 2167 (2013).

7. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 6–7 (2003).

8. *Id.* at 7.

9. *Id.* at 6.

10. *Id.* at 2.

Theodore Roosevelt entered office in 1901, relatively little antitrust jurisprudence existed and it was unclear whether the Sherman Act even covered mergers.¹¹ The disconnect between the public's concerns about trusts and the government's largely indifferent enforcement was a product of many factors, including: a still-nascent understanding of the economic implications of corporate consolidations; political indifference (or worse); and a Supreme Court that had expressly called into question whether the Sherman Act applied to mergers in its 1895 decision in *United States v. E.C. Knight Co.*¹² In that case, the Court rejected the government's attempt to stop the sugar trust from buying four Pennsylvania plants, even though it would give the trust a ninety-eight percent share of the national market.¹³ The Court read the Commerce Clause to exclude these transactions from federal law, because they impacted commerce "only incidentally and not directly."¹⁴ Moreover, since the trust was mainly a manufacturer, the Court noted that, "[c]ommerce succeeds to manufacture, and is not part of it."¹⁵

Roosevelt spearheaded the conversion of public agitation about big business into government action with the formation of the Bureau of Corporations in 1903—a predecessor of the Federal Trade Commission housed within the Department of Commerce and Labor—and by pushing the Department of Justice to litigate cases like *Northern Securities Co. v. United States*,¹⁶ which established the Sherman Act's coverage of mergers and dismantled a large holding company that had brought together three major competing railroad companies in the Midwestern and Western United States.¹⁷

Roosevelt's push for greater antitrust enforcement was a promising start, but his later policies and dealings with industrialists and financiers like J.P. Morgan, with whom he entered a "gentlemen's agreement" to resolve competitive issues less formally, led some to question the direction of American antitrust enforcement.¹⁸ In particular, one of his deals with J.P. Morgan during the financial panic of 1907, in which Roosevelt agreed to allow Morgan to purchase Tennessee Coal & Iron to stabilize the stock market despite Sherman Act concerns, created considerable controversy, leading to Congressional hearings, and becoming a national campaign issue in the 1909 and 1912 presidential

11. *Id.*

12. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

13. Winerman, *supra* note 7, at 8.

14. *Id.*

15. *Id.* (quoting *E.C. Knight Co.*, 156 U.S. at 12).

16. *N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

17. *Id.* at 320–25.

18. Winerman, *supra* note 7, at 20–21.

elections.¹⁹

Over time, Roosevelt grew to believe that concentration was a natural development for an increasingly efficient economy and that government's best role was to expand direct regulation and control of those larger enterprises.²⁰ Big government could manage big business.²¹

Roosevelt's successor in office, lawyer and jurist William Howard Taft, was far less interested in the type of administrative state Roosevelt had appeared to embrace.²² Rather, Taft believed in the courts' development and application of a rule of reason test under the Sherman Act.²³ This view of the important role of courts in legal development prompted Taft to pursue an even more active enforcement agenda than Roosevelt, with his administration relying less heavily on the Bureau of Corporations and instead pursuing more federal court antitrust cases—roughly twenty per year in comparison to an average of six per year under Roosevelt.²⁴ Nonetheless, near the end of his term, Taft lamented the lumbering pace of jurisprudential development and weak remedies typically handed down by the courts in antitrust cases.²⁵ Competition enforcement continued to be an issue through the 1912 presidential election.

By the time Woodrow Wilson entered office in 1913, two perspectives on how to approach antitrust enforcement had gained prominence. The first view held that Congress should create a new agency similar to the DOJ that would enforce existing antitrust laws, but that would be politically independent and possess flexible substantive jurisdiction to allow it to actively shape business behavior.²⁶ The second view wanted to move away from the DOJ model and create an independent policy body, similar to Roosevelt's Bureau of Corporations.²⁷ This policy agency would have special power to work with the business community, research competition issues, and then issue reports, regulations, and guidelines that would help shape industry's conduct.²⁸

The FTC represented a compromise between these views. The result is an independent, bipartisan, policy-oriented, and research-based enforcement agency. The Commission's bipartisan structure, its research

19. *Id.* at 21–22.

20. *Id.* at 25.

21. *Id.* (explaining in detail Roosevelt's evolving views and concluding that "Roosevelt feared neither big business nor big government, trusting the latter to tame the former.").

22. *Id.* at 30–31.

23. *Id.* at 28.

24. *Id.*

25. *Id.* at 31.

26. *Id.*

27. Hyman & Kovacic, *supra* note 6, at 2167–68.

28. *Id.*

and advocacy missions, and its statutory focus on two relatively narrow and complementary areas of law have generally allowed it to navigate a sure course over the years.²⁹ More specifically, the Commission's bipartisan composition, supported by three Bureaus of equal standing under direct control of the Commission, including a Bureau of Economics, promotes thoughtful analysis and discussion of the legal and economic implications of market and agency actions at both the Bureau and Commission level. In addition, the research, outreach, and advocacy missions of the agency allow it to identify and then promote best practices for enhancing competition and consumer protection in industry, among consumers, and even with other government actors.³⁰ The outreach also encourages transparency with the agency's stakeholders and promotes dialogue and, ultimately, buy-in to the agency's mission from multiple constituencies.³¹

Over the years, the agency has been able to generate important industry studies, reports on specific issues, and guidelines for industry practices and agency enforcement policies. A good example is the FTC's merger review program generally and, in particular, the Horizontal Merger Guidelines.³² Since the 1990s, these Guidelines have become

29. The agency has not been without its missteps. The agency's actions in the late 1970s and early 1980s, particularly in the area of consumer protection, led to claims that the FTC had become a national nanny and ended in Congressional action to curtail the agency's authority with the passage of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980), prompting the agency to retreat from its agenda and adopt unfairness and deception guidelines for consumer protection enforcement. *See, e.g.*, MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 69–119 (1983) (discussing, in a chapter entitled “Stoning the National Nanny: Congress and the FTC in the Late 1970s,” the political battles over the agency's consumer protection agenda of that era). It has been called “one of the roughest periods ever” for the agency. Quentin Riegel, *The FTC in the 1980s: An Analysis of the FTC Improvements Act of 1980*, 26 ANTITRUST BULL. 449, 449 (1981).

On the competition side of the agency, the introduction of new economic analysis in the 1960s and 1970s led to a vigorous debate among antitrust practitioners about the nature of antitrust—i.e., whether economic, political, or social factors should predominate in the analysis—that for a time fell largely along political party lines. *See, e.g.*, William Kovacic, The Modern Evolution of U.S. Competition Policy Enforcement Norms, Keynote Remarks at the Antitrust Practice Group Retreat of Howrey, Simon, Arnold & White (May 2, 2003), in 71 ANTITRUST L.J. 377 (2003).

30. *See, e.g.*, FED. TRADE COMM'N, BROADBAND CONNECTIVITY COMPETITION POLICY (2007), <https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf> (researching and offering perspectives on network neutrality and other key issues in broadband network access).

31. *See, e.g.*, Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Competition Advocacy: The Impact of FTC Staff Reports on Barriers to E-Commerce in Contact Lenses and Wine, FTC 90th Anniversary Symposium (Sept. 2004), https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/ohlhausen.pdf.

32. *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), <http://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

widely accepted tools for merging parties to evaluate and defend proposed deals, and they have had a profound influence on merger review by federal courts. In particular, over twenty years ago, they introduced new empirical, economic analyses to reflect the growing consensus in the bar and academia that economics, not political or social factors, should determine the outcome of the agency's merger review.³³

These efforts to reflect and adopt modern analysis also earned the agency considerable legitimacy with its constituents and political benefactors. In a 2005 speech on the bipartisan legacy of antitrust, former FTC Commissioner Thomas Leary observed “[t]here really is no such thing as a ‘Republican’ or a ‘Democratic’ antitrust agenda today. People may have different views on the facts of individual cases for a variety of reasons, but there is a broad mainstream consensus on the basic approach to antitrust issues.”³⁴

2. The FCC

Based on some of the FCC's structural similarities to the FTC, one could reasonably expect a similar convergence of political views on competition policy in the broadband space. Like the FTC, the FCC has a bipartisan Commission with five Commissioners, no more than three of whom can be from a single political party.³⁵ It has seven bureaus that execute its mission and employ professionals with technical expertise and industry knowledge.³⁶ Despite these structural similarities—and although it has had many other successes³⁷—the agency's work to date on network neutrality, and, more broadly, competition policy in broadband services, has been, politically, very controversial and now threatens the agency's support in Congress.³⁸ The history of the FCC's

33. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Apr. 2, 1992, revised 1997), <http://www.justice.gov/atr/horizontal-merger-guidelines-0>.

34. Thomas B. Leary, Comm'r, Fed. Trade Comm'n, *The Bipartisan Legacy*, Remarks before the American Antitrust Institute 1 (June 21, 2005), https://www.ftc.gov/sites/default/files/documents/public_statements/bipartisan-legacy/050803bipartisanlegacy.pdf; see also Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209 (2005).

35. See, e.g., *Leadership*, FED. COMM. COMMISSION, <http://www.fcc.gov/leadership> (last visited Sept. 16, 2015).

36. See, e.g., *Bureaus & Offices*, FED. COMM. COMMISSION, <http://www.fcc.gov/bureaus-offices> (last visited Sept. 16, 2015).

37. See generally, Sherille Ismail, *Transformative Choices: A Review of Seventy Years of FCC Decisions* (Fed. Comm'ns Comm'n Office of Strategic Planning & Policy Analysis, Working Paper No. 1, Oct. 2010), <https://www.fcc.gov/working-papers/transformative-choices-review-70-years-fcc-decisions>.

38. See, e.g., Julian Hattem, *Republicans Vow to Fight “Illegal” Internet Rules*, THE HILL (Mar. 4, 2015, 10:17 AM), <http://thehill.com/policy/technology/234563-congress-wants-to-put-fcc-back-in-the-box>; Jon Sallet, *The Process of Governance: The FCC and the Open Internet Order*, OFFICIAL FCC BLOG (Mar. 2, 2015, 3:22 PM), <http://www.fcc.gov/blog/process-governance-fcc-open-internet-order> (stating that the agency

founding reveals some of the reasons for its divergent political credibility.

First, unlike the FTC, which is a research and enforcement agency focused on relatively narrow complementary goals built with flexibility in mind, the FCC was created as a regulator and, from day one, given a sweeping mandate.³⁹ In 1934, President Franklin Roosevelt asked Congress to pass legislation and consolidate the regulation of radio, telephone, and telegraph transmission services under a single agency.⁴⁰ The President wrote to Congress that, “I have long felt that for the sake of clarity and effectiveness the relationship of the Federal Government to certain services known as utilities should be divided into three fields – transportation, power and communications.”⁴¹ He noted that while there were agencies regulating transportation and power, “[i]n the field of communications, however, there is today no single government agency charged with broad authority.”⁴² He recommended that “Congress create a new agency . . . with such authority over communications as now lies with the Interstate Commerce Commission—the services affected to be all of those which rely on wires, cables or radio as a medium of transmission.”⁴³

The President had convened a committee to study how best to regulate communications. It was reported that “[t]he committee’s study led it to believe that rates for the various services could be lowered through regulation of company profits, overhead expenses and intercompany charges.”⁴⁴ The committee also noted that “a single independent government agency could prevent discrimination, regulation of annual depreciation charges and extension of service to localities and homes not now served.”⁴⁵ Roosevelt’s initial conception of the agency—as a regulator of utilities providing specific, separate, forms of communication and as a defender of personal freedoms of communication—appears to have shaped the agency’s policies and resulting political fortunes in the decades since its founding.

First, the agency has followed a silo approach to regulating different media.⁴⁶ The Communications Act has several titles, each of which

received roughly four million comments on its proposed Open Internet Order).

39. Ismail, *supra* note 37, at 2–3 (discussing the FCC’s predecessor, the Federal Radio Commission, and the chaos on the airwaves that Congress wanted the FCC to solve).

40. *Roosevelt Urges Board of Control on Wires, Radio*, N.Y. TIMES, Feb. 27, 1934, at 1, <http://graphics8.nytimes.com/packages/pdf/business/roosevelтурges.pdf>.

41. Franklin Roosevelt, *The President’s Message*, Feb. 26, 1934, *reprinted in id.* at 8.

42. *Id.*

43. *Id.*

44. Rebecca R. Ruiz, *Reaction to Regulation: 1934 vs. Today*, N.Y. TIMES (Mar. 5, 2015, 6:32 PM), <http://nyti.ms/18nnc35>.

45. *Id.*

46. *See* 47 U.S.C. §§ 151–621 (2013).

pertains to specific types of media, with the exception of Title I, which gives the agency general oversight of communications.⁴⁷ Of greatest relevance here, “telecommunications services” under Title II of the Act are treated as common carriers with specific obligations, including the provision of services without discrimination.⁴⁸ Other titles relate to different modes of signal transmission, like radio, which falls under Title III and can include media like broadcast television,⁴⁹ or cable television, which falls under the provisions of Title VI.⁵⁰ As media technologies have merged—many millions of people now watch television programming over the top of broadband delivery services, instead of on cable television—this regulatory model has not been able to keep pace because it lacks design flexibility. This regulatory structure predicated on separate treatment of distinct media has forced the FCC to take unusual steps to handle emerging media that do not fit neatly within any of the older forms of media, which in turn has had a negative impact on the coherence of its policies and its political support.

A second structural issue that has eroded political support of the FCC in its handling of broadband competition policy is the statute’s broad standard of review, which allows the agency to include subjective non-competition factors in its analysis. Even at the time of its founding, senators resisted creation of the agency based on perceptions that it could hamper individual liberties, including the freedom of expression, and would be a politically-motivated body. For instance, Senator Dickinson of Iowa was quoted as saying, “[o]nly a united front by the press of the nation can halt this new plan to gag them.”⁵¹ In addition, Louis G. Caldwell, former General Counsel of the Federal Radio Commission, told the *New York Times* in 1934, “[a]s is true generally of administrative tribunals, regulation under the new law will be as good or as bad as the personnel.”⁵² The agency’s mandate appears to have been contentious from the start.

Today, the FCC’s review standard still requires it to consider whether an action would serve “the public interest, convenience, and necessity.”⁵³ As the current General Counsel of the FCC explains,

The breadth and importance of the public-interest standard to the review of transactions involving our nation’s communications networks logically flows from the Commission’s statutory mission,

47. *Id.* §§ 151–162.

48. *Id.* §§ 201–276.

49. *Id.* §§ 301–386.

50. *Id.* §§ 521–573.

51. Ruiz, *supra* note 44.

52. *New Law Effective Today*, N.Y. TIMES, July 1, 1934, at XX17, <http://graphics8.nytimes.com/packages/pdf/business/1934reaction.pdf>.

53. 47 U.S.C. §§ 214(e), 310(d) (2013).

since the conduct of buying other licensees can be as important to the public as the way a licensed company conducts itself in the absence of a transaction. This standard complements, but is different from the antitrust agencies' standard set forth Section 7 of the Clayton Act, which instructs them to challenge transactions that would "substantially lessen competition."⁵⁴

The use of a public interest standard invites the consideration of sweeping issues of subjective importance that can bring with them controversial disputes, particularly when those discussions will almost by necessity involve questions about the freedom of speech. A description of the analytical considerations for mergers by the FCC's General Counsel sheds light on the breadth of the agency's inquiries:

But, the "public interest" standard is not limited to purely economic outcomes. It necessarily encompasses the "broad aims of the Communications Act,"⁵⁵ which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to the public,⁵⁶ and generally managing spectrum in the public interest. Our public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers. The leading examples may come from broadcast transactions, where the Commission has long applied the congressional admonition to promote localism in programming, and especially news programming, available to communities.⁵⁷ Consider also Justice Breyer's concurring opinion in *Turner Broadcasting v. FCC*.⁵⁸ That case concerned a challenge to the "must carry" rules that require cable systems to carry local broadcast signals. In agreeing that the statute should be upheld, Justice Breyer expressly relied on Congress' goal of "promoting the widespread dissemination of information from

54. Jon Sallet, *FCC Transaction Review: Competition and the Public Interest*, OFFICIAL FCC BLOG (Aug. 12, 2014, 12:39 PM), <http://www.fcc.gov/blog/fcc-transaction-review-competition-and-public-interest>.

55. *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Dkt. No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd. 12,348, 12,364, para. 31 (2008); *News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, MB Dkt. No. 07-18, Memorandum Opinion and Order, 23 FCC Rcd. 3265, 3277-78, para. 23 (2008); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations*, WT Dkt. No. 04-70, Memorandum Opinion and Order, 19 FCC Rcd. 21,522, 21,544, para. 41 (2004).

56. 47 U.S.C. § 521(4) (2013); *see also* § 532(a).

57. *Applications of Comcast Corp., Gen. Elec. Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Dkt. No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd. 4238, 4249-50, paras. 26-27 (2011).

58. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (Breyer, J., concurring in part).

a multiplicity of sources.”⁵⁹

Third, and finally, the FCC appears to have different internal processes and voting culture than the FTC, which tend to reinforce a partisan divide at the FCC. For example, the FTC has in place voting mechanisms that protect minority Commissioners from being rushed in making decisions—most of the agency’s votes allow a Commissioner two weeks to vote *after* formation of a majority on a particular motion.⁶⁰ In addition, any FTC Commissioner (not just the Chairman) may move to have a matter placed on the agenda (although it requires a vote to place the matter on the agenda).⁶¹ These procedural mechanisms can give the minority some leverage to advocate change in specific agency decisions. In addition, the FTC cannot make material changes to its orders or other authorized actions once voted on by the Commission. This ensures that the agency’s orders quickly become public, promoting transparency of its work.

The FCC procedures appear to be significantly different. Although the FCC rules do require advance notice of three weeks for a vote on circulated matters, they do not have in place mechanisms for the minority to put forward competing amended motions or delay a vote after a majority has formed.⁶² Moreover, the FCC often modifies and finalizes its orders *after* a vote—a fact that has led to public frustration with the agency for delays of thirty days or more for the public disclosure of some final orders and, once they are disclosed, orders that look considerably different than the proposal originally posted by the agency for public comment.⁶³ Thus, a recent paper noted,

Unlike other federal agencies, the FCC does not make public the text of the rules on which it is voting at the time of the vote. Instead, at the time of the vote the bureau in charge of writing the order is given “editorial privileges” to continue working on the order, which is then released days, weeks, or even months after the vote. As a result, there

59. *Id.* at 226; Sallet, *supra* note 54.

60. See AM. BAR ASS’N, FTC PRACTICE AND PROCEDURE MANUAL 76 (2d ed. 2014) (describing the process for approving non-agenda, non-adjudicative motions and citing to Fed. Trade Comm’n, Open Commission Meeting Minutes (Sept. 15, 1983)).

61. 16 C.F.R. § 4.14(a) (2015).

62. See, e.g., *FCC Reauthorization: Improving Commission Transparency: Before the Subcomm. on Comm’n’s and Tech. of the H. Energy and Commerce Comm.*, 114th Cong. (April 30, 2015) (statement of Mike O’Reilly, Comm’r, Fed. Comm’n’s Comm’n), <http://docs.house.gov/meetings/IF/IF16/20150430/103399/HHRG-114-IF16-Wstate-ORiellyM-20150430.pdf> (detailing procedural issues at the FCC, including the inability of two Commissioners to have an item moved onto the agenda).

63. See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO/RCED-94-242242, FCC PROCEDURES DELAY RELEASE OF DECISION DOCUMENTS 7 (1994), <http://www.gao.gov/products/RCED-94-242>.

is no way to know what changed between the vote and the final rule.⁶⁴

This lack of transparency helps chip away at the agency’s credibility with stakeholders and undermines its political support over time.

In addition, whereas FCC staff can initiate enforcement proceedings without a vote of the Commission, the opposite is typically true at the FTC—even the use of subpoena power first requires authorization of the Commission.⁶⁵ These rules limit the ability of the minority at the FCC to shape the agency’s actions, creating a culture in which the majority does not need the minority’s support and is not even expected to reach across the aisle.⁶⁶

The limitations of minority Commissioners to influence policy at the FCC has undermined the perceived independence of the agency, which has led to expressions of frustration by some Commissioners and further erosion of broad political support.⁶⁷ For example, Commissioner Ajit Pai recently was quoted as saying, “I’ve been calling this President Obama’s plan to regulate the Internet . . . [and have] gotten a lot of blowback as you can imagine, within the building and on Twitter. But nonetheless I stand by that characterization. Because I think it’s an unfortunate situation that this independent agency has been compromised.”⁶⁸

In response, some Republican members of Congress are scrutinizing contacts between the Democratic leadership at the FCC and the President for evidence of undue influence and many observers expect that this new set of rules may result in Congressional action and almost certainly will be challenged in courts for years.⁶⁹ Compare this to the FTC’s unanimous bipartisan support for a 2007 staff report urging caution on network neutrality regulation in which perhaps the strongest critical statement from a minority Commissioner was that the report “soberly

64. Scott Walsten, *Administrative Procedures, Bureaucracy, and Transparency: Why Does the FCC Vote on Secret Texts?*, TECH. POLICY INST. 2 (Feb. 2015), http://www.techpolicyinstitute.org/files/walsten_administrativeproceduresbureaucracyandtransparency.pdf; see also *FCC Reauthorization*, *supra* note 62, at 3–4 (detailing “editorial privileges” of staff allowing for revisions to a text after the Commission votes).

65. 15 U.S.C. § 49 (2014).

66. See, e.g., *FCC Reauthorization*, *supra* note 62 (outlining concerns and need for reform of Commission procedures at FCC); see also Colin Campbell, *The Top Critic of White House’s Net Neutrality Plan Was Appointed by Obama*, BUS. INSIDER (Feb. 19, 2015, 1:39 PM), <http://read.bi/1G8ucNd>.

67. See, e.g., *FCC Reauthorization*, *supra* note 62, at 2.

68. See Campbell, *supra* note 66.

69. See, e.g., Brian Fung, *Read the E-mails That Republicans Say Show Obama Meddled in Net Neutrality*, WASH. POST (Mar. 17, 2015, 12:17 PM), <http://wapo.st/1Ends1O>. See also Brian Naylor, *On Net Neutrality, Republicans Pitch Oversight Rather Than Regulation*, NPR: IT’S ALL POLITICS (Feb. 26, 2015, 3:44 AM), <http://n.pr/1GwytKG>.

reminds us that regulation often has unintended side-effects. That is surely true. But it seems to me equally clear that this Report shows that doing nothing may have its costs as well.”⁷⁰

B. Policy Coherence

1. The FTC

A second important factor for agency success is policy coherence. Professors Kovacic and Hyman have observed that this factor is, “[i]n economic terms, [whether] the [agency’s] functions [are] complements or substitutes[.]”⁷¹ The FTC has a strong design in this regard because the framework of the FTC Act empowers the agency to pursue complementary enforcement goals.

As written in 1914, Section 5 of the FTC Act prohibited “unfair methods of competition.”⁷² In the agency’s first two decades, it interpreted this authority expansively, allowing it to reach undesirable conduct like false advertising.⁷³ But the agency’s aggressive interpretations of the law began to strain credibility as it created increasingly tenuous links between what were essentially consumer protection violations and its underlying competition authority.⁷⁴ These missteps produced doctrinal confusion and incoherent policies that in 1931 prompted action by the Supreme Court.

In *FTC v. Raladam Co.*, the FTC sued Raladam for making false claims about a product it marketed as an obesity cure.⁷⁵ The agency’s theory of liability against Raladam was only loosely tethered to its competition authority.⁷⁶ On review, the Court ruled against the FTC and then affirmatively curtailed the agency’s authority, stating, “[i]t is that condition of affairs [the loss of competition] which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public.”⁷⁷ The Court went on to observe, “[u]nfair trade methods [like false advertising] are not per se unfair methods of *competition*. . . . If broader

70. Jon Leibowitz, Comm’r, Fed. Trade Comm’n, Concurring Statement Regarding the Staff Report on Broadband Connectivity Competition Policy 3 (June 27, 2007), <https://www.ftc.gov/public-statements/2007/06/concurring-statement-commissioner-jon-leibowitz-regarding-staff-report>.

71. Hyman & Kovacic, *supra* note 2, at 21.

72. 15 U.S.C. § 45(a)(1) (2014).

73. See Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection and the Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121, 139–140 (2015) (discussing the history of the agency).

74. See *id.*

75. *FTC v. Raladam Co.*, 283 U.S. 643 (1931).

76. See *id.* at 644–46.

77. *Id.* at 649.

powers be desirable they must be conferred by Congress.”⁷⁸

In 1938, Congress addressed this structural issue with the FTC Act and forever placed the FTC on firmer jurisdictional footing by passing the Wheeler-Lea Act to amend Section 5 of the FTC Act and authorize the agency to directly pursue “unfair or deceptive acts or practices.”⁷⁹ Although these are nominally different objectives, they are, in practice, equally important, complementary tools for the agency to help promote fairness and consumer welfare in our markets.⁸⁰ Each protects consumers in different ways, and each has its limitations, allowing one to offer relief where the other cannot.

Competition is the first line of defense—a competitive market is a welfare-enhancing one for consumers. But there are limits to this—as former FTC Chairman Timothy Muris once wryly observed, “the commercial thief loses no sleep over its standing in the community.”⁸¹ Because a competitive market sometimes cannot discipline all disruptive behavior, we also use our consumer protection authority.⁸² But these missions are aligned, which allows the agency to apply them cohesively and imbues Commission staff with a sense of common purpose—to protect consumers. The FTC’s consumer protection activity meets or may even exceed the volume of its work on the competition side. For example, in 2014 the agency brought a case against AT&T for alleged data throttling,⁸³ and settled a case against prepaid mobile provider TracFone for misrepresenting its data plans as “unlimited” when the company was slowing or cutting users off after they reached certain usage thresholds, regardless of network congestion.⁸⁴

78. *Id.*

79. See 15 U.S.C. § 45(a)(1) (2014) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”).

80. Timothy J. Muris, Chairman, Fed. Trade Comm’n, *The Interface of Competition and Consumer Protection*, Remarks at the Fordham Corporate Law Institute’s Twenty-Ninth Annual Conference on International Antitrust Law and Policy (Oct. 31, 2002), https://www.ftc.gov/sites/default/files/documents/public_statements/interface-competition-and-consumer-protection/021031fordham.pdf.

81. *Id.* at 4.

82. See Timothy J. Muris, *Principles for A Successful Competition Agency*, 72 U. CHI. L. REV. 165, 173–76 (2005).

83. Press Release, Fed. Trade Comm’n, *FTC Says AT&T Has Mised Millions of Consumers with “Unlimited” Data Promises* (Oct. 28, 2014), <https://www.ftc.gov/news-events/press-releases/2014/10/ftc-says-att-has-mised-millions-consumers-unlimited-data>.

84. Press Release, Fed. Trade Comm’n, *Prepaid Mobile Provider TracFone to Pay \$40 Million to Settle FTC Charges It Deceived Consumers About “Unlimited” Data Plans* (Oct. 28, 2014), <http://www.ftc.gov/news-events/press-releases/2015/01/prepaid-mobile-provider-tracfone-pay-40-million-settle-ftc>.

2. The FCC

Turning to the FCC, many people have criticized its approach to competition policy as less coherent. Perhaps the leading issue for the agency, particularly over the last fifteen years, has been the archaic statutory design of the Communications Act and its siloed approach to different types of media. This structure has forced the agency to take creative steps in interpreting its authority over the Internet, much as the FTC did in the 1920s with its consumer protection enforcement activities.

The agency's novel approaches to Internet competition policy date back at least to 2002, when it issued the *Cable Modem Order*, which characterized cable modem service as a Title I "information service" rather than either a Title II "telecommunications service" or Title VI "cable service."⁸⁵ The Supreme Court upheld this decision in 2005, allowing the FCC to exclude cable modem service from common carriage requirements.⁸⁶ In a subsequent order, the FCC also began to treat digital subscriber line ("DSL") broadband service similarly.⁸⁷

Building on its success with the *Cable Modem Order*, the FCC issued an Internet Policy Statement articulating Internet freedoms "to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers."⁸⁸ Soon after instituting its policy, the FCC moved to stop Comcast from allegedly slowing its customers' access to certain peer-to-peer networking applications.⁸⁹ Comcast challenged the agency's authority to act, and the United States Court of Appeals for the D.C. Circuit concluded that the FCC had overreached its jurisdiction by citing to its policy statement without offering any underlying statutory support.⁹⁰

The agency then explored several short-lived proposals to identify support for its jurisdiction. Then-Chairman Genachowski indicated that the FCC could break out the transmission component of broadband as a

85. *High-Speed Access to the Internet Over Cable and Other Facilities*, GN Dkt. No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, 4802 paras. 75-76, 4822-23 paras. 38-39 (2002) [hereinafter *Cable Modem Order*].

86. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1000 (2005) (affirming the *Cable Modem Order*).

87. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Dkt. Nos. 02-33, 01-337, 95-20, 98-10, Policy Statement, 20 FCC Rcd. 14,986 (2005) [hereinafter *DSL Policy Statement*]. These steps allowed the agency to exercise ancillary jurisdiction over the Internet under Section 4(i) of the 1934 Communications Act, 47 U.S.C. § 154(i) (2013).

88. *DSL Policy Statement* at 14,988. See also *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, WT 07-53, Declaratory Ruling, 22 FCC Rcd. 5901, 5901-02 (2007).

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

90. *Id.* at 655, 661.

telecommunications service subject to common carriage rules under Title II.⁹¹ Public concerns over this proposal led to an almost immediate reversal, with another proposal for the agency to rely on Section 706 of the Telecommunications Act of 1996 and ancillary jurisdiction under other Titles.⁹² Using this jurisdictional basis, the agency adopted an Open Internet Order in 2010. With certain exceptions, this order required transparency, no blocking, and no discrimination by fixed broadband providers.⁹³ Verizon successfully challenged these rules in the D.C. Circuit, which overturned the order except for the provisions related to transparency.⁹⁴ The Court, however, supported the FCC's authority to regulate broadband as common carriage.⁹⁵

In light of the D.C. Circuit's decision, in a 2015 order the FCC once again changed tack and re-classified broadband services so that they are, in large part, characterized as common carriage services.⁹⁶ Claiming that industry developments led to a new understanding of the market, the FCC stated:

[T]he retail broadband Internet access service available today is best viewed as separately identifiable offers of (1) a broadband Internet access service that is a telecommunications service (including assorted functions and capabilities used for the management and control of that telecommunication service) and (2) various “add on” applications, content, and services that generally are information services.⁹⁷

The agency then also claimed it would be better to classify mobile broadband service as a “commercial mobile service or, in the alternative, the functional equivalent of commercial mobile service.”⁹⁸

This rapid change, which allows the FCC to continue to enforce its Open Internet Order, also unfortunately contributes to the perception that the agency lacks policy coherence in this area. Treating broadband as

91. Press Release, Julius Genachowski, Chairman, Fed. Commc'ns Comm'n, The Third Way: A Narrowly Tailored Broadband Framework (May 6, 2010), https://apps.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf.

92. Robert M. McDowell, Commentary, *The FCC's Threat to Internet Freedom*, WALL ST. J. (Dec. 19, 2010, 12:01 AM), <http://on.wsj.com/1zjTrue>.

93. *Preserving the Open Internet, Broadband Industry Practices*, GN Dkt. No. 09-191, WC Dkt. No. 07-52, Report and Order, 25 FCC Rcd. 17,905, 17,906 (2010).

94. *See Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014) (holding that the Commission's rules on anti-blocking and anti-discrimination had impermissibly regulated broadband services as common carriage services despite their classification as information services).

95. *See id.* at 650–653.

96. *See Protecting and Promoting the Open Internet*, GN Dkt. No. 14-28, Report & Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, para. 29 (2015).

97. *Id.* at para. 47.

98. *Id.* at para. 48.

common carriage undoes *nearly two decades* of analysis and advocacy by the FCC to treat broadband specifically *as an information service and not common carriage*.⁹⁹ In addition, the agency now has to forbear on most of the detailed rules that apply to common carriage, including those pertaining to rate regulation.¹⁰⁰

Both Republican Commissioners voted against the new Order. Commissioner Ajit Pai argued in his dissent that with this Order, the FCC has abandoned twenty years of successful market-oriented policies on the Internet without any evidence of harm.¹⁰¹ He called the order a power grab and claimed the only reason for the agency “flip-flopping” is that “President Obama told us to do so.”¹⁰² Commissioner Michael O’Rielly’s dissent observed, “a majority of the Commission attempts to usurp the authority of Congress by re-writing the Communications Act to suit its own ‘values’ and political ends.”¹⁰³ This latest chapter in the agency’s approach to broadband competition is unnecessarily confusing and complicated (the order is more than three hundred pages long), and undercuts a perception of policy coherence.

C. Capacity and Capability

The third important factor for agency success is the capacity and capability of the agency to execute on its mission. Capacity refers to the agency’s resources, which in large part turns on the agency’s credibility with Congress. The more Congress likes an agency and supports its work, the more likely it is that Congress will supply it with the money and latitude to do its job. Capability, on the other hand, has been defined as “whether an agency has the tools to make good decisions, and does so.”¹⁰⁴ A review of the agency’s enforcement history shows that the FTC in the past three decades has a strong record of making sound competition law and policy decisions.

For example, the FTC has made vital contributions in doctrinal grey areas of antitrust law. On the merger side, the agency has introduced new concepts or new ways of analyzing hospital mergers, potential competition issues, and dynamic markets.¹⁰⁵ On the conduct side, the FTC has been at the forefront of developing invitations to collude, patent

99. See, e.g., *id.* at para. 322 (explaining treatment as information service).

100. See, e.g., *id.* at para. 51 (noting forbearance of more than 700 codified rules).

101. *Id.* at 5921 (Dissenting Statement of Comm’r Pai).

102. *Id.*

103. *Id.* at 5985 (Dissenting Statement of Comm’r O’Rielly).

104. Hyman & Kovacic, *supra* note 2, at 27.

105. See generally Maureen Ohlhausen, Comm’r, Fed. Trade Comm’n, How to Measure Success: Agency Design and the FTC at 100, Remarks before the ABA Section of Antitrust Law Fall Forum (Nov. 6, 2014), https://www.ftc.gov/system/files/documents/public_statements/597191/141106ftcat100fallforum.pdf.

ambush in standard setting as a form of monopolization, the proper extent of competitor collaborations in cases like *Polygram*, and reverse payment settlement agreements in pharmaceuticals.¹⁰⁶ The agency also has had a major impact on developing the outer bounds of antitrust law, particularly with respect to the scope of exemptions and immunities like *Noerr*, the filed-rate doctrine, and state action. In the past twenty-nine years, the FTC has appeared before the Supreme Court as a party in seven antitrust cases, and our track record of success in six of those cases demonstrates our impact on doctrinal developments.¹⁰⁷

Clearly, the FCC has also done well in many areas, and the expansion of the nation's wireless spectrum and its leadership in deployment of long-term evolution ("LTE") standard technology is testament to that success. But, again, in terms of competition policy, the agency has had a more controversial history. For instance, the agency's network neutrality policies are an attempt to impose *per se* antitrust rules to what are often vertical issues in the broadband space—i.e., an ISP blocking a content provider from accessing the ISP's subscribers. In a way, this would roll back antitrust analysis to the kind of categorical *per se* treatment that is otherwise reserved for the most pernicious categories of horizontal conduct, like price-fixing, that carry no net benefits for competition.¹⁰⁸ All other conduct is typically analyzed under a rule of reason or similarly nuanced factual analysis. Despite being rebuffed and creating considerable dispute, the FCC is again putting forth this same approach, on different jurisdictional grounds. Now that the agency has characterized essentially all broadband services as common carriage and issued a three hundred-page order with detailed forbearance provisions, it will have to explain, enforce, and defend its order. These obligations will place a tremendous strain on the agency because a broad *per se* prohibition sweeps in a greater amount of conduct, resulting in inevitable challenges for the next several years. In addition, the order's complex forbearance structure will require the agency to make considerable effort to interpret the rules for those that want to comply with it. FCC

106. See, e.g., *Polygram Holding, Inc. v. FTC* 416 F.3d 29 (D.C. Cir. 2005) (providing analysis of competitor collaborations); accord *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (establishing rule of reason test for reverse payment settlements for pharmaceutical patent infringement cases).

107. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1114 (2015); *Actavis*, 133 S.Ct. at 2224; *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S.Ct. 1003 (2013); *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986).

108. Christopher Yoo, *What Can Antitrust Contribute to the Network Neutrality Debate?*, 1 INT'L J. COMM. 493, 517 (2007). See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979); see also *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977) (observing that *per se* condemnation is reserved for "conduct that is manifestly anticompetitive").

Commissioner O’Rielly, in a recent speech, noted his concern about the new burden on the agency, remarking that, “[a]s it stands today, the Enforcement Bureau does not currently have the funding or authority to hire the additional attorneys and Internet experts to conduct the copious amount of work delegated to it under the Net Neutrality decision.”¹⁰⁹

Here again, part of the problem is the infiltration of non-competition factors in the FCC’s analysis. Network neutrality is not simply a competition issue for the agency, but bears political and social dimensions. In addition, the agency carries the weight of the doctrinal inflexibility that comes from the rigid structure of the Communications Act and its emphasis on creating an *ex ante* regulatory environment rather than one based on *ex post* enforcement. This siloed regulatory philosophy, coupled with reliance on non-competition factors in its competition analysis, means the FCC will likely continue to have difficulty in unlocking the competitive potential of the broadband sector through the application of its existing policies. An example from the early years of American antitrust laws can help shed light on the quandary facing the FCC today.

II. CHIEF JUSTICE EDWARD DOUGLASS WHITE AND THE RULE OF REASON

Philosopher George Santayana’s famous quote bears repeating: “Those who cannot remember the past are condemned to repeat it.”¹¹⁰ The FTC is guided in most of its antitrust enforcement by the flexible, fact-intensive analysis of the rule of reason. This philosophy of detailed, empirically grounded analysis has guided antitrust doctrine for nearly one hundred years. Chief Justice Edward Douglass White is widely considered the architect of the modern rule of reason.¹¹¹ His story is worth remembering as it sheds light on a path forward in analyzing network neutrality issues today.

Justice White was appointed to the Supreme Court in 1894.¹¹² A few years later, the Court encountered its second antitrust case, *Trans-Missouri Freight Association*,¹¹³ in which the United States sued to stop a railroad association from jointly setting rates. The majority, in its

109. Michael O’Rielly, Comm’r, Fed. Commc’ns Comm’n, FCC Enforcement: Questionable Priorities & Wrong Decisions, Remarks Before the Federal Communications Bar Association 4 (June 11, 2015), <https://www.fcc.gov/document/commissioner-orielly-remarks-fcba-annual-meeting>.

110. GEORGE SANTAYANA, *THE LIFE OF REASON: REASON IN COMMON SENSE* 284 (1906).

111. William Kolasky, *Chief Justice Edward Douglass White and the Birth of the Rule of Reason*, *ANTITRUST*, Summer 2010, at 77.

112. *Id.* at 78.

113. *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897).

analysis, adopted a literal reading of the Sherman Act and condemned the association activity as unlawful.¹¹⁴ Justice Peckham, writing for the Court, reasoned that when the “plain and ordinary” language of a statute “pronounces as illegal every contract or combination in restraint of trade or commerce . . . all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.”¹¹⁵ Literally construed in this way, the Sherman Act would have completely stifled competition in the United States.

In his dissent, Justice White exposed this constricted logic, explaining that it contradicted “the plain intention” of the Sherman Act “to protect the liberty of contract and the freedom of trade” and ignored the common law handling of the term, “restraint of trade” under a reasonableness standard.¹¹⁶ He argued, “If the rule of reason no longer determines the right of the individual to contract . . . what becomes of the liberty of the citizen or of the freedom of trade?”¹¹⁷ Despite the obvious failings of the majority approach, Justice White would not be fully vindicated for fourteen years, when, as Chief Justice, he authored the Court’s landmark 1911 opinions in *Standard Oil*¹¹⁸ and *American Tobacco*¹¹⁹ and set out in detail the rule of reason test we still use today.

The story offers at least two important lessons for broadband competition policy. First, dynamic markets, like oil and railroads in the early twentieth century, require complex and dynamic modes of competition analysis that is preoccupied primarily with enhancement of consumer welfare. This counsels in favor of a rule of reason applied with *ex post* enforcement separate from any non-competition considerations. Second, the loose structure of the Sherman Act allowed Justice White, with persistence and vision, to realize the analysis that still represents a standard of modern antitrust jurisprudence. The rigid silo format of the Communications Act would likely not allow this flexible analysis to flourish. Perhaps Congress should step in to give the agency greater freedom to pursue what is best for the consumer, irrespective of the specific medium of communication.

CONCLUSION

History demonstrates that regulatory structure matters a great deal for successful government policy and enforcement. The sector of the

114. *Id.* at 328.

115. *Id.*

116. *Id.* at 355 (White, J., dissenting); Kolasky, *supra* note 111, at 78.

117. *Trans-Missouri*, 166 U.S. at 355.

118. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

119. *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

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economy potentially impacted by the FCC's work on network neutrality is highly vibrant, dynamic, and robustly competitive, which creates a serious mismatch with the FCC's current siloed, *ex ante* regulatory structure. The FCC's approach to net neutrality and adoption of the Open Internet Order further exacerbates this mismatch, eroding political support for the agency in the current Congress, undermining the agency's policy coherence, and ultimately straining its ability to achieve its regulatory mission. As decision makers seek to update our laws to better serve Internet consumers, I urge them to consider the time-tested FTC model of successful *ex post* enforcement of competition and consumer protection rules as a way to preserve competition and protect consumers in the provision of broadband services.

