ANTITRUST OVER NET N EUTRALITY: WHY WE SHOULD TAKE C OMPETITION IN BROADBAND SERIOUS LY

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In 2015, the FCC subjected broadband Internet service providers to Title II regulation. It did so to enforce net neutrality rules, which require ISPs (internet service providers) to treat all content on their networks equally. The principal justification is to prevent ISPs, in delivering content to their subscribers, from favoring their

-tier modes of access to consumers, degrading competition.

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

This Article argues, however, that net neutrality proponents too easily dismiss an titrust. Competition law can indeed protect non-economic goals like free speech and democratic participation, but only to the extent that consumers actually value those goals above others. Of course, antitrust does not promote civic discourse as an end in itself. But antitrust does not require price, output, and innovation outcomes either. Rather, it protects the competitive process, which delivers the qualities that consumers demand. Pur-

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

The real question is why competition between ISPs would not yield the non-monetary values championed by net neutrality pro-

ket forces and antitrust as sufficient alternatives to regulation.

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

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

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

3. 2015 Open Internet Order , supra note

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

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

The 2014 ruling in Verizon created a quandary for the FCC and reignited the public debate over net neutrality regulation. Although the FCC had lost two rulings in four years in trying to enforce anti-discrimination rules against broadband ISPs, it was not all bad news for the agency. The

June 2014 and called on viewers to tell the FCC their views , the FCC s comments website crashed after it received over 45,000 comments.[32] In November of that year, President Obama pressed the FCC to reclassify ISPs, arguing th at [c]able companies . . . can t let any company pay for priority over its competitors. [33] The FCC reversed course, adopting the Open Internet Order in February 2015.[34] In doing so, it reclassified broadband ISPs under Title II. [35]

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

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

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

32. See Soraya Nadia McDonald, John Oliver ·

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

But there is good reason not to assume that ISPs necessarily enjoy a terminating

practices.[69]

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

It is true that U.S. broadband ISP markets are not perfectly competitive, but no market is. The key question is whether market forces have sufficient clout in combination with antitrust enforcement to constrain ISPs from harming the competitive process. On that critical issue, evidence from the marketplace is telling: there are almost no examples of net neutrality violations, let alone any that corrupted the competitive pro cess. Indeed, in its 282

solution to ISP conduct would be superior.

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

Part I explained that the FCC s net neutrality rules disregard market competition, as bolstered by antitrust, as an adequat

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

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

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

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80. Id.

81. Paid prioritization is ubiquitous throughout the economy. Distributors charge manufacturers not only for carrying their merchandise, but also for promoting it over rival goods. Supermarkets carry selected brands and give superior placement to the goods of firms that pay the most. Premium broadcast advertising slots go to those who pay for them. Shopping centers provide space to the outlets willing and able to fork up more rent than their riv als. That dynamic, though commonplace in bricks and mortar industries, is not specific to them. Online advertising, such as Google s AdWords product, allows firms that are willing to pay more to enjoy greater exposure. In all such cases, is it the case tha t firms lack the opportunity that their competitors enjoy simply because they cannot afford to pay as much? To take issue with the price -based allocation of scarce goods is to impugn the free market system all pn-6(fc)-3(a)4(nn)13(o)-6(t)16( )-348(a)4(f)5(f)5(o)-6(r)-3(d)22(

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

Due to evidence that vertical restraints generally promote competition, antitrust law has determined that no vertical restraint should be per se illegal.[95] Indeed, the Supreme Court has jettisoned the per se rule entirely from vertical contracts.[96] Today, manufacturers and distributors often agree for preferred de10(e)-(l)-2(e)172(str)1 612 (of)3(te)14(n)

band ISP markets than it does in any other market.

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

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

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

97. This is a basic principle of microeconomics, which underlies our market economy. The fact that market prices lead to conservation and higher output can prove to be controversial in extreme cases, such as those involving market shocks following a natural disaster. Even then, however, many economists argue that free market pricing carries important benefits. See, e.g.

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

Nevertheless, the myth that net neutrality places all content providers on an equal playing field persists. Even if edge providers were otherwise identically positioned, it still may not make sense

peting content providers costs or, absent an alternative ISP, to exclude rival edge providers fr om local markets altogether. This means that net neutrality violations warrant scrutiny from a competition

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

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

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

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

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

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

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

It is true that antitrust liability would not attach in every in-

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

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

In pivoting toward non-monetary values associated with ISPs, we must ask whether consumers hold those values. Although many ISP subscribers doubtless value neutrality, they will not always do so in every case. That possibility has important implications for the analysis of net neutrality regulation, which may elevate regulators' values over those held by consumers. But assuming for now that consumers share the full array of non-monetary values embraced by net neutrality advocates, it follows that ISPs have an incentive in contested markets to provide broadband access that caters to those values. To the extent that ISP subscribers demand neutral treatment of data flowing over

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

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

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

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

121. See, e.g., Barbara van Schewick, Network Neutrality and Quality of Service: What a No ndiscrimination Rule Should Look Like , 67 STAN. L. R

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

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

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

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

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

124. Id.