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s 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 slly dests s il4dkv2performance 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, Alexacp6fu4p6fFay ( ) -3s6Fe rFacp6fu4p6m2-2 (n) Tm /TT1 1 a (,) 26abFact6fu4pa(n) T (cep6fu4p6m -2 (n) Tm

as a Commissioner of the Federal Trade Commission (ÒFTCÓ).[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 agencyÕs 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. Net neutrality, as it is typically identified, relates mainly to competition. By analyzing the respective designs of the FTC and the Federal Communications Commission (ÒFCCÓ), including aspects of their respective enabling laws, and applying factors for agency success, this

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 publicÕs concerns about trusts and the governmentÕs 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 governmentÕs 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 Òonly incidentally and not directly.Ó[14] Moreover, since the trust was mainly a manufacturer, the Court noted that, Ò[c]ommerce succeeds to manufacture, and is not part of it.Ó[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.[16] Also by pushing the Department of Justice to litigate cases like Northern Securities Co. v. United States,[17] which established the Sherman ActÕs 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.

RooseveltÕs 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 ÒgentlemenÕs agreementÓ 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

elections.[19]

Over time,

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widely accepted tools for merging parties to evaluate and defend proposed deals, and they have had a profound influence on merger

> 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 agenciesÕ standard set forth Section 7 of the Clayton Act, which instructs them to challenge transactions t that would Òsubstantially lessen competition.Ó[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 FCCÕs General Counsel sheds light on the breadth of the agencyÕs inquiries:

> But, the Òpublic interestÓ standard is not limited to purely economic outcomes. It necessarily encompasses the Òbroad aims of the Communications Act,Ó which include, among other things, a deeply[55]

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powers be desirable they must be conferred by Congress.Ó[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 Òunfair or deceptive acts or practices.Ó[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 Ñ a competitive market is a welfare-enhancing one for consumers. But there are limits to this Ñ as former FTC Chairman Timothy Muris once wryly observed, Òthe commercial thief loses no sleep over its standing in the community.Ó[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 Ñ to protect consumers. The FTCÕs consumer protection activity meets or

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common carriage undoes nearly two decades of analysis and advocacy

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-three 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 nationÕs wireless spectrum and its leadership in deployment of long-term evolution (ÒLTEÓ) 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 agencyÕs network neutrality policies are an attempt to impose per se antitrust rules to what are often vertical issues in the broadband space, where an ISP blocking a content provider from accessing the ISPÕs 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

Commissioner OÕRielly, in a recent speech, noted his concern about the new burden on the agency, remarking that, Ò[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.Ó

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