A Change in Direction for the Federal Trade Commission?

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Other Views:

• Rohit Chopra & Lina Khan, *The Case for "Unfair Methods of Competition" Rulemaking,* 87 U. Chi. L. Rev. 357 (2020), *available at* https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/4/.

• Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 564 (2017), *available at* https://www.yalelawjournal.org/note/amazons-antitrust-paradox.

• Tom Wheeler et al., *New Digital Realities; New Oversight Solutions in the U.S. The Case for a Digital Platform Agency and a New Approach to Regulatory Oversight,* Shorenstein Center (August 2020), *available at* https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities_August-2020.pdf.

• Memo from Chair Lina M. Khan to Commission Staff and Commissioners Regarding the Vision and Priorities for the FTC (Sept. 22, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

While antitrust and regulation are supposed to be two sides of the same coin,[1] there has always been a healthy debate over which enforcement paradigm is the most efficient. Those who have long suffered under the zealous hand of ex ante regulation would prefer to be overseen by the more dispassionate and case-specific oversight of antitrust.[2] Conversely, those dissatisfied with the current state of antitrust enforcement have increased calls to abandon the ex post approach of antitrust and return to some form of regulation.[3]

While the "antitrust versus regulation" debate has raged for some time, the election of President Joe Biden has brought a new wrinkle: Lina Khan, the newly-appointed Chair of the Federal Trade Commission (FTC), has made it very clear that she would like to expand the Commission's role from that of a mere enforcer of the nation's antitrust laws to that of an agency that also promulgates ex ante "bright line" rules to regulate firms' conduct. Thus, the "antitrust versus regulation" debate is no longer academic.

Khan, even before she was nominated, has been quite open about her policy vision for the FTC. For example, last year, Khan coauthored an essay with her former boss (and later briefly her FTC colleague) Rohit Chopra in the *University of Chicago Law Review* entitled "The Case for 'Unfair Methods of Competition' Rulemaking."[4] Given the tremendous power Khan now wields and

1 *See, e.g.,* United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980) (quoting Northern Natural Gas Co. v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968)) (The "basic goal of governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible."); Town of Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.), *cert. denied*, 499 U.S. 931 (1991) (The goals of regulation and antitrust laws are "low and economically efficient prices, innovation, and efficient production methods.").

2 *See, e.g.,* J. Eggerton, *AT&T's Cicconi to FCC: Change or Become Irrelevant,* Multichannel News, Sept. 10, 2013, *available at* https://www.nexttv.com/news/att-s-cicconi-fcc-change-or-become-irrelevant-262775.

3 *See, e.g.,* George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business, Committee for the Study of Digital Platforms - Market Structure and Antitrust Subcommittee, Report (July 1, 2019), *available at* https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf; T. Wheeler, P. Verveer, & G. Kimmelman, *New Digital Realities; New Oversight Solutions in the U.S. The Case for a Digital Platform Agency and a New Approach to Regulatory Oversight,* Shorenstein Center (August 2020), *available at* https://shorensteincenter.org/wp-content/uploads/2020/08/New-Digital-Realities_August-2020.pdf; *but c.f.* G.S. Ford, *Beware of Calls for a New Digital Regulator,* Notice & Comment – Yale J. Regulation (Feb. 19, 2021); L.J. Spiwak, *A Poor Case for a "Digital Platform Agency",* Phoenix Center Policy Perspective No. 21-02 (March 9, 2021), *available at* http://www.phoenix-center.org/perspectives/Perspective21-02Final.pdf.

4 Rohit Chopra & Lina Khan, *The Case for "Unfair Methods of Competition" Rulemaking,* 87 U. Chi. L. Rev. 357 (2020).

the aggressive agenda she has laid out for the agency,[5] perhaps it makes sense to summarize and scrutinize her arguments.

I. Summary of Chopra and Khan's Case for Unfair Methods of Competition Rulemaking

At the outset of their essay, Chopra and Khan lay out what they believe to be the shortcomings of modern antitrust enforcement. As they correctly note, "[a]ntitrust law today is developed exclusively through adjudication," which is designed to "facilitate[] nuanced and fact-specific analysis of liability and well-tailored remedies."[6] However, the authors contend that while a case-by-case approach may sound great in theory, "in practice, the reliance on case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process."[7] Chopra and Khan blame this alleged policy failure on the abandonment of per se rules in favor of the use of the "rule of reason" approach in antitrust jurisprudence. In their view, a rule of reason approach is nothing more than "a broad and open-ended inquiry into the overall competitive effects of particular conduct [which] asks judges to weigh the circumstances to decide whether the practice at issue violates the antitrust laws."[8] To remedy this perceived analytical shortcoming, they argue that the Commission should step into the breach and promulgate ex ante bright line rules[9] to enforce better the prohibition against "unfair methods of competition" (UMC) outlined in Section 5 of the Federal Trade Commission Act.[10]

As a threshold matter, while courts have traditionally provided guidance as to what exactly constitutes a UMC, Chopra and Khan argue that it should be the FTC that has that responsibility in the first instance. Because Congress set up the FTC as the independent, expert agency to implement the FTC Act and because the phrase "unfair methods of competition" is ambiguous, Chopra and Khan argue that courts must accord great deference to "FTC interpretations of 'unfair methods of competition'" under the Supreme Court's *Chevron* doctrine.[11]

Having thus asserted definitional primacy for the FTC over the phrase "unfair methods of competition," the authors also argue that the FTC has statutory authority to promulgate substantive rules to enforce the FTC's interpretation of UMC. In particular, they point to the broad, catch-all provision in Section 6(g) of the FTC Act.[12] Section 6(g) provides, in relevant part, that the FTC may "[f]rom time to time . . . make rules and regulations for the purpose of carrying out the provisions of this subchapter."[13] Although this catch-all rulemaking provision is far from the detailed statutory scheme Congress set forth in the Magnusen-Moss Act to govern rulemaking to deal with Section 5's other prohibition against "unfair or deceptive acts and practices" (UDAP),[14] Chopra and Khan argue that the D.C. Circuit's 1973 ruling in *National Petroleum Refiners Association v. FTC*[15]—a case that predates the Magnusen-Moss Act—provides judicial affirmation that the FTC has the authority to "promulgate substantive rules, not just procedural rules" under Section 6(g).[16] Stating the argument a different way, although there may be no affirmative specific grant of authority for the FTC to engage in UMC rulemaking, in the absence of any *limit* on such authority, the FTC may engage in UMC rulemaking subject to the constraints of the Administrative Procedure Act.[17]

Aside from legal arguments, the authors offer three policy arguments to support their position. First, they submit that "rulemaking would enable the Commission to issue clear rules to give market participants sufficient notice about what the law is, helping ensure that enforcement is predictable."[18] Second, they argue that "establishing rules could help relieve antitrust enforcement of steep costs and prolonged trials." In particular, "[t]argeting conduct through rulemaking, rather than adjudication, would likely lessen the burden of expert fees or protracted

5 *See, e.g.,* Memo from Chair Lina M. Khan to Commission Staff and Commissioners Regarding the Vision and Priorities for the FTC (Sept. 22, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf; Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines (Sept. 15, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf; Statement of the Commission Regarding the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591786/p210100commnstmtsec18rulesofpractice.pdf.

6 Chopra & Khan, *supra* note 4, at 359.

7 *Id.*

8 *Id.* at 359-60.

9 *Id.* at 356 ("The Commission has in its arsenal a far more effective tool that would provide greater notice to the marketplace and that is developed through a more transparent and participatory process: rulemaking. Through engaging in rulemaking, the Commission could define 'unfair methods of competition' through processes established by the Administrative Procedure Act (APA).").

10 15 U.S.C. § 45 ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

11 Chopra & Khan, *supra* note 4, at 378-79. *See* Chevron U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837 (1984).

12 *Id.* at 377.

13 15 U.S.C. § 46.

14 Magnuson-Moss Warranty Act, Pub. L. No. 93-637, 88 Stat. 2183.

15 482 F.2d 672 (D.C. Cir. 1973).

16 Chopra & Khan, *supra* note 4, at 378.

17 Notably, the authors maintain that they do not want regulation for regulation's sake, but only in circumstances in which there is some sort of market failure that cannot be adequately addressed by current antitrust laws. They identify two broad circumstances where they believe such failures might be present. The first situation is when the Commission has an "extensive enforcement record" about "a particular anticompetitive practice," but that enforcement record was unsuccessful in "eliminat[ing] the practice altogether." *Id.* at 371-72. The second circumstance is when "private litigation is unlikely to discipline anticompetitive conduct." *Id.* at 372. But both criteria are highly subjective and provide little constraint on FTC behavior.

18 *Id.* at 367.

litigation, potentially saving significant resources on a present-value basis."[19] And third, they contend that rulemaking "would enable the Commission to establish rules through a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it, granting the rule greater legitimacy."[20]

II. Discussion

By arguing for an aggressive regime of UMC rulemaking, Khan and her coauthor raise important questions about the FTC's mission—and its power to enforce that mission—going forward. As detailed below, there is a legitimate debate as to whether the Commission has the legal authority to promulgate rules to define and enforce against UMC under the FTC Act and, perhaps just as important, whether the FTC *should* engage in such rulemaking as a policy matter.

A. Common Critiques of Khan's Legal Arguments

As many courts have taken a broad view of *Chevron* deference, Khan's legal arguments in support of UMC rulemaking are certainly plausible.[21] But they are not infallible. A recent paper by former Acting FTC Chair Maureen Ohlhausen and former Assistant Attorney General for Antitrust at the Department of Justice James Rill lays out some of the common critiques of Khan's legal thesis.[22]

For example, Ohlhausen and Rill point out that the FTC's ability to promulgate substantive rules under Section 6(g) is far from clear. While Khan cites to *National Petroleum Refiners* as definitive authority, Ohlhausen and Rill point out that the D.C. Circuit's opinion "dealt with both UMC and UDAP authority under Section 6(g) yet Congress' reaction to the decision was to provide specific UDAP rulemaking authority and expressly take no position on UMC rulemaking." Thus, Ohlhausen and Rill submit that the FTC Act "is best read as [Congress] declining to endorse the FTC's UMC rulemaking authority and instead leaving the question open for future consideration by the courts."[23]

Chief Justice John Roberts wrote a few years back that the federal bureaucracy now "wields vast power and touches almost every aspect of daily life."[24] For example, the Federal Energy Regulatory Commission regulates wholesale electricity and gas pipelines; the Federal Communications Commission regulates telephone, cable, wireless, and broadcasting services; the Surface Transportation Board regulates freight rail; the Federal Reserve regulates banks; and the Federal Aviation Administration regulates commercial air travel. In each case, Congress has set forth a detailed statutory scheme detailing administrative procedures, subject matter jurisdiction, and agency powers and responsibilities. But as Ohlhausen and Rill point out, the FTC Act is devoid of such specificity when it comes to UMC, which suggests that Congress does not intend for the FTC to regulate UMC the way other agencies regulate in their areas. Khan, however, sees this lack of specificity as a regulatory void that the FTC has the authority to fill in the name of agency discretion.[25] At minimum, such a large analytical leap raises important issues under the Supreme Court's major questions doctrine.[26]

Ohlhausen and Rill also argue that Khan's loose approach to statutory construction is in tension with the Supreme Court's more rigorous view of statutory construction in recent years. They point to Justice Antonin Scalia's memorable line in *Whitman v. American Trucking Association* that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[27] Thus, argue Ohlhausen and Rill, Khan's "claim of broad substantive UMC rulemaking authority based on the absence of limiting language and a vague, ancillary provision authorizing rulemaking . . . stands in conflict with the Court's admonition in *Whitman*.[28]

Along the same lines, Ohlhausen and Rill contend that the FTC Act's lack of any sanctions for violating rules promulgated pursuant to Section 6(g) "seems to indicate that Congress never intended to give the FTC substantive rulemaking authority at all."[29] Accordingly, "it would therefore be very odd for Congress to grant the FTC sole unfair methods of competition rulemaking authority, yet not arm the agency (or anyone else) with the means to enforce violations of those rules."[30]

B. Testing the Bounds of Chevron*: What if the FTC Adopts a Non-Discrimination Rule?*

Whether the FTC has UMC rulemaking authority is an open question. But let's assume arguendo that the FTC has UMC rulemaking authority and uses that authority to adopt a

19 *Id.* at 368.

20 *Id.*

21 *C.f.* L.J. Spiwak, *USTelecom and its Aftermath,* 71 Fed. Comms. L.J. 39 (2019), *available at* http://www.fclj.org/wp-content/uploads/2018/12/71.1-%E2%80%93-Lawrence-J.-Spiwak.pdf.

22 M.K. Ohlhausen & J. Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking,* U.S. Chamber of Commerce (Aug. 12, 2021), *available at* https://www.uschamber.com/sites/default/files/ftc_rulemaking_white_paper_aug12.pdf; *see also* Comments of TechFreedom, In the Matter of Petition for Rulemaking to Prohibit Worker Non-Compete Clauses; Petition for Rulemaking to Prohibit Exclusionary Contracts, Docket ID: FTC-2021-0036 (Sept. 30, 2021), *available at* https://techfreedom.org/wp-content/uploads/2021/10/FTC-UMC-Rulemaking-Authority-FTC-Comment-9.30.2021-FINAL.pdf.

23 Ohlhausen & Rill, *supra* note 22, at 11.

24 City of Arlington, Tex. v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quotation marks omitted).

25 Interestingly, if the FTC goes down the UMC rulemaking path, another unintended consequence might be a conflict with another existing federal or state regulatory regime. *C.f.* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 368, 411-12 (2004) ("Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation.").

26 *C.f.* King v. Burwell, 576 U.S. 473, 485-89 (2015); Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

27 Whitman v. American Trucking Association, 531 U.S. 457, 468 (2001) (Scalia, J.).

28 Ohlhausen & Rill, *supra* note 22, at 11.

29 *Id.* at 13.

30 *Id.*

non-discrimination rule to address vertically integrated business models such as Amazon's. How might courts treat such a rule? As highlighted below, *Chevron* deference may not be as broad as Khan argues it is when it comes to interpreting the phase "unfair methods of competition."

It is no secret that Khan views Amazon as a dominant, vertically-integrated platform that requires strict government oversight.[31] To mitigate Amazon's ability to exercise its alleged market power, Khan has advocated for, among other things, the adoption of a non-discrimination rule that would prohibit "Amazon from privileging its own goods and from discriminating among providers and consumers . . ."[32] While Khan provided no specifics as to what this rule would actually look like, she has argued that "[c]oupling nondiscrimination with common carrier obligations—requiring platforms to ensure open and fair access to other businesses—would . . . limit Amazon's dominance in anticompetitive ways."[33]

Upon taking office, among Khan's first priorities was to rescind the bipartisan 2015 "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (*2015 UMC Statement*).[34] A central pillar of the *2015 UMC Statement* was a commitment by the FTC to retain and adhere to the consumer welfare standard using a rule of reason analysis,[35] so it is not unreasonable to assume from the rescission that Khan would like to replace the consumer welfare standard with a broader approach. Such an approach might allow for the consideration of competitor interests, labor interests, and equity interests; burden shifting; no requirements of finding any abuse of market power in a defined relevant market, and more.[36] What legal problems could arise if Khan attempts to implement her vision of "[c]oupling nondiscrimination with common carrier obligations" using the FTC's reinvigorated UMC rulemaking authority?[37]

1. The "Common Carrier" Exemption

Before turning to the question of *Chevron* deference, Khan's proposed nondiscrimination rule would suffer from an unambiguous statutory barrier. According to Section 5(a)(2) of the FTC Act, the FTC has no jurisdiction over "common carriers."[38] Where Congress has declined to classify and regulate firms as common carriers and withheld FTC jurisdiction over firms that *are* common carriers, it makes little sense to argue that the FTC can step in to designate common carriers and regulate them as such. Moreover, Khan's logic is circular: because of the common carrier exemption, any effort by the FTC to turn firms into common carriers by regulatory fiat would strip the agency of any jurisdiction immediately upon classification.

2. *Chevron* May Not Condone the Abandonment of the Consumer Welfare Standard

Under our hypothetical, the FTC has used its UMC rulemaking authority to promulgate a nondiscrimination rule which requires "equal access," even though the courts have repeatedly said there is no mandatory duty to deal.[39] While *Chevron* deference is certainly broad, caselaw makes clear that it does not provide the Commission carte blanche to abandon the consumer welfare standard.

a. The Concept of "Discrimination" is Well Established

To begin, if the FTC imposed a public utility-type nondiscrimination rule, it is questionable whether the agency could create a new standard out of whole cloth. The concept of nondiscrimination can be found in a host of federal statutes governing public utility regulation, including the

31 L.M. Khan, *Amazon's Antitrust Paradox,* 126 Yale L.J. 710 (2017), *available at* https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf.

32 *Id.* at 799.

33 *Id.*

34 *See FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act* (July 1, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under. *See also* Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.

35 *FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute* (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf. According to the *2015 UMC Statement,* the Commission would adhere to the following principles when deciding whether to use its standalone authority under Section 5 of the FTC Act to challenge unfair methods of competition. Namely, (1) the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare; (2) the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and (3) the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice. *Id.*

36 *C.f.* C. Shapiro, *Antitrust: What Went Wrong and How to Fix It,* 35 Antitrust 33 (Summer 2021), *available at* https://faculty.haas.berkeley.edu/shapiro/fixingantitrust.pdf.

37 At the time of this writing, there are various bills which have introduced in Congress that would codify per se nondiscrimination rules for Internet platform companies thar meet certain jurisdictional triggers. *See, e.g.,* Press Release, *Klobuchar, Grassley, Colleagues to Introduce Bipartisan Legislation to Rein in Big Tech* (Oct. 14, 2021), *available at* https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=3AD365BE-A67E-40BB-908A-C8570FF29600. However, as it is impossible to prognosticate if these bills will ever be signed into law, the hypothetical above will proceed under the current state of the law.

38 15 U.S.C. § 45(a)(2). Many traditional public utilities such as telephone companies, railroads, and oil pipelines are considered to be common carriers. However, it is also important to point out that several other types of public utilities such as cable companies, electric utilities, and natural gas pipelines are not common carriers. *See also* Federal Trade Commission v. AT&T Mobility LLC, 883 F.3d 848 (9th Circuit 2018) (holding that for multi-product firms, common carrier classification for purposes of the FTC Act depends on activity, not status).

39 For an excellent summary of the law, see *FTC v. Qualcomm Inc.,* 969 F.3d 974, 993-94 (9th Cir. 2020).

Communications Act of 1934,[40] the Federal Power Act of 1935,[41] and the Natural Gas Act of 1938.[42] In each case, Congress made it clear that the federal government is only concerned with acts of *undue* or *unreasonable* discrimination; garden variety economic discrimination is perfectly lawful. Moreover, as these statutes are nearly ninety years old, there is a rich body of caselaw governing the contours of what exactly constitutes "undue."[43] Thus, a court considering a challenge to our hypothetical FTC non-discrimination rule may decline to interpret it as generously as Khan's FTC would like.

b. Independent Agencies Must Account for Antitrust Terms of Art

Independent agencies also may not ignore accepted antitrust terms of art (particularly when the agency is an antitrust enforcement agency). The D.C. Circuit's ruling in *Comcast Cable Communications v. Federal Communications Commission* illustrates this point well.[44] The FCC had ruled that Comcast had unduly discriminated against the Tennis Channel in violation of the program carriage requirements of Section 616 of the Cable Competition and Consumer Protection Act of 1992 by refusing to broadcast the Tennis Channel in the same tier as Comcast's affiliated sports networks. At issue in *Comcast* was whether that ruling was arbitrary and capricious.

By way of background, the FCC Program Carriage regulations prohibit certain types of discriminatory conduct by a Multichannel Video Programming Distributor (MVPD) believed to threaten competition and diversity in the video programming marketplace. Under this statute, Congress charged the FCC to develop rules

> to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[45]

Moreover, Congress mandated that the FCC "provide for expedited review of any complaints made by a video programming vendor pursuant to this section."[46] Pursuant to that mandate, the FCC adopted general rules consistent with the statute's specific directions.[47] The FCC's program carriage rules state in relevant part that:

> No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[48]

In other words, the Program Carriage provisions seek to address potential harm arising from the vertical integration of MVPDs into programming by demanding that unaffiliated and affiliated programming be treated similarly.

The Tennis Channel, with which Comcast was unaffiliated, complained that Comcast placed it "on a tier with narrow penetration that is only available to subscribers who pay an additional fee, while Comcast carries its own similarly-situated affiliated networks Golf Channel and Versus (now NBC Sports Network) on a tier with significantly higher penetration that is available to subscribers at no additional charge."[49] (Market definition is required to place the Tennis Channel in the market with "similarly-situated affiliated networks.") The administrative law judge concluded that Comcast had indeed discriminated against the Tennis Channel,[50] and the full Commission later affirmed the ALJ's finding.[51] Comcast appealed to the D.C.

40 47 U.S.C. § 202 ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.").

41 16 U.S.C. § 824d(b) ("No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any *undue preference or advantage* to any person or subject any person to any *undue prejudice or disadvantage*, or (2) maintain any *unreasonable difference* in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.") (emphasis added).

42 15 U.S.C. § 717c(b) ("No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any *undue preference or advantage* to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any *unreasonable difference* in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.") (emphasis added).

43 For a summary of this caselaw, see *USTelecom and its Aftermath*, *supra* note 21.

44 717 F.3d 982 (D.C. Cir. 2013).

45 47 U.S.C. § 536(a)(3).

46 47 U.S.C. § 536(a)(4).

47 *See* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, FCC 93-457, Second Report and Order, 9 FCC Rcd. 2642 (1993).

48 47 C.F.R. § 76.1301(c).

49 *See* In the Matter of Tennis Channel, Inc., Complainant, v. Comcast Cable Communications, L.L.C., Defendant, FCC 12-78, Memorandum Opinion and Order, 27 FCC Rcd 8508 (rel. July 24, 2012) at ¶ 1 (Tennis Channel Order).

50 Tennis Channel, Inc. v. Comcast Cable Commc'ns, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 10-204, File No. CSR-8258-P, 26 FCC Rcd 17160, 17204 ¶ 101 (ALJ Dec. 20, 2011).

51 Tennis Channel Order, *supra* note 49.

Circuit, and, after review, the court ruled that the FCC's decision was arbitrary and capricious.[52]

The D.C. Circuit began its analysis by noting that the parties agreed that Comcast distributed its affiliates more broadly than the Tennis Channel. But as the also court noted that the plain language of Section 616 only prohibits discrimination "*based on* affiliation."[53] Thus, reasoned the court, if Comcast treated third-party content providers differently "based on a reasonable business purpose," then there is no violation of Section 616.[54] The court found that the Tennis Channel failed to present sufficient evidence of harm to support a claim of discrimination under the statute.

For example, the court found that in contrast to the detailed evidentiary submission by Comcast that showed it would have to bear significant costs if it added the Tennis Channel to the same tier as its affiliates, the Tennis Channel "showed no corresponding benefits that would accrue to Comcast by its accepting the change."[55] Similarly, the court found that the Tennis Channel offered no analysis "on either a qualitative or quantitative basis" to show that Comcast would receive a net benefit from the allegedly discriminatory conduct. As a result, concluded the court, the Tennis Channel had not shown that the discrimination was unreasonable.[56] *Comcast* sends an unmistakable message that when evaluating claims of discrimination, a reviewing court will not overlook the absence of serious economic analysis in agency decisions about anticompetitive harm.[57]

Then-Judge (now-Justice) Brett Kavanaugh's extensive concurrence in *Comcast* is also helpful in elucidating how courts should approach statutory interpretation in this field. Judge Kavanaugh specifically refuted the argument that in passing Section 616, Congress abandoned the long-standing consumer welfare standard requirement that a complainant must demonstrate harm to *competition* in favor of a requirement that it simply showing harm to an individual *competitor*. As Judge Kavanaugh noted, Section 616 sets up a two-part test: a MVPD has violated Section 616 if (1) it discriminated among video programming networks on the basis of affiliation and (2) the discrimination unreasonably restrained an unaffiliated network's ability to compete fairly.[58] As Judge Kavanaugh explained, because the "phrase 'unreasonably restrain' is of course a longstanding term of art in antitrust law," it follows that "Section 616 incorporates antitrust principles governing unreasonable restraints. . . ." Established legal precedent dictates that when "a statute uses a term of art from a specific field of law, [a court must] presume that Congress adopted 'the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'"[59] In other words, reasoned Judge Kavanaugh, "the goal of antitrust law (and thus of Section 616) is to promote consumer welfare by protecting competition, not by protecting individual competitors."[60] He elaborated:

> It is true that Section 616 references discrimination against competitors. But again, the statute does not ban such discrimination outright. It bans discrimination that *unreasonably restrains* a competitor from competing fairly. By using the phrase "unreasonably restrain," the statute incorporates an antitrust term of art, and that term of art requires that the discrimination in question hinder overall competition, not just competitors.[61]

Judge Kavanaugh also specifically rejected the argument that Section 616 does not require a demonstration of market power. As noted above, Judge Kavanaugh pointed out that because Section 616 specifically uses the antitrust term of art "unreasonably restrain," any application of Section 616 must incorporate antitrust principles and precedent. After providing a lengthy exegesis of the relevant caselaw, Judge Kavanaugh pointed out that:

> Vertical integration and vertical contracts become potentially problematic only when a firm has market power in the relevant market. That's because, absent market power, vertical integration and vertical contracts are *procompetitive*. Vertical integration and vertical contracts in a competitive market encourage product innovation, lower costs for businesses, and create efficiencies—and thus reduce prices and lead to better goods and services for consumers.[62]

Thus, concluded Judge Kavanaugh, because "Section 616 incorporates antitrust principles and because antitrust law holds that vertical integration and vertical contracts are potentially problematic only when a firm has market power in the relevant market, it follows that Section 616 applies only when a video programming distributor has market power in the relevant market."[63]

Rather than abandon the consumer welfare standard in passing Section 616, Congress embraced it. As explained by Judge Kavanaugh,

> Section 616 thus does not bar vertical integration or vertical contracts that favor affiliated video programming networks, absent a showing that the video programming distributor at least has market power in the relevant market. To conclude otherwise would require us to depart from the established meaning of the term of art "unreasonably restrain" that Section 616 uses. Moreover, to conclude otherwise would

52 *Comcast,* 717 F.3d at 985 (emphasis in original).

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 985-86.

57 *Cf.* Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752, 760 (6th Cir. 1995) (reversing administrative agency's decision because the order contained no "expert economic data or [analogies] to related industries in which the claimed anticompetitive behavior has taken place" but instead justified its conclusions as "simply 'common sense'").

58 *Comcast,* 717 F.3d at 989 (citing 47 U.S.C. § 536(a)(3)).

59 *Id.*

60 *Id.* at 992.

61 *Id.* (emphasis in original).

62 *Id.* at 990 (emphasis in original).

63 *Id.* at 991.

> require us to believe that Congress intended to *thwart* procompetitive practices. It would of course make little sense to attribute that motivation to Congress.[64]

And in this particular case, Judge Kavanaugh argued that Commission failed to make such a showing. Indeed, because the agency defined the relevant geographic market for video programming as national, Judge Kavanaugh pointed out that it was difficult for Comcast to have market power with only a 24% market share.[65]

Judge Kavanaugh's concurrence is particularly applicable to Ms. Khan's thesis. Khan justified the FTC's rescission of the bipartisan *2015 UMC Statement* (and its adherence to a rule of reason analysis and the consumer welfare standard)by arguing that "Congress enacted the Federal Trade Commission Act *to reach beyond* the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust laws."[66] But while the FTC Act is, of course, not the Sherman Act (or Clayton Act for that matter), it is still an antitrust law, and therefore it must adhere to basic antitrust principles as embodied in current caselaw. That caselaw requires antitrust enforcement to proceed using a rule of reason approach under the consumer welfare standard.

c. Courts Have Chastised Other Independent Agencies for Abandoning the Consumer Welfare Standard

It appears that rescinding the *2015 UMC Statement* represents the first step towards a deliberate effort to discard the consumer welfare standard when enforcing Section 5. But it should be noted that courts have chastised other regulatory agencies when they attempted to abandon the consumer welfare standard when adjudicating competition issues under the ubiquitous "public interest" standard.[67] The public interest standard in a regulatory statute is not, in the words of Justice Potter Stuart, "a broad license to promote the general public welfare."[68] For this reason, the courts have provided some important guidance—particularly when an agency is tasked with conducting a competitive analysis—on the boundaries of the public interest standard.[69]

While independent administrative agencies are certainly not required to agree with antitrust enforcement agencies' competitive analyses, they are not permitted to ignore antitrust considerations either.[70] Courts have long "insisted that [administrative] agencies consider antitrust policy as an important part of their public interest calculus."[71] As such, assertions that no relationship exists between antitrust and economic regulation are incorrect. As Supreme Court Justice Felix Frankfurter stated nearly seventy years ago, "[t]here can be no doubt that competition is a relevant factor in weighing the public interest."[72]

Given this requirement, it is little wonder that any application of the public interest standard requires a focus on the interests of the *public,* and not the interests of individual *competitors* who may seek to use the regulatory process to hamstring their rivals.[73] For example, in the 1981 case of *Hawaiian Telephone v. FCC*,[74] the D.C. Circuit remanded an FCC grant of Section 214 authority for service between the U.S. mainland and Hawaii because it found that the Commission had engaged in an ad hoc approach that improperly aimed at "equalizing competition among competitors."[75] The D.C. Circuit stated that the FCC's public interest analysis must be more than an inquiry into "whether the balance of equities and opportunities among competing carriers suggests a change."[76] The court found that it was "[a]ll too embarrassingly apparent that the Commission has been thinking about competition, not in terms primarily as to its benefit to the public, but specifically with the objective of equalizing competition among competitors."[77]

Subsequent decisions reiterate the importance that consumer welfare analysis plays in the public interest standard. In 1995, various parties challenged the FCC's approval of the acquisition of McCaw Cellular licenses by AT&T by arguing that the FCC should have imposed the antitrust Modified Final Judgment (MFJ) restrictions applicable to the Regional Bell

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64 *Id.* (emphasis in original).

65 *Id*. at 992 (citing Tennis Channel Order, *supra* note 49, at ¶ 87).

66 *Khan July 1, 2021, Statement, supra* note 34, at 2-3 (emphasis supplied).

67 The public interest standard can be found in a host of public utility statutory regimes, including, but certainly not limited to, the Federal Power Act, *see, e.g.,* 16 U.S.C. § 824b, and the Communications Act, *see, e.g.,* 47 U.S.C. § 310.

68 NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669 (1976) (rejecting arguments the Federal Power Commission must affirmatively promote equal employment opportunity and nondiscrimination in the employment practices of the firms it regulates under the Federal Gas and Power Acts).

69 *C.f.* T.M. Koutsky & L.J. Spiwak, Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard, 18 Commlaw Conspectus 329 (2010).

70 *See, e.g.*, United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980).

71 *See, e.g.*, *FCC,* 652 F.2d at 82 (In evaluating transactions, the FCC must in the exercise of its responsibilities "make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations."); *Northern Natural Gas*, 399 F.2d at 361 (stating that antitrust laws are a tool that a regulatory agency can use to bring "understandable content to the broad statutory concept of the 'public interest'") (internal citation omitted). *See also* United States v. AT&T, 498 F. Supp. 353, 364 (D.D.C. 1980) (Green, J.) ("[I]t is not appropriate to distinguish between Communications Act standards and antitrust standards . . . . [because] both the FCC, in its enforcement of the Communications Act, and the courts, in their application of the antitrust laws, guard against unfair competition and attempt to protect the public interest.").

72 FCC v. RCA Comm's Inc., 346 U.S. 86, 94 (1953); *see also Northern Natural Gas*, 399 F.2d at 961 (noting that "competitive considerations are an important part of the 'public interest'" standard).

73 *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 488 (1977) ("[A]ntitrust laws . . . were enacted for 'the protection of competition not competitors.'") (quoting Brown Shoe v. United States, 370 U.S. 294, 320 (1962)).

74 498 F.2d 771 (D.C. Cir. 1974).

75 *Id.* at 774–76

76 *Id.* at 776.

77 *Id.* at 775–76

Operating Companies (RBOCs) on the merged firm.[78] Citing *Hawaiian Telephone,* the D.C. Circuit rejected the merger opponents' arguments and found that the application of the MFJ restrictions to the merged entity would "serve the interests only of the RBOCs rather than those of the public."[79] The court stated that when the Commission considers whether a proposed merger serves the public interest, the "Commission is not at liberty . . . to subordinate the public interest to the interest of 'equalizing competition among competitors.'"[80]

C. History Belies Khan's Policy Arguments

Separate from the legal debate over whether the FTC *can* engage in UMC rulemaking, it is also important to ask whether the FTC *should* engage in UMC rulemaking. Khan's argument, if taken to its logical conclusion, essentially posits that the American economy needs a generic business regulator possessed with plenary power and expansive jurisdiction. Given the United States' well-documented (and sordid) experience with public utility regulation, that's probably not a good idea.[81]

Khan's published writings argue forcefully for greater regulatory power, but they suffer from analytical omissions that render her arguments questionable. For example, it is axiomatic that while regulation may have benefits, it can also impose significant costs. These costs can include compliance costs, reductions of innovation and investment, and outright entry deterrence that protects incumbents.[82] Yet nowhere in her coauthored essay does Khan contemplate a cost-benefit analysis before promulgating a new regulation; she appears to assume that regulation is costless.[83] History shows that we cannot always count on future FTC Commissioners to engage in wise economic policymaking.[84] Khan also fails to contemplate the possibility that changing market circumstances or inartful drafting might call for the removal of regulations previously imposed. Khan's argument that "clear rules" would make "enforcement . . . predictable" suffers from the same criticisms.

For example, even if we give an administrative agency the benefit of a doubt that it has promulgated a Pareto-optimal rule, it is still entirely possible that this regulation may be inartfully drafted. For this very reason, the courts have been forced to develop a legal doctrine to deal with the situation of how much deference they should accord an administrative agency's interpretation of its own ambiguous rule.[85] More importantly, as Khan notes, rules must ultimately be enforced. However, enforcement—by definition—requires adjudication on a case-by-case basis that is governed by precedent from prior application of the rule.[86] The FTC cannot pass a rule and punish firms upon allegations that they violated that rule; due process requires more.[87]

Taken together, these analytical omissions reveal a lack of awareness about the realities of modern public utility regulation.

78 SBC Comm's Inc. v. FCC, 56 F.3d 1484, 1490 (D.C. Cir. 1995).

79 *Id.* at 1491

80 *Id.* (quoting *Hawaiian Telephone,* 498 F.2d at 776); *see also* W. Union Tel. Co. v. FCC, 665 F.2d 1112, 1122 (D.C. Cir. 1981) ("[E]qualization of competition is not itself a sufficient basis for Commission action."). One of the counter-arguments to this position is the often misguided notion that the naked "protection of competitors" is the analytical equivalent to attempting to promote tangible new entry into a market currently dominated by a monopoly incumbent. It is not. As the FCC's former chief economist argued, it is "important that the playing field should be leveled upwards, not downwards" because "rules that forbid a firm from exploiting efficiencies just because its rivals cannot do likewise" harm, rather than improve, consumer welfare. J. Farrell, *Creating Local Competition*, 49 Fed. Comm. L.J. 201, 212 (1996). In highly concentrated industries, the focus of policy should be on regulation that promotes competitive entry, rather than regulation that protects competition. The latter will often turn into the mere protection of the private interests of competitors.

81 *C.f.* Ford, *supra* note 3; Spiwak, *A Poor Case for a "Digital Platform Agency," supra* note 3; N. Chilson, *Does Big Tech Need its Own Regulator,* George Mason University Global Antitrust Institute (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733726.

82 *C.f.* T.A. Lambert, *Rent-Seeking and Public Choice in Digital Markets,* The Global Antitrust Institute Report on the Digital Economy (posted Nov. 12, 2020), *available at* https://ssrn.com/abstract=3728990; Ford, *supra* note 3, and citations therein.

83 Indeed, Khan seems outright dismissive of the cost of regulation. *See, e.g., Amazon's Antitrust Paradox, supra* note 31, at 800 (". . . critics portrayed public utility as a form of corruption, a system in which private industry executives colluded with public officials to enable rent seeking. Ultimately these lines of criticism substantially thinned the very concept of public utility. The trend was part of a broader effort to idealize competitive markets and assume that nonintervention was almost always superior to interference.").

84 For example, as former FTC Chairman Timothy Muris noted nearly twenty years ago, the "unfair competition standard" in the wrong hands produced "a series of proposed rules relying upon vague theories of unfairness that often had no empirical basis, could be based entirely upon the commissioners' personal values, and did not have to consider the ultimate costs to consumers of foregoing their ability to choose freely in the marketplace." Thus, depending on who's in charge, it is unclear how a subjective "unfair competition" standard is any better than the FCC's "public interest" standard so many complain about. T. Muris, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy,* Remarks before the Aspen Summit, Cyberspace and the American Dream, The Progress and Freedom Foundation, Aspen, Colorado (Aug. 19, 2003), *available at* https://www.ftc.gov/public-statements/2003/08/federal-trade-commission-and-future-development-us-consumer-protection#N_49_. Indeed, the FTC is not without its own biases, often engaging in the same type of sloppy, politically-driven decision-making as other administrative agencies in an effort to achieve pre-determined outcomes. *See, e.g.,* G.S. Ford, *FTC Staff Bias On Intra-Brand Car Competition Is A Bad Deal For Consumers*, The Hill (Jan. 19, 2016), *available at* https://thehill.com/blogs/pundits-blog/finance/266251-ftc-staff-bias-on-intra-brand-car-competition-is-a-bad-deal-for. When it comes to abuse of government power, there are no "white hats" among regulatory agencies.

85 *See, e.g.,* Kisor v. Wilkie, 139 S. Ct. 2400 (2019); Auer v. Robbins, 519 U.S. 452 (1997).

86 It should also be noted that enforcement proceedings are often not just limited to the alleged offending party and the government. Many administrative agencies have highly permissive standing requirements which often allow the defendants' competitors to participate actively, thus essentially forcing the defendant to negotiate with both the government and their rivals to escape penalties. *See, e.g., In re Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, Applications for New Licenses in the 1695-1710 MHz, and 1755-1780 MHz and 2155-2180 MHz Bands*, FCC 20-160, Memorandum Opinion and Order On Remand, 35 FCC Rcd. 13317 (Nov. 23, 2020).

87 Taken to its logical conclusion, Khan's argument would essentially have the FTC supplant the judiciary as the final arbiter over whether antitrust violations have taken place. Fortunately, under the Administrative

Indeed, Khan offers up as an example of purported rulemaking success the Obama Administration FCC's *2015 Open Internet Order*,[88] which imposed legacy common carrier regulations designed for the old Ma Bell monopoly on the internet.[89] As noted above, Khan argues that rulemaking is better than adjudication because it provides clear rules, is faster and cheaper, and provides for public input. But in the case of net neutrality regulation, history again bears witness that such assertions simply are not true.

To begin, the heart of the *2015 Rules*—what was referred to as the "general conduct" standard—was far from clear.[90] Under the FCC's "general conduct" standard,

> *Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.*[91]

According to the FCC, it would use a "non-exhaustive list" of seven factors to assess such practices.[92] Although the general conduct rule was upheld based on *Chevron* deference on appeal, the practical application of such a vague and subjective rule was a disaster. As the FCC later found in its *2018 Restoring Internet Freedom Order* after developing an exhaustive record of real-world experience, the

> Internet Conduct Standard is vague and has created regulatory uncertainty in the marketplace hindering investment and innovation. Because the Internet Conduct Standard is vague, the standard and its implementing factors do not provide carriers with adequate notice of what they are and are not permitted to do, i.e., the standard does not afford parties a "good process for determining what conduct has actually been forbidden." The rule simply warns carriers to behave in accordance with what the Commission *might* require, without articulating any actual standard. Even ISP practices based on consumer choice are not presumptively permitted; they are merely "less likely" to violate the rule. Moreover, the uncertainty caused by the Internet Conduct Standard goes far beyond what supporters characterize as the flexibility that is necessary in a regulatory structure to address future harmful behavior. We thus find that the vague Internet Conduct Standard subjects providers to substantial regulatory uncertainty and that the record before us demonstrates that the Commission's predictive judgment in 2015 that this uncertainty was "likely to be short term and will dissipate over time as the marketplace internalizes [the] Title II approach" has not been borne out.[93]

Second, the net neutrality rulemaking process was far from expeditious. The FCC initially attempted to enforce net neutrality rules via a policy statement, but that effort was shot down by the courts.[94] After that, FCC Chairman Julius Genachowski initiated the FCC's first formal efforts at rulemaking by issuing a Notice of Proposed Rulemaking (NPRM) on October 22, 2009.[95] Fourteen months later, the Commission released its *2010 Rules*.[96] The *2010 Rules* were then challenged in federal court, and the case was appealed to the D.C. Circuit in *Verizon v. FCC*, which overturned the rules on January 14, 2014.[97] Five months later, Chairman Tom Wheeler issued another NPRM.[98] The Commission produced the *2015 Open Internet Order* on March 12, 2015.[99] These rules were again challenged and appealed to the D.C. Circuit. The court upheld the rules in *United States Telecom Ass'n v. FCC* on June 14, 2016, and reaffirmed this ruling en banc on May 1, 2017.[100] After the change in administrations, the new FCC Chair Ajit Pai released another *NPRM* on May 23, 2017, to remove the *2015 Rules*.[101] After eight months of deliberations,

Procedure Act, parties to regulatory enforcement actions are permitted to appeal any decision to the courts under the "arbitrary and capricious" standard. While this standard is highly deferential like *Chevron*, it does require agencies to do their due diligence. *See, e.g.,* FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision."). When an agency fails to do its due diligence, judicial deference is not guaranteed. *See, e.g., Comcast*, 717 F.3d 982.

88 In the Matter of Protecting and Promoting the Open Internet, FCC 15-24, Report And Order On Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601 (rel. March 12, 2015).

89 *Amazon's Antitrust Paradox, supra* note 31, at 800 ("Although the concept of public utility regulation remains somewhat maligned today, there are signs that a robust movement to apply utility-like regulations to services that widely register as public—such as the internet—can catch wind. The core of the net neutrality debates, for example, involved foundational discussions about how to regulate the communication infrastructure of the twenty-first century. The net neutrality regime ultimately adopted falls squarely in the common carrier tradition.").

90 2015 Rules, *supra* note 88, at ¶¶ 133 et seq.

91 *Id.* at ¶ 136 (emphasis in original).

92 *Id.* at ¶ 138.

93 *Restoring Internet Freedom,* FCC 17-166, Declaratory Ruling, Report, and Order, 33 FCC Rcd. 311 (rel. Jan. 4, 2018) at ¶ 247 (emphasis in original).

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

95 *In the Matter of Preserving the Open Internet*, FCC 09-93, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, (rel. Oct. 22, 2009).

96 *In the Matter of Preserving the Open Internet*, FCC 10-201, Report and Order, 25 FCC Rcd 17905 (rel. Dec. 23, 2010).

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

98 *In the Matter of Protecting and Promoting the Open Internet,* FCC 14-61, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (rel. May 15, 2014).

99 *Supra* note 88.

100 United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *pet. for rehearing en banc denied*, 855 F.3d 381 (2017).

101 *Restoring Internet Freedom,* FCC 17-60, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (rel. May 23, 2017).

the Commission released its *2018 Restoring Internet Freedom Order*.[102] These revised rules were again challenged, and the case appealed to the D.C. Circuit, which upheld them in *Mozilla v. FCC* on October 1, 2019.[103]

In all, not counting the policy statement phase, the FCC's net neutrality rulemaking docket has dragged on for well over a decade. And we are not out of the woods: On July 9, 2021, President Biden issued an "Executive Order on Promoting Competition in the American Economy" calling for the reimposition of some sort of net neutrality rules.[104] While the FCC lacks a clear Democratic majority to carry out the President's wishes at the time of this writing, many anticipate that net neutrality will be at the top of the priority list once the FCC returns to full strength.[105] If so, it looks like there is no resolution of the net neutrality debate in sight.

Moreover, given the economic impacts of net neutrality regulation, the cost to society of participating in this rulemaking was not cheap.[106] A cursory review of the FCC's Electronic Comment Filing System (ECFS) reveals that almost every major law firm in Washington—in addition to a host of law firms from across the country—filed comments in the proceeding. Furthermore, many of the same (and expensive) leading economists often utilized in major antitrust litigation were either retained as expert witnesses or authored white papers to influence the debate. And, of course, many third party public interest groups filed comments or wrote op-eds to gin up pollical pressure in favor of their preferred regulatory outcome.

Khan's third argument in favor of regulation over ex post enforcement of antitrust rules is that it allows for greater public participation. Politicians, in theory, are supposed to be responsive to public outcry. When faced with an avalanche of blast emails from angry constituents, legislators generally are moved to act. In contrast, independent regulatory agencies are supposed to be (but admittedly often are not) apolitical and immune from such pressure. While it is true that administrative agencies must subject their actions to "public notice and comment" under the Administrative Procedure Act, regulatory agencies are not created to promulgate rules and regulations based upon the vox populi; rather, these agencies are charged with dispassionately and expertly implementing their respective enabling statutes as delineated by Congress based upon the plain text of the statute, the caselaw interpreting that statute, the economic evidence, and the substantive record before them. If they fail in that task, then administrative agencies can be reprimanded by an appellate court for engaging in arbitrary and capricious behavior or, in very rare cases, rebuked by Congress via the Congressional Review Act.

Fed up with congressional inaction, however, advocacy groups on both sides of the aisle have increasingly turned to applying the same political pressure tactics traditionally used on elected officials on unelected bureaucrats by aggressively pounding regulatory agencies with blast form email comments during controversial rulemaking proceedings. These email comments are commonly referred to as "clicktivism" because of the generally automated nature of the process. Users visit a web page, see a banner which reads "click here and send Washington a message," and voilà, an automated form comment is generated and filed with the agency. If advocacy groups can inundate an agency with an avalanche of angry comments, the thinking goes, then the agency will be compelled to consider the public outcry as it weighs the evidence. But such clicktivism is far from probative evidence.

In the case of the net neutrality debate, clicktivism at the FCC reached new heights.[107] For example, when Chairman Pai was contemplating removing the *2015 Rules*, over 20 million comments were filed in the docket. A detailed forensic analysis revealed that 36 percent of these comments appeared to have been generated by self-described "temporary" and "disposable" email domains attributed to FakeMailGenerator.com. Moreover, this forensic report revealed that 9.3 million comments listed the same email and physical address as another, indicating that many entities filed multiple comments.[108] The overwhelming majority of these comments provided no serious legal, economic,

102 *Supra* note 93.

103 940 F.3d 1 (D.C. Cir. 2019), *reh'g en banc denied,* (D.C. Cir. 18-1051) (Feb. 6, 2020).

104 Executive Order on Promoting Competition in the American Economy (July 9, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy.

105 Khan recently called for the FCC to reimpose common carrier regulation on broadband internet access services so as to "once again put in place the nondiscrimination rules, privacy protections, and other basic requirements needed to create a healthier market." *See Remarks of Chair Lina M. Khan Regarding the 6(b) Study on the Privacy Practices of Six Major Internet Service Providers*, Commission File No. P195402 (Oct. 21, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1597790/20211021_isp_privacy_6b_statement_of_chair_khan_final.pdf. Since common carrier status would deprive the FTC of jurisdiction over companies providing broadband internet access services, this was a rare case of an agency head seeking to decline jurisdiction. Such a rejection of jurisdiction is curious, particularly when it comes to enforcing consumer privacy, given that the U.S. Congress—recognizing the economic costs of the asymmetrical privacy regime created by the combination of the FCC's imposition of common carrier status on broadband internet access services and the FTC Act's common carrier exemption—took the extraordinary step of using its authority under the Congressional Review Act to eliminate the Obama-era FCC's privacy rules as it wanted a cohesive federal approach at the Federal Trade Commission. L.J. Spiwak, *Insight: Digital Privacy Requires a Cohesive Federal Solution*, Bloomberg Law (June 13, 2018), *available at* https://www.phoenix-center.org/oped/BloombergLawDigitalPrivacy13June2018.pdf.

106 While it is true that major antitrust litigation may be expensive, the cost of participation is limited to the parties involved in the case. In contrast, because regulations are rules of general applicability across an industry, there are more affected parties who must participate to protect their interests.

107 *See, e.g.,* L.J. Spiwak, *Curbing 'Clicktivism' at the Federal Communications Commission,* The Hill (Sept. 19, 2017), *available at* http://thehill.com/opinion/technology/351082-curbing-clicktivism-at-the-federal-communications-commission.

108 Emprata, *FCC Restoring Internet Freedom Docket 17-108, Comments Analysis* (Aug. 30, 2017), *available at* https://www.emprata.com/insights/reports/fcc-restoring-internet-freedom-docket; *see also* New York State Office of the Attorney General Letitia James, *Fake Comments: How U.S. Companies & Partisans Hack Democracy to Undermine Your Voice* (May 6, 2021), *available at* https://ag.ny.gov/sites/default/files/oag-fakecommentsreport.pdf.

or engineering insight to aid in the FCC's deliberations. Most were simply one-page form email comments asking the FCC to keep or reverse reclassification. Many clicktivists used language so profoundly disgusting that decorum prevents them from being mentioned here. Still, due process required the FCC's staff to comb through this garbage, wasting valuable FCC resources.

We also cannot ignore the other side of the public comment coin: direct lobbying via ex parte meetings with both Commissioners and staff. Again, even a cursory review of the FCC's ECFS system reveals a cornucopia of such meetings as parties (and their lobbyists) tried to influence the outcome. Politicians also attempted to put further political pressure on individual Commissioners.[109] This political full court press ranged the full gamut from state officials to members of the House and Senate to the White House itself.[110]

Finally, but perhaps most importantly, the net neutrality saga also shows that economic regulation has costs as well as benefits. As former FCC Chief Economist Dr. Tim Brennan publicly admitted, the *2015 Rules* were formulated in an "economics free zone" without a cost/benefit analysis or a legitimate theoretical foundation.[111] In fact, the FCC's whole case was based on an erroneous application of a "virtuous circle" theory of innovation.[112] Absent a sound economic theory, it came as no surprise that the *2015 Order* resulted in a significant reduction in network investment to the detriment of consumer welfare.[113]

The story of net neutrality shows that ex ante antitrust rules analogous to those imposed by the FCC would not necessarily be superior to ex post, case-by-case enforcement by the FTC and the Department of Justice under the nation's antitrust laws.[114] Khan's arguments in favor of such per se regulation—that it is more predictable, efficient, and democratic—should be evaluated with attention to the history of how similar attempts at regulation have played out in the real world.

III. Conclusion

As detailed above, Khan's legal arguments in favor of UMC rulemaking are subject to debate. But until the bounds of this claimed authority are squarely resolved by the courts (and perhaps, if ultimately necessary, Congress), Khan nonetheless appears determined to move the FTC down the UMC rulemaking path.[115] But if history is any guide, UMC rulemaking is a terrible policy. Not only will UMC rulemaking inevitably lead to a myriad of unintended economic consequences, but it will inexorably transform the FTC from a respected dispassionate enforcer of our nation's antitrust laws to just another highly politicized institution in the sea of "ABC" regulatory agencies that populate Washington, D.C. today.

109 L.J. Spiwak, *The Law, the Public Interest, and the FCC—A Critique of Title II Comments from Eleven Democratic Congressmen,* Bloomberg BNA (Aug. 25, 2017), *available at* https://www.phoenix-center.org/oped/BloombergBNADemocratCongressmenTitleIIResponse25August2017.pdf.

110 L.J. Spiwak, *The "Clicktivist" In Chief,* The Hill (Nov. 12, 2014), *available at* http://thehill.com/blogs/pundits-blog/technology/223744-the-clicktivist-in-chief.

111 T. Brennan, *Is the Open Internet Order an "Economics-Free Zone"?,* Perspectives from FSF Scholars, Free State Foundation (June 28, 2016), *available at* https://freestatefoundation.org//wp-content/uploads/2019/06/Is-the-Open-Internet-Order-an-%E2%80%9CEconomics-Free-Zone%E2%80%9D-062816.pdf.

112 *Id.*; *see also* G.S. Ford, *Revisiting the "Virtuous Circle" Two Years Later,* Bloomberg BNA (July 10, 2017), https://www.phoenix-center.org/oped/BloombergBNAVirtuousCircleRevisited10July2017.pdf.

113 G.S Ford, Regulation and Investment in the U.S. Telecommunications Industry, 56 Applied Economics 6073 (2018), available at https://tinyurl.com/y2brc94f.

114 It should also be noted that given the dearth of proven allegations of anticompetitive conduct by internet service providers, Khan's arguments for when rulemaking is appropriate, *see supra* note 17, are also not satisfied in this case.

115 *See, e.g.,* Press Release, *FTC Opens Rulemaking Petition Process, Promoting Public Participation and Accountability,* Federal Trade Commission (Sept. 15, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/09/ftc-opens-rulemaking-petition-process-promoting-public; *see also* Press Release, *FTC Acting Chairwoman Slaughter Announces New Rulemaking Group* (March 25, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group.