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Measuring Monopsony: Using the Antitrust Toolbox to Protect Market Competition and Help the Television Consumer

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NOTES

MEASURING MONOPSONY: USING THE ANTITRUST TOOLBOX TO PROTECT MARKET COMPETITION AND HELP THE TELEVISION CONSUMER

TABLE OF CONTENTS

INTRODUCTION	301
I. CABLE'S REGULATORY TRADITION: MEASURING COMPETITION	
MARKET-TO-MARKET	307
A. <i>Cable as a Natural Monopoly</i>	307
1. <i>Efficiency: The Cheapest Good for the Greatest</i>	
<i>Number</i>	307
2. <i>Equity: Providing the Local Voice</i>	308
B. <i>History of Cable Regulation and Deregulation</i>	310
1. <i>Cable Regulation</i>	310
2. <i>Antitrust Oversight of Cable</i>	312
C. <i>Comcast-Time Warner Cable and Future Mergers</i>	315
II. THE FAILURE OF CURRENT GOVERNMENT MEASURES	316
A. <i>In Search of a Limiting Principle</i>	316
B. <i>Tales from the Other Side</i>	318
C. <i>Programmers Are Limited by Antitrust Law</i>	321
1. <i>Legal Limitations</i>	321
2. <i>Two Sets of Losers, Two Doctrines Lost</i>	323
III. THE DOJ MUST MEASURE BOTH CABLE MONOPOLY AND	
MONOPSONY WHEN CALCULATING THE HHI (AND REJECT A	
MERGER EXCEEDING EITHER THRESHOLD)	325
A. <i>The Legal Authority</i>	326
B. <i>Enter Monopsony</i>	329
1. <i>Background</i>	329

2. <i>DOJ/FTC Framework</i>	331
C. <i>Balancing Efficiency and Equity</i>	332
D. <i>The Time Is Now, Not the Future</i>	333
1. <i>Cable Companies Will Lose Ground</i>	334
2. <i>Line-Drawing Problems</i>	336
3. <i>"Would it be so bad?" Counterarguments</i>	337
CONCLUSION	338

INTRODUCTION

After a long day at the office, Carl Chicago comes home to spend a few minutes catching up on world events courtesy of CNN. Settling into the couch cushion, he turns on the TV, only to find the network blacked out. A message from his cable provider, Comcast, tells him that it is currently disputing its agreement with the station, and gives him a number to call to register his complaint. Carl is undeterred, and decides that he would rather just kick back with Finn and Jake on *Adventure Time* instead. But as he turns to Cartoon Network for some much-needed entertainment, he runs into a similar message from his cable provider. Carl, growing increasingly frustrated, decides to call his sister in Virginia, Wendy Williamsburg, who can see both of the stations fine. Carl begins complaining to her about the amount he pays for stations he cannot even access. “Well how much do you pay?” she asks. Carl tells her he pays about \$75 per month for the standard expanded cable. Wendy checks her own bill. Up until about a year ago, she had been paying roughly the same amount, around \$76.50 or so. However, for the same package of channels, she notices she is now paying almost \$84. “How can this be?” she asks Carl, wondering why his enormous cable conglomerate can offer such lower prices than hers. “Don’t ask me,” Carl retorts, “I didn’t pick them.”

Carl, as well as most of his neighbors and friends throughout the country, did not choose his cable company. That is because most localities have only one cable provider, and although there were previously hundreds, if not thousands, of different cable companies nationwide, most people today are served by one of only a few national conglomerates. More concerning than this lack of competition is that federal regulators at the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have sanctioned this situation by choosing to measure a cable company’s growth only in individual markets, potentially ignoring nationwide gains.

The merger between Comcast and Time Warner Cable would have been the largest merger of two cable providers in history.¹

1. See *Comcast and Time Warner Cable Transaction Fact Sheet*, COMCAST, <http://corporate.comcast.com/images/Transaction-Fact-Sheet-2-13-14.pdf> [<http://perma.cc/H3RZ->

Before Comcast abandoned its plans after the tepid reaction of both the DOJ and the Federal Communications Commission (FCC),² the merger garnered substantial consumer opposition³ and concerned policy analysts and economists over the power such a large company would have.⁴ The cable industry began as a collection of small conglomerates serving one or a few localities,⁵ until providers began to combine.⁶ There are now only about seven companies serving most of the cable-using public nationwide, of which the four largest are Comcast, Time Warner Cable, Cox Communications, and Charter Communications.⁷

When companies merge, they must submit notice of the merger to the federal government.⁸ Either the DOJ Antitrust Division or the FTC Bureau of Competition investigates the merger,⁹ and then either approves it or sues to block it.¹⁰ Regulators determine the

CFMT] (last visited Sept. 27, 2015).

2. Shalini Ramachandran, *Comcast Kills Time Warner Cable Deal*, WALL ST. J. (Apr. 24, 2015, 4:40 PM), <http://www.wsj.com/articles/comcast-kills-time-warner-cable-deal-1429878881> [<http://perma.cc/3CNE-MWN5>].

3. David Ingram, *Americans Take Dim View of Comcast, Time Warner Cable Deal*, REUTERS (Mar. 26, 2014, 1:04 AM), <http://www.reuters.com/article/2014/03/26/us-usa-antitrust-idUSBREA2P0BD20140326> [<http://perma.cc/9ZJ9-7A6V>].

4. See, e.g., Jon Brodtkin, *How the U.S. Could Block the Comcast/Time Warner Cable Merger*, ARS TECHNICA (Feb. 18, 2014, 3:20 PM), <http://arstechnica.com/tech-policy/2014/02/how-the-us-could-block-the-comcasttime-warner-cable-merger> [<http://perma.cc/VK2B-24TQ>]; Art Brodsky, *7 Ways the Feds Can Make a Comcast-Time Warner Merger Less Terrible*, WIRED (Apr. 19, 2014, 6:30 AM), <http://www.wired.com/2014/04/7-limits-the-fcc-should-impose-on-a-comcast-time-warner-merger/> [<http://perma.cc/EKH5-HC62>]; Warren Grimes, *Competition Will Not Survive the Comcast-Time Warner Merger*, FORBES OP. (Feb. 27, 2014, 10:59 AM), <http://www.forbes.com/sites/realspin/2014/02/27/competition-will-not-survive-the-comcast-time-warner-merger/> [<http://perma.cc/FSD2-FE7L>].

5. See *The Cable History Project*, CABLE CTR., <http://www.cablecenter.org/cable-history/108-the-cable-history-project-overview.html> [<http://perma.cc/ZWP3-PNPY>] (last visited Sept. 27, 2015).

6. See *United States: Cable Television*, MUSEUM OF BROAD. COMM'NS, <http://www.museum.tv/eotv/unitedstatesc.htm> [<http://perma.cc/AR5L-4F3T>] (last visited Sept. 27, 2015).

7. Press Release, Major Pay-TV Providers Lost About 150,000 Subscribers in 3Q 2014, Leichtman Research Grp. (Nov. 14, 2014), www.leichtmanresearch.com/press/111414release.html [<http://perma.cc/UF9U-TPYR>] [hereinafter Leichtman Research Grp.].

8. Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a(d) (1976).

9. *Id.* § 18a(b)(1)(A).

10. The FCC also reviews telecommunications (telco) mergers for possible effects on the telco market and the provision of services to consumers. Not only is FCC analysis usually duplicative of DOJ/FTC analysis, see Laura Kaplan, Note, *One Merger, Two Agencies: Dual Review in the Breakdown of the AT&T/T-Mobile Merger and a Proposal for Reform*, 53 B.C. L. REV. 1571, 1573-74 (2012), but it is frequently rejected by courts as being arbitrary and

potential anticompetitive effects of mergers by turning to ratios of companies' market shares¹¹ to predict the effect a merger will have on all other sellers in that market.¹² If the analysis shows the companies' merger would have anticompetitive effects, regulators generally sue to block the merger.¹³ The argument between the merging companies and regulators is always over *which* market regulators measure.¹⁴ Unlike most industries, in which the merger effects are measured nationally, the DOJ/FTC measures a cable merger for its local impacts, looking at whether it will decrease competition in Richmond, Virginia, as opposed to competition on a national scale.¹⁵ Most markets have only one cable provider,¹⁶ so Comcast and Time Warner Cable, for instance, do not compete in any market nationwide.¹⁷ In fact, very few cable companies share territory nationwide.¹⁸ Theoretically, the DOJ should have approved the Comcast-Time Warner Cable merger on the grounds that it would not have

capricious when it departs from DOJ/FTC analysis. *See infra* Part III.A.

11. DOJ & FTC, HORIZONTAL MERGER GUIDELINES 18-19 (2010), <http://www.justice.gov/atr/horizontal-merger-guidelines-08192010#5c> [<http://perma.cc/272R-8DT6>] [hereinafter HORIZONTAL MERGER GUIDELINES] (describing use of the Herfindahl-Hirschman Index (HHI) to measure the market).

12. THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 19 (John E. Kwoka, Jr. & Lawrence J. White eds., 6th ed. 2014); *see also infra* Part I.B.1.

13. THE ANTITRUST REVOLUTION, *supra* note 12, at 12.

14. Jonathan B. Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*, in HANDBOOK OF ANTITRUST ECONOMICS 6, 7 (Paolo Buccirossi ed., 2008) (explaining that merging companies often define their market broadly, while the federal government often defines it more narrowly, each of them implicitly negotiating over the impact of the merger on the market).

15. *Why the Feds Won't Be Able to Block a Comcast-Time Warner Merger*, FORTUNE MAG. (Feb. 13, 2014, 5:36 PM), <http://fortune.com/2014/02/13/why-the-feds-wont-be-able-to-block-a-comcast-time-warner-merger/> [<http://perma.cc/2XW8-9S32>].

16. Thomas W. Hazlett, *Cable TV Franchises as Barriers to Video Competition*, 12 VA. J.L. & TECH. 2, 10 (2007). This is so because cable is a "natural monopoly," where a market with a single provider is more economically efficient than one with multiple providers. *See infra* Part I.A.1 (explaining the concept of a natural monopoly).

17. *Comcast and Time Warner Cable in Top 50 TV Markets*, CNN MONEY, <http://money.cnn.com/infographic/news/comcast-time-warner-coverage-map/> [<http://perma.cc/LV3P-VW5C>] (last visited Sept. 27, 2015).

18. *See, e.g.,* Zachary M. Seward, *The Charts and Maps You Need to Understand Why Charter is Buying Time Warner Cable and Bright House*, QUARTZ (May 25, 2015), <http://qz.com/411712/the-charts-and-maps-you-need-to-understand-why-charter-is-buying-time-warner-cable-and-bright-house/> [<http://perma.cc/9CNU-E3KZ>].

decreased competition in any localities.¹⁹ Where there is no competition to begin with,²⁰ a merger cannot make competition worse.²¹

While this may be the case on a theoretical level, the problem is that a cable company's national power *does* matter. The cable market is two-sided: a cable company negotiates nationally with programming companies to buy their content, and then sells it to consumers in localities.²² A cable company with sufficient power nationwide could decide that it is tired of paying \$5.54 per month per customer for ESPN²³ and, because of its size, have a substantial ability to extract lower prices from ESPN.²⁴ ESPN would then have to either decrease operations or, to the extent it can, use its own power over smaller cable companies to extract higher fees from customers.

Programming companies' ordinary response in this situation would be to merge.²⁵ However, they cannot do so without raising

19. Geoffrey Manne, *Why the Antitrust Realities Support the Comcast-Time Warner Merger*, TRUTH ON THE MKT. (Apr. 14, 2014), <http://truthonthemarket.com/2014/04/14/why-the-antitrust-realities-support-the-comcast-time-warner-cable-merger> [<http://perma.cc/VSG8-D2G6>]. Although then-Attorney General Eric Holder indicated that the DOJ was considering suing to block the Comcast-Time Warner Cable merger, it was ultimately the FCC's indication that it would seek to frustrate merger plans that caused Comcast to abandon its attempt. See Ramachandran, *supra* note 2.

20. Although satellite and telco rivals provide alternatives in some localities, the discussion in Part III will demonstrate why these are not effective sources of competition in the long term.

21. Maurice E. Stucke & Allen P. Grunes, *Crossing the Rubicon: Why the Comcast/Time Warner Cable Merger Should Be Blocked* 1-2 (Univ. of Tenn. Legal Studies, Research Paper No. 245, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2422868 [<http://perma.cc/88Z6-XDGG>].

22. Andre Boik, *Intermediaries in Two-Sided Markets: An Empirical Analysis of the U.S. Cable Television Industry* 2 (Univ. of Toronto, Working Paper, 2013), <http://kelley.iu.edu/BEPP/documents/boik%20paper.pdf> [<http://perma.cc/82KG-KWCV>].

23. L.A. Ross & Tony Maglio, *Your Unfair Cable Bill: Most Expensive Channels Aren't the Most Watched*, THE WRAP (Mar. 13, 2014, 3:21 PM), <http://www.thewrap.com/cable-bill-battle-subscribers-providers-carriage-fees/> [<http://perma.cc/5542-DM66>] (using data compiled by SNL Kagan).

24. Meg James, *Comcast-Time Warner Cable Merger Is No Longer Viewed as Inevitable*, L.A. TIMES (Jan. 27, 2015, 5:00 AM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-comcast-time-warner-cable-merger-opposition-20150127-story.html#page=1> [<http://perma.cc/Y3WY-ZN95>] (describing discussions between federal investigators and heads of programming companies expressing concerns that Comcast can use its power to undercut how much programming companies are paid for their channels).

25. BARBARA S. PETITT & KENNETH R. FERRIS, VALUATION FOR MERGERS AND ACQUISITIONS 6-7 (2d ed. 2013).

significant antitrust concerns of their own, because regulators measure them—as they do companies in most industries—on a national level.²⁶ Programming companies are thus roughly stuck in place while a sufficiently large cable company, which is unfettered by the current enforcement scheme, can theoretically obtain unprecedented power to dictate prices to programmers, leaving the programmers to pass costs on to other cable companies' customers, like Wendy Williamsburg. This may have seemed unlikely until the proposed Comcast-Time Warner Cable merger, which would have made the two largest cable companies one. Even though that merger was scuttled, the immediate presence of another buyer for Time Warner Cable—Charter, the fourth-largest company—indicates that this merger activity will likely continue.²⁷

Government regulators, however, have a little-used tool in their antitrust toolbox to measure buyer power in the market. This Note proposes that government regulators measure potential mergers for monopsony power—the ability of a single buyer to impact a would-be seller in a market—to ensure that they consider all economic effects of any future cable mergers.²⁸ Although monopsony has never been applied to the cable industry, the economic realities support dusting off this doctrine and putting it to work. This Note analyzes the abandoned Comcast-Time Warner Cable merger, which, as a proposed merger between the two largest cable providers in the country, put these issues front and center for regulators for the first time. Although the parties abandoned that merger, Charter Communications' proposed merger with Time Warner Cable would enlarge the merged company to almost the same size as Comcast.²⁹ These issues remain prevalent, as the future of cable seems to promise more of such activity.

26. See *infra* notes 115-17 and accompanying text (describing a proposed merger between two programming companies in the wake of the Comcast-Time Warner Cable announcement, which raised substantial antitrust concerns that would have needed to be addressed before the merger could have proceeded).

27. See Sydney Ember, *In Time Warner Cable Deal, Charter Seeks National Heft*, N.Y. TIMES (May 25, 2015), http://www.nytimes.com/2015/05/26/business/media/in-cable-deal-charter-seeks-its-legitimacy.html?_r=0 [http://perma.cc/32SZ-HDFB].

28. The monopsonist can dictate terms to its suppliers. Consequently, if federal regulators determine that a cable merger might create monopsony power, they will be able to effectively curtail this growth as they have not been able to do before. See *infra* Part III.B.

29. See Ember, *supra* note 27.

Part I of this Note discusses the history and goals of cable regulation, including why conglomerates are traditionally allowed, and how programming companies are measured differently than cable companies. Part II examines the problems with measuring cable market-to-market. It begins by explaining how and why this structure does not check the size of cable providers, and how courts have eliminated prior rules. The only reasonable market solution to cable power is programming power, and if their mergers are blocked under standard antitrust doctrine, regulators may have inadvertently enshrined cable dominance over programming and consumers. This Part also discusses the potential losers in a large-scale cable merger.

Finally, Part III argues that, although other regulators have failed to stop cable's unchecked growth, antitrust laws should have more success. This Note proposes that the DOJ Antitrust Division and FTC³⁰ be required to measure both sides of the cable market—the influence of cable both market-to-market via consumer delivery, and the nationwide effects on programming purchasing via monopsony power. If either of these raises the concentration of the market beyond the established antitrust thresholds, the DOJ should sue to block the merger. This proposal will allow more robust consumer protection, uphold a free market, and keep cable companies from shifting economic equity towards themselves and away from their customers and competitors. The proposal also squares with the purpose of the antitrust laws, which should vest the authority to change their market analysis within the DOJ and FTC without their rules being struck down by the courts. This Part will also address alternatives, explaining why this proposal is more sustainable than others.

30. This Note applies to both the DOJ Antitrust Division and the FTC, but because the DOJ considered the Comcast-Time Warner merger, this Note makes shorthand references to the DOJ.

I. CABLE'S REGULATORY TRADITION: MEASURING COMPETITION MARKET-TO-MARKET

A. Cable as a Natural Monopoly

Two concepts in economics, efficiency³¹ and equity,³² are usually in tension with one another in regulators' calculations of economic policy. In the case of cable franchises, both of these actually work in tandem to establish cable as a "natural monopoly," where the best solution is a single provider in a locality. As a result, most localities in the United States are served by only one cable company.³³ These concepts are explored in detail below.

1. Efficiency: The Cheapest Good for the Greatest Number

Cable, as a natural monopoly, validates efficiency concerns. Like other utilities, cable is the almost quintessential example of a natural monopoly, meaning that the most efficient market exists when only one provider serves a locality.³⁴ Because a cable system requires large capital expenditures up front to install coaxial cable and other equipment to transmit a cable signal,³⁵ the cost for each consumer decreases as it is amortized over increasing numbers of

31. Economic efficiency is the requirement that the market maximizes producer and consumer surplus—in other words, that producers sell the product for as low as possible, and that the maximum number of consumers willing to buy at that price are able to buy at that price. Put in more basic, non-economic terms, this intuitively means that the *most* people are made the *most* happy, as far as happiness can be measured through economic systems. See AVINASH DIXIT, MICROECONOMICS: A VERY SHORT INTRODUCTION 52-55 (2014).

32. Equity, as used in this Note, refers to the economic concept of equity, rather than ownership of a company. Economic equity describes how the benefits buyers and sellers get from competition accrue to each party (in other words, are they equal, or does one party benefit more than others?). See *infra* notes 123-25 and accompanying text.

33. OWEN M. FISS, THE IRONY OF FREE SPEECH 70 (1996); see also Reza Dibadj, *Toward Meaningful Cable Competition: Getting Beyond the Monopoly Morass*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 245, 265 (2003) (citing FCC data that only 2 percent of "cable community units" have more than one provider nationwide, and noting that only one in twenty customers responding to a Consumer Reports survey reported having a choice among more than one cable option).

34. Shaun Christensen, *Cable Television: Competition and the First Amendment*, 37 S.D. L. REV. 566, 576-77 (1992).

35. W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 535 (4th ed. 2005).

customers.³⁶ Consequently, if two or more companies were to compete head-to-head, installing their own different sets of coaxial cable and equipment, they would have to amortize their costs over fewer consumers.³⁷ This would raise the cost of doing business for each company, and raise the price for consumers, to a point at which the price would be too high for consumers to pay and the costs too great for the companies to bear.³⁸ Efficiency considerations thus dictate that only one cable company exist in order to spread these capital expenditures among the highest number of customers, ensuring the lowest possible price for those customers.³⁹ Most local governments thus aim to have only one cable provider, and they have been fairly successful in that regard.⁴⁰

2. *Equity: Providing the Local Voice*

Equity considerations have also guided federal regulators to a natural monopoly. The courts have long supported the FCC's decision to favor consumer equity⁴¹ over economic efficiency.⁴² The earliest of these decisions, *Carter Mountain Transmission Corp. v. FCC*, upheld an FCC rule prohibiting an outside corporation from importing its own offerings, delivered via microwave and providing better service than the local cable provider, because it "would result in the 'demise' of the local television station ... and the loss of service to a substantial rural population not served by the community antenna systems."⁴³ The court upheld the rule as a proper exercise of the FCC's regulatory power.⁴⁴ This decision is important because

36. *Id.*

37. For instance, if a company spends \$1,000,000 to start, and can sell to 100,000 customers in an area, their bill is \$10 (plus the ongoing costs of the cable company, profit, and so on). If two companies compete and each win half of the customers, they have each still spent \$1,000,000, but now only sell to 50,000 customers. Those customers pay an additional \$10, which might make them less likely to buy cable.

38. VISCUSI ET AL., *supra* note 35, at 535.

39. *Id.*

40. See generally Dibadj, *supra* note 33; *infra* notes 50-51 and accompanying text.

41. See *supra* note 32 (explaining the concept of equity).

42. See *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 361 (D.C. Cir. 1963).

43. *Id.*

44. *Id.* at 362-63. The court upheld the decision despite the fact that the FCC's duties include considering both equity *and* efficiency concerns: "Relevant, too, is the congressional mandate that the Commission 'make such distribution of licenses, frequencies, ... and of power

pure efficiency, which reigns in most laissez-faire markets, would dictate that the government allow this arguably superior competitor to thrive because it could provide citizens with a better product than their local provider.⁴⁵

Economic theory most often presumes that lower prices make for the best civic good.⁴⁶ The FCC's rule, and the *Carter Mountain* court's imprimatur, indicates a continuing desire by social planners to protect decisions that may actually cost consumers more money or provide worse service in order to keep a local voice in the community.⁴⁷ Regulators have long taken the view that cable's provision of the local voice vindicates a consumer right. Cable came into existence because not all communities received adequate broadcast signal⁴⁸—the towns in *Carter Mountain* were Wyoming mountain towns that otherwise did not have strong television signals.⁴⁹ In exchange for cable companies incurring the substantial up-front fixed costs for laying the infrastructure necessary to provide cable service,⁵⁰ local government franchising authorities that dictate which firms are allowed to broadcast in a certain area granted them exclusive access to municipal rights of way.⁵¹

among the several States and communities as to provide a *fair, efficient, and equitable distribution of ... service* to each of the same.” *Id.* (emphasis added). This same impulse guides the “must-carry” provisions imposed by the FCC on local providers, which mandates that cable companies carry the local broadcast stations and their news media, even if they could execute a cheaper arrangement with a non-local news station. Interview with Brian Hendricks, Head of Tech. Policy & Gov’t Relations N. Am., Nokia, in Williamsburg, Va. (May 5, 2014).

45. Economic equity, on the other hand, considers what each of the buyers and sellers gets—in this case, the local voice is “worth paying for,” even though each party gets a lower total surplus because they could have obtained a product for cheaper, and, as discussed in *supra* note 31, is what makes buyers “happiest” in economic theory. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 38 (16th ed. 1998) (discussing the macroeconomic objectives of “promoting efficiency, achieving a fairer distribution of income, and pursuing macroeconomic objectives of economic growth and stability”).

46. *Efficiency*, ECON. ONLINE, http://www.economicsonline.co.uk/Business_economics/Efficiency.html [<http://perma.cc/WY4K-C3KE>] (last visited Sept. 27, 2015) (defining alternative efficiency).

47. Interview with John Michael Parman, Assistant Professor, Dep’t of Econ., College of William & Mary, in Williamsburg, Va. (Mar. 17, 2014); see also DANA ROYAL ULLOTH, *COMMUNICATION TECHNOLOGY: A SURVEY* 82-85 (1992).

48. *Evolution of Cable Television*, FCC ENCYCLOPEDIA, <http://www.fcc.gov/encyclopedia/evolution-cable-television> [<http://perma.cc/ZF3F-GQEV>] (last updated Mar. 14, 2012).

49. *Carter Mountain*, 321 F.2d at 361.

50. See VISCUSI ET AL., *supra* note 35, at 535.

51. *Id.*

These barriers persist today, partially because of franchising protection.⁵² Cable companies often enjoy solicitous relationships with their local franchising authorities.⁵³ In addition, the cost of “overbuilding”⁵⁴ on existing cable lines effectively stymies competitors and raises their marginal cost for adding customers, because additional customers usually only come from the existing customer base.⁵⁵ As a result, 98 percent of municipalities are served by only one cable provider.⁵⁶ The fact that cable is considered a natural monopoly, and the policy desire embodied in *Carter Mountain* to reward franchises, combine to keep competition low.

B. History of Cable Regulation and Deregulation

1. Cable Regulation

Though cable may have started as a small market characterized by a loose federation of local franchises, it is now quite different. Most of these small local companies have been absorbed over the years by larger “multi-system operators” (MSOs), such as Time Warner Cable, Charter, and Comcast, which may operate hundreds of “mini-franchises” in these localities.⁵⁷ This allows the cable compa

52. *Evolution of Cable Television*, *supra* note 48.

53. Thomas W. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 U. PA. L. REV. 1335, 1358-59 (1986).

54. Overbuilding is the practice of a separate cable company laying down lines using the same community rights of way. See generally Kevin Caves & Hal Singer, *Life After Comcast: The Economist's Obligation to Decompose Damages Across Theories of Harm*, 28 ANTITRUST 90 (2014) (discussing barriers to entry and the cost of overbuilding).

55. The primary deterrent for overbuilding is the fact that companies must absorb this cost before they are guaranteed any customers, and there are few “new” customers in a “mature” industry like cable. The cost to *both* cable companies in an area will be higher because they will have smaller customer bases than the single cable company would. See Dorothy Pomerantz, *If You Overbuild It*, FORBES (Apr. 16, 2001, 12:00 AM), <http://www.forbes.com/forbes/2001/0416/144.html> [<http://perma.cc/VGL2-Y5QV>]. Despite these challenges, some evidence suggests that not only are some companies attempting to overbuild and enter the cable arena, but also that large cable companies are trying to keep them out. See Brodsky, *supra* note 4 (explaining that Comcast and Time Warner Cable have spent money fighting overbuilders and creating an artificially singular provision of service).

56. See Eli Noam & Robert N. Freeman, *The Media Monopoly and Other Myths*, 29 TELEVISION Q. 18 (1997), http://www.citi.columbia.edu/elinoam/articles/media_monopoly.htm [<http://perma.cc/H2J8-5FH6>]; see also Dibadj, *supra* note 33, at 265.

57. Stuart Smith, *Introduction to the Cable MSO Industry*, MINTEK (July 21, 2010), <http://www.mintek.com/blog/cpe-management/introduction-cable-mso-industry/> [<http://perma.cc/>

nies to price their packages in each locality according to what consumers are willing to pay, while giving them substantial national market power because they can control their corporate policies at a national level.⁵⁸ This creates an inherent problem, as federal regulations were established to protect the monopolies of individual cable providers, which were usually small. These cable providers have been snapped up by the national firms, which have accumulated national largesse as a result. If left unchecked by the current legal scheme, this could allow cost increases for all customers whose bills do not come from the largest competitor in the market, particularly if that largest competitor has behind it the economic power created by one of these new mergers.⁵⁹

Cable regulation historically has not been particularly robust, struggling with issues of fit in a dynamic market.⁶⁰ The only regulation has concerned the price of a basic cable package,⁶¹ demonstrating that the FCC's primary focus is consumer access to basic channels and broadcast networks, and the presence of a "local voice" in the community.⁶² The most impactful regulations are those enforced by the DOJ Antitrust Division and the FTC Bureau of Competition. These regulators administer the federal antitrust

XHU5-5PSW].

58. See *Company Overview*, COMCAST, <http://corporate.comcast.com/news-information/company-overview> [<http://perma.cc/F59X-6VGE>] (last visited Sept. 27, 2015) (describing Comcast as "a global media and technology company," despite the fact that its biggest business, Comcast Cable, delivers "to residential customers").

59. See *infra* Part II.C.2 (explaining that Comcast could have forced concessions from programming companies as a result of its greater power, and that the programming companies in turn would use their power against smaller cable companies to charge more than they had before).

60. See generally Dibadj, *supra* note 33, at 250; Hazlett, *supra* note 16.

61. *Regulation of Cable TV Rates*, FCC (Dec. 30, 2014), <http://www.fcc.gov/guides/regulation-cable-tv-rates> [<http://perma.cc/88NV-4FTY>].

62. This is not necessarily a bad thing. During periods when cable prices were unregulated, they rose, but so did the provision of better channels like HBO and ESPN, and the actual price per channel of a cable package went down. During periods of regulation, the price remained the same. Not only did cable development stagnate during these periods, but the most desirable offerings—such as HBO—were moved off of the basic cable package and into premium packages. This means that now, the broadcast networks and local channels are some of the *only* offerings available to consumers under a regulated basic package, but the amount of money and time Americans spend on cable suggests that they receive substantial value from these packages—they *want* to pay for HBO. See generally *Evolution of Cable Television*, *supra* note 48.

statutes,⁶³ which originally rose during the era of Standard Oil and railroad cartels in order to keep companies from creating a monopoly that restrained trade.⁶⁴ In furtherance of these laws, regulators not only watch for agreements or conduct between two or more companies that restrain trade,⁶⁵ but also review mergers to assess whether they will enhance or restrain competition.⁶⁶

2. Antitrust Oversight of Cable

Antitrust laws provide the most robust means for regulating a cable company's size, but, as is the case with all federal merger approvals, the way the merging companies and regulators define the relevant market determines whether regulators will allow the companies to merge. When companies plan to merge, they usually must file paperwork with federal authorities under the Hart-Scott-Rodino Act, which amended the Clayton Antitrust Act.⁶⁷ The DOJ or FTC then use the Herfindahl-Hirschman Index (HHI) to accurately measure the merger's effect on market concentration. The HHI provides a number between 0 and 10,000 for market concentration, with higher numbers demonstrating greater market power in fewer hands.⁶⁸ Regulators have termed markets between 0 and 1500 points "not concentrated," markets between 1500 and 2500 "moder-

63. The three primary statutes are the: (1) Sherman Antitrust Act, Pub. L. No. 107-203, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2012)), which prohibited businesses from engaging in anti-competitive conduct; (2) Clayton Antitrust Act, Pub. L. No. 63-323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (2012) and 29 U.S.C. §§ 52-53 (2012)), which first established provisions for the government to block mergers; and (3) Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (2012)), which established the FTC.

64. See generally *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 52 (1911) (introducing the "three evils" of monopolies the public cried out against at English common law: higher prices, reduced output, and reduced quality).

65. 15 U.S.C. §§ 1-2 (2012).

66. *Id.* § 18.

67. *Id.* § 18a.

68. Market concentration "is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers." *Herfindahl-Hirschman Index*, DOJ: ANTITRUST DIVISION, <http://www.justice.gov/atr/public/guidelines/hhi.html> [<http://perma.cc/3B5Q-9WZ8>] (last visited Sept. 27, 2015). For example, for a market in which there are four firms with market shares of 30 percent, 30 percent, 20 percent, and 20 percent, respectively, the HHI would be calculated as follows: $30^2 + 30^2 + 20^2 + 20^2 = 900 + 900 + 400 + 400 = 2600$. *Id.* Thus, the HHI would be 2600, making this a highly concentrated market. *Id.*

ately concentrated,” and markets over 2500 points “highly concentrated.”⁶⁹ In determining whether a merger is concerning enough to give rise to suit, the DOJ and FTC consider both (1) whether the market is already highly concentrated and (2) how much the merger would increase market concentration.⁷⁰ For instance, an increase of more than 200 points in a highly concentrated market is “presumed to be likely to enhance market power.”⁷¹ In less concentrated markets, regulators look for a greater increase in market concentration before they are concerned.⁷²

Federal policy does not inhibit firms from combining, except when the new firm could unreasonably restrain trade.⁷³ For instance, regulators famously blocked AT&T’s attempted purchase of T-Mobile out of concern that the merger would take away a valuable competitor in an already concentrated market and essentially allow a “duopoly”⁷⁴ between AT&T and Verizon.⁷⁵ However, regulators often approve mergers with certain requirements, such as divestiture of some of the merged company’s assets. When American Airlines merged with U.S. Airways, for example, it divested itself of some of its gates and flights at Ronald Reagan Washington National Airport because the combined company would have had an inordinate presence compared to other airlines.⁷⁶

69. *Id.*

70. HORIZONTAL MERGER GUIDELINES, *supra* note 11, at 7.

71. *Id.* at 19.

72. *Id.*

73. See generally *id.* (discussing the lack of concern for mergers in less concentrated markets).

74. Just as in a monopoly where one company controls most of the market, a duopoly exists where two companies effectively control the market. See George J. Stigler, *Notes on the Theory of Duopoly*, 48 J. POL. ECON. 521, 521 (1940).

75. See Michael J. de la Merced, *AT&T Ends \$39 Billion Bid for T-Mobile*, N.Y. TIMES (Dec. 19, 2011, 4:44 PM), <http://dealbook.nytimes.com/2011/12/19/att-withdraws-39-bid-for-t-mobile/> [<http://perma.cc/2V2A-EHCJ>] (explaining that AT&T and Verizon Wireless would have had almost three-quarters of the cellular market between them if AT&T had absorbed T-Mobile).

76. Ashley Halsey III, *American Airlines Ends Direct Service to 17 Cities from National Airport Under Merger Deal*, WASH. POST (Jan. 15, 2014), http://www.washingtonpost.com/local/trafficandcommuting/american-airlines-ends-direct-service-to-17-cities-from-national-airport-under-merger-deal/2014/01/15/345610f4-7df4-11e3-9556-4a4bf7bcbd84_story.html [<http://perma.cc/WJJ2-G9UM>].

The whole battle of a merger is often won and lost over the definition of the market itself.⁷⁷ Companies seeking a merger generally argue that they are members of a larger market in order to increase the number of players, decrease the market concentration, and win when the DOJ performs its HHI calculations.⁷⁸ Regulators for the DOJ or FTC who want to block the merger will define the market as narrowly as possible, amplifying the effect of the proposed merger.⁷⁹ The DOJ Antitrust Division uses the HHI to measure cable market-to-market,⁸⁰ because each franchise exists in its own mini-market with its own natural monopoly.⁸¹ Cable companies are frequently the only provider in their respective market.⁸² For instance, when advocating for the Comcast-Time Warner Cable merger, Comcast Vice President David Cohen correctly stated that “Time Warner and Comcast do not compete in any relevant market,” such that any consumer who paid Time Warner Cable would simply just start paying Comcast post-merger, since Comcast was *never a player in their market to begin with*.⁸³ To put it succinctly, where there was never substantial competition to begin with, a merger between two cable companies cannot make such competition worse, which the-

77. See THE ANTITRUST REVOLUTION, *supra* note 12, at 26-29; see also Baker & Bresnahan, *supra* note 14, at 7.

78. See Jon Brodtkin, *Comcast: Without Time Warner, We Can't Compete Against Google, Netflix*, ARS TECHNICA (Apr. 8, 2014, 1:16 PM), <http://arstechnica.com/tech-policy/2014/04/comcast-without-time-warner-cable-we-cant-compete-against-google-netflix/> [<http://perma.cc/T5FE-VJD9>] (noting Comcast's statement to the FCC that, in addition to competing against other cable companies, its relevant market includes Google, Netflix, Verizon, Apple, and Sony).

79. Federal regulators have not yet indicated how they would define the market, but another example would be the airline industry: regulators typically do not include train and bus travel as adequate “substitutes” for airline travel, which would otherwise define the market for national travel more broadly, making the airline merger less impactful. See, e.g., Complaint at 10, *United States v. US Airways*, 38 F. Supp. 3d 69 (D.D.C. 2014) (No. 13-cv-1236).

80. Kevin Roose, *This Math Formula Shows Why the Comcast-Time Warner Cable Deal Should Be Blocked*, N.Y. MAG. (Feb. 13, 2014, 9:59 AM), <http://nymag.com/daily/intelligencer/2014/02/why-comcasttime-warner-cable-should-be-blocked.html> [<http://perma.cc/8AN7-AX7X>]. Roose notes that the telco industry has also argued that it should be considered market-to-market. *Id.*

81. See *supra* Part I.A.

82. Dibadj, *supra* note 33; see also *Comcast and Time Warner Cable in Top 50 TV Markets*, *supra* note 17; *supra* note 18 and accompanying text.

83. *Why the Feds Won't Be Able to Block a Comcast-Time Warner Merger*, *supra* note 15.

oretically quashes any possible checks inherent in antitrust doctrine.

C. Comcast-Time Warner Cable and Future Mergers

The aborted merger between Comcast and Time Warner Cable would have allowed the single largest cable provider in the U.S. (23 million customers) to merge with the second largest provider (11 million customers).⁸⁴ Comcast had agreed to divest itself of 3 million customers as part of the arrangement, meaning the merged company would have had just over 30 million subscribers.⁸⁵ This would have given Comcast control of one-third of all U.S. cable subscribers, while the second-largest, Cox Communications, would have had just 5 percent of subscribers.⁸⁶ A Comcast-Time Warner Cable company would have dwarfed all others, serving twenty of the top twenty-five markets nationwide.⁸⁷

The aborted merger should have set off major alarm bells for regulators.⁸⁸ Rough estimates demonstrate that the merger would have increased market concentration by over 500 HHI points, up to an HHI score of 2454—almost to the DOJ’s 2500 threshold delineat-

84. See Leichtman Research Grp., *supra* note 7; see also Brian Stelter, *Comcast Buys Time Warner Cable for \$45 Billion*, CNN MONEY (Feb. 13, 2014, 3:09 PM), <http://money.cnn.com/2014/02/13/technology/comcast-time-warner-cable-deal/> [<http://perma.cc/HR5E-9TY5>].

85. Stelter, *supra* note 84. This arrangement was designed to appease regulators, but there is little to bind Comcast long-term, and it is unlikely, given their past history of concessions, that they will voluntarily bind themselves long-term. See *infra* notes 95-98 and accompanying text.

86. George Winslow, *The Top 20 Multichannel Providers*, MULTICHANNEL (Aug. 6, 2012, 12:01 AM), <http://www.multichannel.com/news/cable-operators/top-20-multichannel-providers/326351> [<http://perma.cc/2TE4-36SP>] (citing statistics compiled by the consultancy SNL Kagan).

87. *Turn It Off: American Regulators Should Block Comcast’s Proposed Deal with Time Warner Cable*, ECONOMIST (Mar. 15, 2014), <http://www.economist.com/news/leaders/21598997-american-regulators-should-block-comcasts-proposed-deal-time-warner-cable-turn-it> [<http://perma.cc/6DLN-C9QR>].

88. Importantly, the DOJ never actually had to reveal its exact position on the merger, as it was the FCC’s proposed order for a hearing that would have delayed the merger far enough into the future that it became unpalatable for Comcast and Time Warner Cable to continue. See Roger Yu & Mike Snider, *How Comcast, Time Warner Cable Deal Unraveled*, USATODAY (Apr. 25, 2015, 12:27 PM), <http://www.usatoday.com/story/money/2015/04/24/how-comcast-deal-to-buy-time-warner-cable-fell-apart/26313471/> [<http://perma.cc/9YR6-L2MN>] (quoting antitrust attorney Amanda Wait as stating that “the DoJ got the FCC to do the dirty work here.... The DoJ never had to show their hand”).

ing highly concentrated industries.⁸⁹ By all calculations, such an increase should essentially have mandated that the government block any such merger—if they measured the merger nationally. Although the merger was called off and the two largest competitors did not merge, Charter Communications quickly stepped into the breach to make its own bid for Time Warner Cable and another provider, which would make the post-merger Charter a close second in size to Comcast nationwide.⁹⁰ This merger activity seems poised to continue, so regulators will still have to confront the state of antitrust doctrine as it applies to cable mergers, which is the focus of the next Part.

II. THE FAILURE OF CURRENT GOVERNMENT MEASURES

A. *In Search of a Limiting Principle*

The fundamental problem with cable growth is that, without a measure that tracks the company's national footprint, and concomitantly, without a legal mechanism to address this growth, cable company growth has no limiting principle.⁹¹ If all that matters is that a company does not create less competition in any one locality, a single large cable company could theoretically expand to merge with every cable provider that serves customers in an area in which it does not. A ruling from a D.C. Circuit case interpreting rulemaking by the FCC nominally limits Comcast to a 60 percent market share,⁹² but even a company half this size has the potential to dominate the cable industry.⁹³

National cable companies now control most local monopolies and operate these franchises individually only with regards to pricing for consumers: each cable company acts mostly as a national

89. Tim Fernholz, *Why the Time Warner-Comcast Merger Isn't Going to Happen—At Least the Way It Looks Today*, QUARTZ (Feb. 13, 2014), <http://qz.com/177162/why-the-time-warner-comcast-merger-isnt-going-to-happen-at-least-the-way-it-looks-today/> [http://perma.cc/4BC2-TGKG].

90. See *supra* note 29 and accompanying text.

91. Stucke & Grunes, *supra* note 21, at 2.

92. See *Comcast Corp. v. FCC*, 579 F.3d 1, 4 (D.C. Cir. 2009).

93. See *infra* Part III.A. Under federal antitrust laws, as long as a merger does not “unreasonably restrain trade,” there is no clear limit to how much of the national market a cable company can have.

company, not a collection of local ones.⁹⁴ Moreover, there are few contractual remedies to limit these companies' growth. In presenting its merger with Time Warner Cable to the DOJ, Comcast agreed to divest itself of 3 million of its own customers to other cable companies,⁹⁵ presumably to make the merger more palatable to regulators.⁹⁶ This arrangement mirrored Comcast's decision when acquiring NBC Universal in 2011 to agree to uphold the FCC's then-effective net neutrality rules until 2017.⁹⁷ This self-imposed limit of 30 million customers would probably have expired at some point after the merger was approved, as it is unlikely that Comcast would have permanently limited itself to 30 million customers. After all, a corporation could not guarantee continued growth and returns to its stockholders if it limited itself from growing permanently.⁹⁸ Therefore, not only does a limiting principle not apply to companies like Charter Communications, but it would not have applied even to Comcast after a certain point. Regulators are unlikely to be able to contract out of this issue, which would primarily impact the other side of the market: programming companies.

94. See *Company Overview*, *supra* note 58.

95. Ryan Lawler, *Comcast and Time Warner Cable to Divest 3.9 Million Subscribers Through Charter Deal*, TECHCRUNCH (Apr. 28, 2014), <http://techcrunch.com/2014/04/28/comcast-twc-charter/> [<http://perma.cc/2W5M-G9RD>]. Time Warner would give Charter 1.4 million customers, Time Warner and Charter would "trade" about 1.6 million customers to increase Charter's overall geographic reach, and Comcast would spin off 2.5 million customers into a new company, two-thirds of which Comcast would own and one-third of which Charter would own. *Id.*

96. See *Comcast Offers to Divest Customers to Win TWC Approval*, CNBC (Apr. 28, 2014, 10:35 AM), <http://www.cnbc.com/2014/04/28/comcast-strikes-deals-to-divest-39-million-subscribers.html> [<http://perma.cc/DV3R-2KSV>].

97. See Emily Siner, *How the Big Cable Deal Could Actually Boost Open-Internet Rules*, NPR: ALL TECH CONSIDERED (Feb. 13, 2014, 3:24 PM), <http://www.npr.org/blogs/alltechconsidered/2014/02/13/276453747/how-the-big-cable-deal-could-actually-boost-open-internet-rules> [<http://perma.cc/X3H4-UEWM>]. Courts have since struck down these rules. See *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014). Because Comcast contracted with the FCC to abide by the rules, however, they remain in effect with regards to Comcast, and any Time Warner Cable customers it picks up in the merger through 2017. See Siner, *supra*.

98. Comcast ultimately is beholden to its shareholders and would be leaving profits on the table by permanently limiting its growth. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (establishing the principle that, generally, a company's duty is to maximize shareholder value).

B. Tales from the Other Side

Many early responders focused on the costs the Comcast-Time Warner merger would extract from consumers,⁹⁹ but no cable company would practically be able to raise the price on its customers without risking losing those customers.¹⁰⁰ The true cost of a merger between such large cable companies would probably be to programming companies, the other side of the cable market. Cable is a classic example of the two-sided market, meaning that cable companies both transact with programming companies (nationally) and deliver their product to consumers (locally).¹⁰¹ If there is no check on the cable companies, they will gain *national* power and a much stronger bargaining position with programming companies. If a cable company like Comcast had been allowed to merge with Time Warner Cable, it would have represented a full one-third of all U.S. cable customers—and the *most lucrative* one-third of those customers, given that it would have controlled twenty of the top twenty-five

99. See, e.g., *Join the Fight to Stop the Comcast-Time Warner Cable Merger*, FREE PRESS, <http://www.freepress.net/resource/105883/join-fight-stop-comcast-time-warner-cable-merger> [<http://perma.cc/JUG3-S8MZ>] (last visited Sept. 27, 2015).

100. See Matt Richtel & Brian Stelter, *In the Living Room, Hooked on Pay TV*, N.Y. TIMES (Aug. 23, 2010), <http://www.nytimes.com/2010/08/23/business/media/23couch.html> [<http://perma.cc/95TH-AFG9>] (quoting Comcast CEO Brian L. Roberts describing cable-only customers as “very price-sensitive,” meaning they react strongly to changes in price). Much has been made of the increase in cable “cord cutters,” the industry colloquialism for those who, while not actually cutting their cable cords, forego cable and instead rely primarily on Internet streaming video services for their entertainment. See, e.g., Timothy Stenovec, *Yes, Netflix and Hulu Are Starting to Kill Cable*, HUFFINGTON POST (Apr. 17, 2014, 3:44 PM), http://www.huffingtonpost.com/2014/04/17/netflix-cable_n_5168725.html [<http://perma.cc/226B-BFXV>]. This is somewhat misleading, as the true cost may be borne in younger customers who become accustomed to living without cable, choosing “over the top” video services like Apple TV or Google Chromecast, rather than current cable customers choosing to “cut the cord.” See Joan E. Solsman, *Cord-Cutter Wannabes Are Still a Small Group, but Growing*, CNET (Sept. 10, 2014, 9:00 PM), <http://www.cnet.com/news/cord-cutter-wannabes-are-still-a-small-group-but-growing/> [<http://perma.cc/4B3M-EC6V>]. This is in part because of the careful dance cable companies have undertaken to make sure that they do not raise prices on consumers past their willingness to pay, and why customers enter their zip code in order to get the price of a cable package that “their” market will bear. The chance, therefore, that an enlarged company is suddenly able to charge these customers more, without losing their business, remains unlikely. Additionally, most cord-cutting customers will continue to need internet service, which most often comes from their cable provider.

101. See Mark Armstrong, *Two-Sided Markets: Economic Theory and Policy Implications*, in RECENT DEVELOPMENTS IN ANTITRUST: THEORY AND EVIDENCE 39 (Jay Pil Choi ed., 2007).

markets.¹⁰² Cable companies of this size would have substantial leverage over Disney, for instance, which owns ESPN. The merged Comcast could have decided it wanted to pay less to purchase ESPN¹⁰³ for its customers in New York, Chicago, and Los Angeles, and would have had a fairly good chance of extracting money from ESPN by threatening to cut off customers in these markets. As will be explained herein, the negotiations then become a matter of which company can outlast the other.¹⁰⁴

Laissez-faire economic markets only work when each player is a price taker.¹⁰⁵ When there are many players in the market, each of whom is fairly similar to one another, they are forced to *take* the prices set by the market, rather than set the prices themselves.¹⁰⁶ If, on the other hand, a company is able to affirmatively set its own prices, regardless of the actions of consumers or their competitors, they are beholden to no one, and the theory of perfect competition breaks down.¹⁰⁷ A large enough cable company could have the power to dictate pricing terms to programming companies such as Viacom, the Walt Disney Company, News Corp., Time Warner, and CBS.¹⁰⁸

102. *Turn It Off*, *supra* note 87.

103. See Ross & Maglio, *supra* note 23 (noting ESPN's high cost per subscriber).

104. The fact that Comcast depends on subscribers for its income, rather than advertisers, as its programming counterparts do, would give it substantial leverage allowing it to weather the storm of public opinion much longer. See *infra* notes 110-14 and accompanying text.

105. *Perfect Competition*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/perfectcompetition.asp> [<http://perma.cc/PM73-SKYZ>] (last visited Sept. 27, 2015) (explaining the concept of price takers). In the economic ideal of perfect competition, all sellers in the market should be "price takers," meaning they all buy and sell products at the same equilibrium price. When there are 1000 firms that all sell the same widget and buy the same parts to make it, no one can truly charge more than the other 999 because customers will buy from any number of them—the firms all "take" the same price at which they buy and sell. When one of these 1000 sellers is more powerful than the others and can dictate what this equilibrium price is, raising it without customers being able to buy from the other 999, there are serious theoretical and real-world economic problems. See WAYNE C. CURTIS, MICROECONOMIC CONCEPTS FOR ATTORNEYS 9-10 (1984).

106. CURTIS, *supra* note 105, at 9-10.

107. *Marginal Revenue Under Single-Pricing*, LIVING ECON., <http://livingeconomics.org/article.asp?docId=319> [<http://perma.cc/Z46M-89V5>] (last visited Sept. 27, 2015).

108. Viacom owns over 160 cable channels including MTV, VH1, Nickelodeon, Comedy Central, and Spike TV. *Who Owns the Media?*, FREE PRESS, <http://www.freepress.net/ownership/chart> [<http://perma.cc/2HMT-9KSH>] (last visited Sept. 27, 2015). Walt Disney Company owns ESPN, Disney, ABC Family, and minority stakes in A&E, Lifetime, and the History Channel. *Id.* News Corp. owns FOX, Fox News, and twenty-five other cable channels. *Id.* Holding power over these entities is the ball game for cable.

The company could, for instance, decide that it no longer liked the idea of paying \$5.54 per customer to ESPN,¹⁰⁹ one of the highest cable rates. The cable company would thus have the power to shut out sports fans.

Comcast-Time Warner Cable would have represented over a third of the nationwide customer base, and a merger between Charter and Time Warner Cable would give the merged company close to a quarter of customers nationwide—if negotiations with programming companies break in a way that the cable company does not find favorable, it could simply black out that station to its customers. Even if the cable company were to *lose* in the court of public opinion and take the lion's share of the blame for the blackout, it still depends primarily on cable subscribers for its revenues, rather than advertisers.¹¹⁰ If the top markets cannot watch ESPN, for example, its advertisers will walk away more quickly than the cable company's customers.¹¹¹ Cable has spent a lot of time and money to lock consumers into its ecosystem: consumers have a difficult time switching proprietary cable boxes, incur costs in switching to satellite, and, because of the buy-in they have already made with the company, are simply less likely to walk away from their cable company over what they perceive as a temporary blackout.¹¹² If a cable company controls *some* geographic areas, but not all, and if programming companies know they are dealing with several different

109. Ross & Maglio, *supra* note 23.

110. Tasneem Chippy & Christopher M. Snyder, *The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Television Industry*, 81 REV. ECON. & STAT. 326, 333 (1999) (calculating the profit functions of programming companies based almost entirely on their income from advertisers, and noting that, although other revenue represents a growing portion of their revenue, "advertising revenue continues to be the largest portion of supplier revenue").

111. Hazlett, *supra* note 16, at 65 n.222 (defining elasticity of demand as the percentage change in quantity demanded for a percentage change in price). Although cable customers are somewhat demand-elastic, meaning they respond to price changes, they are not as sensitive as advertisers. See Steven C. Salop et al., *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations* 31 n.60 (Time Warner, Working Paper, 2010), http://97.74.209.146/downloads/broadcaster_brinkmanship.pdf [<http://perma.cc/YDH3-ZU9Y>] (discussing how advertisers will depart from cable much more quickly than customers).

112. Andrew S. Wise & Kiran Duwadi, *Competition Between Cable Television and Direct Broadcast Satellite—It's More Complicated than You Think* 1 (FCC Media Bureau Staff, Working Paper No. 2005-1, 2005), https://apps.fcc.gov/edocs_public/attachmatch/DOC-255869A1.pdf [<http://perma.cc/DYK3-EDTP>].

MSOs with about the same power nationwide, that begins to look like a fair market.¹¹³ But there is little chance programming companies can afford to face off against the largesse of a sufficiently big cable company without harming their profits.

It seems obvious, then, that the typical response from most programming companies would be to merge themselves.¹¹⁴ If Comcast-Time Warner Cable had wanted to use its 30 million subscribers as its ammunition, a Disney Company merged with Viacom could threaten to cut families off from ESPN, VH1, TLC, and Nickelodeon all at once. If the whole family is missing their favorite channels, they will be quicker to call DirecTV, and this will look more like a competitive market. Herein lies the other side of the coin that result's from cable's lack of a limiting principle.

C. Programmers Are Limited by Antitrust Law

1. Legal Limitations

When faced with this scenario, most programming companies are likely to consider mergers to increase their own size, and, consequently, their nationwide negotiating power. It is unclear that they may do so, but it is not for lack of trying. Rupert Murdoch announced that his 21st Century Fox proposed to acquire Time Warner, Inc. over the summer of 2014.¹¹⁵ Although Time Warner ultimately rejected Murdoch's advances, critics were nearly unanimous in their position that the merger would have created antitrust issues for regulators by concentrating too much media in the hands of one company. This is because programming companies are measured nationally, and if they were measured locally, Time Warner's products compete *in every local market* with those of 21st Century Fox—most cable packages actually group CNN and Fox News near

113. See *supra* notes 101-04 and accompanying text.

114. THE ANTITRUST REVOLUTION, *supra* note 12, at 51.

115. Time Warner, Inc. is a separate entity from Time Warner Cable. Time Warner, Inc. owns Warner Brothers Television, the CW Network, TBS, TNT, Cartoon Network, and HBO. See *Who Owns the Media?*, *supra* note 108. All future references to "Time Warner" concern Time Warner, Inc., while the company involved in cable acquisition continues to be referred to as "Time Warner Cable."

one another.¹¹⁶ The combination of the two companies would have given 21st Century Fox control over a substantial portion of the pay cable packages, and thus they would probably have too much leverage over cable providers.¹¹⁷ This is not to suggest that regulators counter cable company mergers by allowing programmers to bulk up as well; the regulations currently in place to limit this growth are there for a good reason and should remain in place. On the contrary, cable companies should be held to the same standard, not handed a loophole by virtue of having separate franchises in each market.

Given that there is an increasingly small contingent of major television and movie studios,¹¹⁸ the market is already what regulators would call “highly concentrated.”¹¹⁹ Since it is so concentrated, regulators are much more likely to scrutinize a programming merger and sue to block it because it harms competition in the national market. Current programmers would thus be locked into their current sizes, while cable companies could be allowed virtually unlimited growth nationwide.

The real fear, however, stems from the belief that the market operates best when these two sides compete on a fair playing field *against one another* to provide the lowest cost and the highest level of service for their customers. This is the accidental enshrinement of unfairness mentioned in the Introduction. Federal antitrust law tends to favor cable companies because the rights of way awarded to cable companies—which created a natural monopoly—were intended for small providers, not national conglomerates. This has granted these cable companies exceptional power over the other

116. See, e.g., Ryan Chittum, *Murdoch Moves on Time Warner*, COLUM. JOURNALISM REV. (July 17, 2014, 4:04 PM), http://www.cjr.org/the_audit/murdoch_and_time_warner.php [<http://perma.cc/3HXV-72CC>] (noting in its secondary headline that “[a]s pipes companies merge, another round of media consolidation [begins]”); Michael Liedtke, *21st Century Fox Abandons Pursuit of Time Warner*, ASSOCIATED PRESS (Aug. 5, 2014, 10:26 PM), <http://bigstory.ap.org/article/21st-century-fox-abandons-pursuit-time-warner> [<http://perma.cc/88D6-M6JL>]; Andrew Ross Sorkin & Michael J. de la Merced, *Murdoch Puts Time Warner on His Wish List*, N.Y. TIMES (July 16, 2014, 7:02 AM), http://dealbook.nytimes.com/2014/07/16/rupert-murdoch-said-to-have-made-offer-for-time-warner/?_r=0 [<http://perma.cc/TV5B-8JPA>] (noting that Murdoch did plan to spin off CNN, a Time Warner-owned station, to another company in order to avoid antitrust concerns, particularly because of the influence of his own Fox News).

117. Stucke & Grunes, *supra* note 21, at 4.

118. *Who Owns the Media?*, *supra* note 108.

119. See *supra* Part I.B.2.

market players and programmers, who, by these same laws, cannot combine to become much larger than they already are.

2. *Two Sets of Losers, Two Doctrines Lost*

Why should consumers and regulators fear this result? After all, the very definition of a natural monopoly means that it may in fact be economically more efficient for everyone to get their cable from one enormous company.¹²⁰ However, even if consumers do not feel the full brunt of the effects for some time, the approval of the merger of large cable companies could have far-ranging consequences for antitrust and telecommunications (telco) mergers. Economic regulatory theory recognizes two principal and competing goals: efficiency and equity.¹²¹ Regulators are constantly trying to ensure that markets run as efficiently as possible. This means they want to reach “equilibrium,” the point at which the cost to the producer of producing each additional unit (“marginal cost”) is *equal* to the benefit of that unit to the consumer (“marginal benefit”), such that everyone who values an item at or above the marginal cost will buy the product, and others will not. Everyone is happy, either buying or not buying based on their prerogative.¹²²

At the same time, other regulators would structure for maximum equity.¹²³ The degree to which a consumer’s marginal benefit exceeds what they paid for an item is called their “surplus.” Producers also have surplus, the degree to which they can sell a product for more than it costs to produce. There is a “total surplus” calculating the surplus across all consumers and producers.¹²⁴ Equity is the distribution of this surplus—who benefits more and who benefits less when prices are lower than value, or prices are higher than what it costs the producer to sell it.¹²⁵ Cable regulations allow a sufficiently large company to ignore both of these prerogatives, and consumers and programmers would pay for it.

120. See *supra* Part I.A.

121. See Kenneth G. Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1191-92 (1977); see also *supra* Part I.A.

122. SAUL ESTRIN ET AL., MICROECONOMICS 3-5 (5th ed. 2008).

123. See SAMUELSON & NORDHAUS, *supra* note 45, at 37-38.

124. See ROGER A. ARNOLD, ECONOMICS 88 (12th ed. 2014).

125. *Id.* at 74-76.

A cable merger thus has the potential to create two sets of losers: other cable industry competitors would lose because programming companies, as explained below, are not going to absorb the costs the larger company extracts from them, so they are going to pass them along to smaller, weaker cable companies. Programming companies are also going to lose because not all market players will be price takers.¹²⁶ From an equity standpoint, one cable company could control 20 million subscribers, controlling the way that almost a quarter of the country accesses cable.¹²⁷ If a merged company is able to force lower prices on programmers, programmers will pass this cost on to all smaller cable providers, who will in turn pass those costs on to their consumers. Any customer not within the service area of the largest competitor will likely pay more in the long term for their cable, by virtue of their provider being a fraction of the size of the biggest players. Furthermore, the largest cable companies are not likely to pass their own gains on to their customers¹²⁸—their prices will remain the same, with the company pocketing the money it receives as profit.¹²⁹ Such a merger thus also threatens efficiency. Current laws do not seem to limit the size of cable providers at all, but national content providers are limited by traditional antitrust doctrine, keeping them from competing with cable companies that may, by law, grow unchecked. This does not ensure that all firms in the market are price takers, which is economists' goal for antitrust law.¹³⁰

126. See *supra* notes 105-07 and accompanying text.

127. *Comcast and Time Warner Cable Transaction Fact Sheet*, *supra* note 1.

128. Spencer Woodman, *Exclusive: Politicians Are Supporting Comcast's TWC Merger with Letters Ghostwritten by Comcast*, VERGE (Jan. 26, 2015, 11:46 AM), <http://www.theverge.com/2015/1/26/7878239/comcast-twc-fcc-merger-letters-politicians-ghostwritten> [<http://perma.cc/3Y57-7WS9>] (quoting Columbia University Law Professor Tim Wu that, in the case of the Comcast-Time Warner Cable merger, "Comcast could have said this merger will lower prices and committed itself to lower prices but it has made no sign that it will do this").

129. Of course, each negotiation between a programming company and a cable provider over rates will lead to slightly different outcomes for consumers—there is nothing to guarantee that a programming company gives the same price to each cable company. Nor should there be; that is properly within the realm of negotiation. This Note will demonstrate, however, that there is a *substantive* difference in the negotiating power of an entity like the merged Comcast and another like Cox, which has one-sixth as many customers.

130. Elzinga, *supra* note 121 (discussing economists' goal of maximizing efficiency, which results in maximizing total output).

This is the heart of Carl Chicago and Wendy Williamsburg's hypothetical problem. Wendy is served by Cox Communications, while Carl is a Comcast customer. If Comcast had merged, it would have been able to extract higher gains for itself in the form of profit. Carl would not see any of this money but, as a result, he would have experienced the ups and downs of negotiations on Comcast's terms. Wendy's cable provider, on the other hand, does not have the power to negotiate these terms, so she has all of the channels, but her cable company has to pay more for the profits Comcast extracts from CNN and Cartoon Network. Even though the Comcast-Time Warner Cable merger did not come to pass, this remains an enforcement loophole. Regulators ought to consider cable's national power to prevent customers from experiencing such wildly different results based on where they live.

III. THE DOJ MUST MEASURE BOTH CABLE MONOPOLY AND MONOPSONY WHEN CALCULATING THE HHI (AND REJECT A MERGER EXCEEDING EITHER THRESHOLD)

The lack of adequate legal enforcement to stop current mergers is concerning. Beyond a few limited FCC rules, the lack of any future limiting principle to keep operators from expanding nationally is potentially disastrous.¹³¹ Our procompetitive antitrust laws are the best defense against these anticompetitive practices.

This Note therefore proposes that the DOJ analyze cable, a two-sided market, by performing two HHI analyses. The first analysis would compare the market for cable delivery to consumers market-to-market. The second would have regulators, for the first time, consider the impact of the cable merger on buyer power over programming content nationally, by determining whether the merger would give the company monopsony power over programming companies. If either of these HHI analyses indicates that competition would decrease as a result of the merger, the DOJ should sue to block the merger.

One of the chief benefits of this plan is that it should be feasible to implement without new authority from Congress; the DOJ has

131. *Comcast Corp. v. FCC*, 579 F.3d 1, 4 (D.C. Cir. 2009) (establishing the only current limit on a cable company's national market share at 60 percent).

the authority to decide how to measure the markets, and what markets to consider.¹³² The dual analyses do not depend on one another per se. They merely consider for the first time the impact of any cable merger on both sides of the market. The DOJ conducts separate market analyses for each, and then may draw its own conclusions about whether to grant approval or sue to block. This, of course, would not necessarily stop a merger. As discussed above in relation to the AT&T-T-Mobile and American-US Airways mergers,¹³³ litigation follows a DOJ lawsuit just as often as settlement or abandonment of the merger attempt. No plan is foolproof, but this proposal helps ensure that the DOJ has the ability to consider all potential market impacts when evaluating a cable merger.

A. The Legal Authority

Monopoly laws are in place to prevent anticompetitive practices by firms¹³⁴ as well as mergers that will restrain competition in an industry.¹³⁵ The Clayton Antitrust Act, as amended by the Hart-Scott-Rodino Act,¹³⁶ prohibits any merger from taking place if it would substantially reduce competition in any one market,¹³⁷ as measured by the HHI described above. Competitive advantages given to large cable conglomerates, but disallowed to their strongest market opponents, ought to be considered to violate the antitrust laws for several reasons.

First, there could never be any effective competition if programming companies know that they are prohibited from becoming any larger while cable companies are essentially unlimited in their growth.¹³⁸ Second, if the most powerful cable company could dictate, rather than merely negotiate, prices, it would be difficult for other cable companies to retain current levels of pricing and services. The

132. 15 U.S.C. § 18a (2012); HORIZONTAL MERGER GUIDELINES, *supra* note 11.

133. *See supra* notes 73-76 and accompanying text.

134. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2012). These are also often termed practices “in restraint of trade.”

135. Clayton Antitrust Act, 15 U.S.C. §§ 12-27 (2012); *see also* 29 U.S.C. §§ 52-53 (2012).

136. *See supra* notes 67-72 and accompanying text (describing the application of the Hart-Scott-Rodino Act in further detail).

137. *See supra* notes 67-72 and accompanying text.

138. Stucke & Grunes, *supra* note 21, at 2-3.

very basis for a competitive market is the idea that no single player in the market has the ability to set prices—in other words, all companies are “price takers.”¹³⁹ Whenever one company can affect what its competitors will pay through its own actions, it is no longer a price taker, and the market suffers.¹⁴⁰ Regulators need to be able to limit such uninhibited growth, and the antitrust laws provide them with the tools necessary to do so.

The FCC previously tried to use its own regulatory authority to limit the growth of cable, with disastrous results. In 1992, Congress passed the Cable Television Consumer Protection and Competition Act to require cable systems to carry local broadcast signals¹⁴¹ and keep cable operators from charging local broadcasters to carry the signal.¹⁴² The Act also gave the FCC the power to limit cable provider growth:

In order to enhance effective competition, the Commission shall, within one year after October 5, 1992, conduct a proceeding—(A) to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest.¹⁴³

After cable companies challenged the Act on its face, the D.C. Circuit held that the rule was content-neutral.¹⁴⁴ The FCC soon set a national ownership cap for cable providers at 30 percent of the market, based on their econometric analysis that programming companies needed to be able to access at least 70 percent of the market to remain viable.¹⁴⁵

The FCC’s rule was purportedly based on an analysis of whether, if one or more cable providers denied access to a programming

139. ESTRIN ET AL., *supra* note 122, at 308.

140. *Id.*

141. This is called the “must-carry provision.” See *supra* notes 47-51 and accompanying text (discussing how cable companies are prohibited from transmitting an alternative local news station to localities even if it is cheaper than carrying the local station’s signal).

142. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

143. 47 U.S.C. § 533(f)(1) (1992).

144. *Time Warner Entm’t Co. v. United States*, 211 F.3d 1313, 1313 (D.C. Cir. 2000) [hereinafter *Time Warner I*].

145. *Comcast Corp. v. FCC*, 579 F.3d 1, 4 (D.C. Cir. 2009).

network, it would otherwise be able to reach alternative video programmers of a sufficient size to allow it to survive in the market.¹⁴⁶ The underlying idea was to ensure that “no single cable operator ‘can, by simply refusing to carry a programming network, cause it to fail.’”¹⁴⁷ The FCC was to complete this analysis by considering the “minimum viable scale,” the number of viewers a channel needs to remain economically viable, the total number of subscribers available in the U.S. market, and the “penetration rate,” the number of subscribers the network will actually reach and cable providers will allow.¹⁴⁸

The D.C. Circuit rejected the FCC’s choice of the 30 percent cap as “arbitrary and capricious” because it failed to take into account the increasing popularity of satellite and telco alternatives, which serve up to 33 percent of the market.¹⁴⁹ The court instead proposed a cap of up to 60 percent, based on evidence that satellite and telco alternatives meant that programming networks needed to reach only 40 percent of cable customers to survive and remain economically viable.¹⁵⁰ The FCC failed to rebut this evidence.¹⁵¹ This eliminated a 30 percent subscriber cap and enshrined, for the time being, a subscriber cap that would have allowed Comcast to double its *post-Time Warner* subscriber base without running afoul of FCC regulations.¹⁵²

At first blush, this looks like the death knell for any arguments that the government can regulate the size of a cable company until it serves around 60 percent of the cable market. Upon closer inspection, though, there are two major reasons that the court’s rejection of the FCC’s rulemaking authority should not burden rulemaking under antitrust laws. First, the D.C. Circuit’s analysis of satellite and telco alternatives concerned consumers’ ability to switch to those services if cable simply refused to carry the programming. The FCC’s central focus was not negotiations over rates between cable and programming—it was to “ensure that no cable operator ... can

146. *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1130-31 (D.C. Cir. 2001) [hereinafter *Time Warner II*].

147. *Comcast Corp.*, 579 F.3d at 4 (citing 23 F.C.C.R. 2134, 2154 (2008)).

148. *Id.*

149. *Id.* at 6-8.

150. *Id.* at 4.

151. *Id.* at 8.

152. *Id.*

unfairly impede ... the flow of video programming from the video programmer to the consumer.”¹⁵³ The FCC was concerned about a long-term blackout used by the cable companies to choke off competitors in the context of a larger bill *about cable choking off the local voice*, not about cable companies trying to extract money. The antitrust concerns focus on the competitive negotiations between cable and programming for their share of the total surplus.

Second, much of the D.C. Circuit’s analysis turned on the Commission’s admittedly feeble analysis that satellite was not a viable alternative to cable.¹⁵⁴ None of this matters in addressing the problems of negotiating power and distribution of total surplus. If Comcast gets a reduction in the amount it pays for ESPN, *all other providers* will bear these costs, whether they are a cable company like Cox or a satellite company like Dish Network.¹⁵⁵ There is nowhere for consumers to run (at least those who buy a package containing ESPN). The FCC’s analysis is largely inapposite to the current situation, but merely represents the completeness of regulators’ failure to limit cable’s rise in the past. If regulators are ever going to limit cable’s growth, they should look once again to the nation’s antitrust laws and their application instead of the FCC’s regulatory authority.

B. Enter Monopsony

1. Background

Most lay readers could be forgiven for not knowing monopsony—when it was first proposed during the Comcast-Time Warner Cable merger, most media treated it as a foreign concept.¹⁵⁶ The concept is basically the opposite of a monopoly: whereas a monopoly is concerned with the power of a single seller over multiple buyers,

153. 47 U.S.C. § 533(f)(2)(A) (2012).

154. *Comcast Corp.*, 579 F.3d at 6-7.

155. Because satellite and telco companies must also negotiate with programming companies for the prices of their shows, they are price takers as well. Therefore, if Comcast can dictate the market, but no other purchaser of programming can do so, customers at telco and satellite companies are hurt just as much as those at smaller cable companies.

156. See, e.g., David Ingram, *Not a Typo, Monopsony in Spotlight in U.S. Cable Deal*, REUTERS (Feb. 21, 2014, 3:21 PM), <http://www.reuters.com/article/2014/02/21/us-usa-comcast-monopsony-analysis-idUSBREA1K1VI20140221> [<http://perma.cc/F3JB-NBMF>].

monopsony is the power of a single buyer over multiple sellers.¹⁵⁷ A monopsonist is able to restrict the output of their product below competitive levels—by blacking out signal, as an example—which gives them the leverage to lower input prices below competitive levels as well.¹⁵⁸

Monopsony analysis is most often conducted in two situations. First, economists examine monopsony power in the labor context, such as various examinations of Wal-Mart's ability, as the dominant employer in a local labor market, to exert wage power over workers and artificially suppress its output of paid positions.¹⁵⁹ Monopsony has also been applied in agricultural contexts.¹⁶⁰ It has never been applied to a cable merger. In fact, relatively few mergers have ever been challenged on the grounds that they will increase buyer power,¹⁶¹ and few cases have ever gotten close to a finding of monopsony violation.¹⁶²

However, the power to measure monopsony is actually present in the DOJ-FTC Horizontal Merger Guidelines.¹⁶³ More careful consideration of monopsony power is a fairly recent phenomenon: while once the DOJ-FTC merely addressed the assessment of monopsony concerns in one short paragraph, a longer discussion of buyer power

157. *Roundtable on Monopsony and Buyer Power: Note by the United States* 2 (Directorate for Fin. and Enter. Affairs Competition Comm., Working Paper, 2008), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/monopsony.pdf> [<http://perma.cc/U3GX-R3TG>] [hereinafter *Note by the United States*].

158. Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 305 (1991).

159. See, e.g., Alessandro Bonanno & Rigoberto A. Lopez, *Wal-Mart's Monopsony Power in Local Labor Markets* 1 (presented at the Am. Agric. Econ. Ass'n Annual Meeting, July 27-29, 2008), <http://ageconsearch.umn.edu/bitstream/6219/2/469304.pdf> [<http://perma.cc/TWL9-FA3W>].

160. DOJ, COMPETITION AND AGRICULTURE: VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD 8 (2012), <http://www.justice.gov/sites/default/files/atr/legacy/2012/05/16/283291.pdf> [<http://perma.cc/UR5E-TFCS>].

161. *Note by the United States*, *supra* note 157, at 6-7.

162. Jonathan M. Jacobson, *Monopsony 2013: Still Not Truly Symmetric* 13-14 (presented at the 61st Annual Antitrust Law Spring Meeting, Apr. 12, 2013), <http://www.wsgr.com/attorneys/BIOS/PDFs/jacobson-0413.pdf> [<http://perma.cc/P7W6-G4TB>] (noting that, with the exception of a jury verdict sustained by the court of appeals but overturned by the Supreme Court in *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*, 549 U.S. 312 (2007), the Court has never found a violation).

163. See HORIZONTAL MERGER GUIDELINES, *supra* note 11, at 32.

appeared for the first time in the 2010 Guidelines.¹⁶⁴ It is time for the DOJ and FTC to reacquaint themselves with this doctrine to more rigorously examine cable mergers.

2. DOJ/FTC Framework

The agencies would conduct their analysis in much the same manner as they do for monopoly, by measuring the number of buyers available to programming companies to sell their products.¹⁶⁵ As monopsony is in many ways the mirror image of monopoly,¹⁶⁶ the key definition in this case, as in all others, is the market.¹⁶⁷ Herein lies the benefit of monopsony measurement—the DOJ and FTC are to include in the market definition any *reasonably interchangeable* products that consumers could turn to if the buyer restricted output—in this case, in the form of a cable blackout.¹⁶⁸ Because cable companies typically have a natural monopoly in all of the areas where they provide to customers, *consumers do not have reasonable alternatives* to cable-line programming delivery.

A cable company might argue that the relevant geographic market is the same as in monopoly cases—in other words, because it does not currently compete to *buy* in the Chicago market with another company it intends to merge with, its merger cannot change this situation. However, the analysis of a monopsony measures the number of good substitutes to which to sell *from the point of view of the sellers*.¹⁶⁹ In this case, the “relevant market” from the sellers’ point of view is all the land where the merging companies provide service to customers. In this market, post-merger, the sellers go from negotiating with two companies in the proposed cable coverage

164. Compare DOJ & FTC, HORIZONTAL MERGER GUIDELINES § 0.1 (issued Apr. 2, 1992, revised Apr. 8, 1997), with DOJ & FTC, HORIZONTAL MERGER GUIDELINES §§ 8, 12 (2010). Section 12, on monopsony power, remains substantially shorter than portions discussing monopoly power. *Id.*

165. Note that this looks substantially like the FCC rule struck down by the D.C. Circuit. See *supra* Part III.A. However, the key difference is that the harm the regulators are working to combat in this case is not the limitation of speech by a complete blackout, but the use of a limited, short-term blackout to depress prices below cost for programming companies.

166. See Maurice E. Stucke, *Looking at the Monopsony in the Mirror* 4 (Univ. of Tenn. Research & Creative Exch., Working Paper, 2013).

167. Blair & Harrison, *supra* note 158, at 323-24.

168. *Id.*

169. *Id.*

areas, to negotiating with only one in this coverage area. The market for sale of programming in the proposed coverage area would be the relevant market from the point of view of the programming companies.

Finally, a cable company may claim that there is no need for the regulators to concern themselves with its monopsony power, because it is traditionally understood that if it results in decreased prices for consumers, monopsony is a good thing.¹⁷⁰ Comcast, however, specifically noted that consumers would not receive lower prices as a result of its merger with Time Warner Cable.¹⁷¹ Therefore, any gains it would have made would have been, in part, because of its ability to extract lower prices from content providers, an ability the combined Charter-Time Warner Cable, or any other large MSO, could also have.¹⁷² Whether this power extends from the competitor's legitimate negotiating skills, or from monopsony power, where it can decrease output in the form of a blackout to consumers, is something the DOJ and FTC will have to measure if they take up a torch for monopsony.

C. Balancing Efficiency and Equity

This plan achieves balance between the two primary concerns animating all decisions by social planners and state economists—efficiency and equity. One or the other of these concerns is the major driver of economic policy for economists,¹⁷³ and many economic issues fail to appease both sets of interests.¹⁷⁴ A plan that requires the DOJ to conduct an HHI analysis for both sides of the relevant two-sided market vindicates both concerns.

Economists who follow the efficiency model, many of whom fall into the Chicago School,¹⁷⁵ believe that antitrust laws exist not to

170. Ingram, *supra* note 156 (quoting Professor Herbert Hovenkamp's explanation that monopsony is only a "problem when it threatens to decrease output").

171. *See supra* notes 127-29 and accompanying text.

172. As with most mergers, there would also be gains from scale and efficiency—closing down redundant factories, combining staff, and other measures. These gains are not the focus of this Note.

173. *See* VISCUSI ET AL., *supra* note 35, at 5.

174. *Id.*

175. The Chicago school of economics, named because of its creation through the work of faculty at the University of Chicago, is an economic theory that argues that free markets best

protect *consumers*, but to protect *competition*, and that maximizing the total surplus of the market is the most valuable and feasible goal for social planners.¹⁷⁶ Total surplus is maximized when consumers get the most utility and producers sell at the highest price possible.¹⁷⁷ There has already been a demonstration of how allowing a cable company to set what it is willing to pay will impact the market—costs will rise for programming companies and will be passed on to consumers at other cable companies, thus upsetting the natural equilibrium where each person willing to sell at a certain price matches each person willing to buy at a certain price.¹⁷⁸ If this match is lost, consumers who would buy cable at the ordinary price, but not at this higher price, will opt out, decreasing total surplus.

Economists who are primarily concerned with equity do not believe that our antitrust laws merely exist to protect the market but that the highest goal of this doctrine is consumer protection,¹⁷⁹ ensuring that the total surplus is distributed roughly equally among consumers.¹⁸⁰ In this context, it is perhaps even easier to see how the natural endpoint of the current law leaves consumers unprotected. By making sure that programming companies are on roughly the same footing, and that cable companies are in roughly the same bargaining position, this proposal ensures that consumers nationwide, who do not have any realistic choices among cable companies, will have roughly the same experience for roughly the same price.

D. The Time Is Now, Not the Future

Counterarguments and alternatives to the proposal in this Note are not as compelling. Although there have been previous econometric analyses concluding that the post-merger cable company might

allocate resources with minimal government intervention, and prizes total surplus as the most valuable measure of economic welfare. *See generally* Richard Ebeling, *Milton Friedman and the Chicago School of Economics*, FREEMAN (Dec. 1, 2006), <http://fee.org/freeman/detail/milton-friedman-and-the-chicago-school-of-economics> [<http://perma.cc/9JEW-B92Q>].

176. Daniel L. Rubinfeld, *On the Foundations of Antitrust Law and Economics*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 51, 51 (Robert Pitofsky ed., 2008).

177. Elzinga, *supra* note 121, at 1192-94; *see also* notes 124-25 and accompanying text.

178. *See supra* notes 127-29 and accompanying text.

179. Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 713-15 (1997).

180. Elzinga, *supra* note 121, at 1192-94.

be the one to lose ground, these studies are outdated and do not resolve the fundamental equity distribution problems. Further, the concept of a luxury tax on the post-merger profits of a cable company deemed “too large” presents line-drawing problems and puts social planners into a dangerously active position. Finally, despite advancements in over-the-top video alternatives like Apple TV or Netflix, consumers still depend on cable, and would not be as empowered to cut the cord as commentators suggest.

1. Cable Companies Will Lose Ground

Some of the most common counterarguments to putting legal structures in place to protect consumers from the unimpeded growth of cable fail to take into account just how unprotected the current market is. The most comprehensive examination of cable as a two-sided market suggests that larger cable companies will actually *lose* ground when negotiating with programming providers.¹⁸¹ This point requires some explanation. The traditional understanding in business circles has been that “downstream concentration is negatively correlated with upstream profitability.”¹⁸² This simply means that as downstream providers, such as cable companies, become larger, there is a negative impact on the profits that the upstream programming companies see as a result.¹⁸³ Tasneem Chipty and Christopher Snyder used the profit functions of roughly twenty-one providers over a nine-year period to estimate the impact of a cable merger on those profit functions.¹⁸⁴ The authors concluded that merging actually worsens the cable company’s bargaining position relative to the programming company.¹⁸⁵ The only reasons cable companies merge, they argue, are for the efficiencies they gain and the money they save—they can combine physical properties and sell unnecessary

181. Chipty & Snyder, *supra* note 110, at 326.

182. *Id.*

183. See, e.g., Douglas G. Brooks, *Buyer Concentration: A Forgotten Element in Market Structure Models*, 1 INDUS. ORG. REV. 151, 160 (1973); Robert D. Buzzell et al., *Market Share—A Key to Profitability*, 53 HARV. BUS. REV. 97 (1975), <https://hbr.org/1975/01/market-share-a-key-to-profitability> [<http://perma.cc/MQ9N-CWS9>]; Steven H. Lustgarten, *The Impact of Buyer Concentration in Manufacturing Industries*, 15 REV. ECON. & STAT. 125, 130-31 (1975).

184. Chipty & Snyder, *supra* note 110, at 328-32.

185. *Id.* at 337-38.

buildings, eliminate redundant jobs, and free up those resources for the rest of the market to use.¹⁸⁶

There is good reason to dispute the conclusion that Chipty and Snyder reach, or at least to doubt that it solves the problem of growing cable companies. To begin with, they conducted the study in 1999, using panel data¹⁸⁷ that ended in 1992.¹⁸⁸ At that time, cable companies were significantly smaller than they are in 2015, and there was more competition on the whole: there were both more cable providers and more programming companies,¹⁸⁹ making the power concentration of both in relation to one another much lower. The authors estimated that “for the bargaining effect to be positive ... cable providers would need to serve ... [at least] 39.1 million subscribers.”¹⁹⁰ This number may have been inconceivable in 1991, but Comcast would have been within striking distance post-merger, and nothing stops another company from reaching the same threshold.¹⁹¹ Furthermore, even if Chipty & Snyder were correct, the equity concerns remain, but are just reversed. That is, if a larger company had to pay *more* instead of *less* than other providers, and therefore its customers paid more than the rest of the people in the market, economists and social planners would consider this just as unpalatable from an equity standpoint as the larger company’s

186. *Id.*

187. Panel data compares explanatory variables across one independent variable over a long period of time. In this case, the cable companies’ dataset consisted of the same variables drawn from each company over a period of between five and nine years. *See generally id.* (discussing the dataset used for their study).

188. *Id.* at 333.

189. The authors measured twenty-one cable companies. *Id.*

190. *Id.* at 337.

191. Cox Communications has 5.91 million customers. *See* News Release, Cox Enterprises, Cox Sees Lowest Customer Churn in Its History (July 26, 2007), <http://coxenterprises.mediaroom.com/index.php?s=26244&item=67835> [<http://perma.cc/KQ8W-HN94>]. Charter Communications would have had 8.2 million subscribers after the pre-merger divestitures from Comcast and Time Warner Cable. *See* Cynthia Littleton, *Charter to Become Second-Largest Cable Operator in Divestiture Pact with Comcast*, VARIETY (Apr. 28, 2014, 4:41 AM), <http://variety.com/2014/tv/news/charter-to-become-second-largest-cable-operator-in-divestiture-pact-with-comcast-1201165594/> [<http://perma.cc/G9LS-N6RY>].

customers paying less¹⁹² and other customers paying more. Whoever pays more, they are no longer equal.

2. *Line-Drawing Problems*

Other counterarguments similarly fail to examine the present nature of the cable market and the previous failures of regulation. Commentators, such as Gary Wax, have argued that the best way to deal with large cable companies would be to impose a luxury tax.¹⁹³ The proposal would have the FCC¹⁹⁴ arrange to collect excess-profits taxes from cable companies in lieu of regulation. This approach certainly has some positive attributes, particularly its recognition of the FCC's failure to implement effective ownership caps. The proposal instead encourages bargaining between regulators and companies that harnesses the companies' natural inclination to expand and simply collects a (small) portion of that profit to share with consumers.¹⁹⁵ It also addresses Judge Posner's arguments in favor of natural monopolies, in which he opined that social planners, lacking any real concept of economics and held sway by third-party interests, were inadequate to determine what regulation should attach to industries.¹⁹⁶

The problem with Wax's concept is that there is no true indication as to where the line should be drawn with regards to "excess profits." In other words, the big question would always be, "When is Charter making outsize profits *due entirely to its size, rather than the fact that consumers demand its products?*" This is a line-drawing issue that ultimately requires the FCC to determine when size creates such outsized profits, and when a firm might have reached

192. Bear in mind that the reference to "customers" is mere shorthand. Comcast customers would, in all likelihood, pay the same amount they always have, with the company itself capturing the gains. Comcast has made no representations that a merger will improve costs for consumers. See *Public Interest Benefits Summary*, COMCAST, <http://corporate.comcast.com/images/Public-Interest-Benefits-Summary.pdf> [<http://perma.cc/VNU3-AU9V>] (last visited Sept. 27, 2015).

193. Gary Wax, *Cable Company Monopoly: Comcast and Time Warner Control the Board*, 28 LOY. L.A. ENT. L. REV. 159, 163 (2008).

194. The local franchising authorities would be responsible for levying the taxes, and the money would go directly to local coffers.

195. Wax, *supra* note 193, at 202.

196. Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 549-50 (1969).

that size through vigorous competition—the exact same threshold deemed “arbitrary and capricious” by the D.C. Circuit.¹⁹⁷ Deciding that something is “too big” or too anti-competitive to survive also goes against the HHI analysis the regulators perform on every merger; if a firm could be deemed too large per se, the DOJ and FTC would never have used the HHI in the first place.

3. “Would it be so bad?” Counterarguments

Other commentators argue that, were the worst to pass and were cable to become a product consumers were sufficiently unhappy with, they would have ample opportunities to switch to other options—telco and satellite alternatives,¹⁹⁸ over-the-top devices like the Apple TV or Google’s Chromecast, and the myriad streaming options available on most personal computers.¹⁹⁹ These options are simply not replacements. Cable retains advantages, such as the solicitude of the local franchising authority, and an incumbency often supported by local franchising laws and requirements that protect cable (as opposed to the alternatives discussed above).²⁰⁰ Satellite and telco will never enjoy these advantages, and their customers would lose just as much if a merged company forced ESPN to raise prices on its competitors.

An over-the-top provision is also not a cure-all. Cable companies have worked hard to keep streaming companies and products from getting access to sports programming, one of the most lucrative and widely viewed cable products.²⁰¹ The late-breaking introduction of streaming applications by some of the strongest players—the cable stations HBO and Showtime, and the broadcast network CBS—that

197. See *Comcast Corp. v. FCC*, 579 F.3d 1, 3 (2009).

198. Manne, *supra* note 19.

199. See Geoffrey A. Fowler, *Getting Rid of TV: The Smartest Ways to Cut the Cord*, WALL ST. J. (July 15, 2014, 9:05 PM), <http://online.wsj.com/articles/getting-rid-of-cable-tv-the-smartest-ways-to-cut-the-cord-1405472757> [<http://perma.cc/284Z-BWPX>] (recommending that consumers purchase a home antenna and position it towards broadcast towers or take part in “login borrowing,” the practice of more than one household illegally sharing one user’s credentials for a service like HBO Go).

200. See Hazlett, *supra* note 16, at 9-10.

201. Chris Welch, *The NFL Is Finally Coming to Apple TV, but Not How You Want It*, VERGE (Aug. 4, 2014, 12:11 PM), <http://www.theverge.com/2014/8/4/5967123/nfl-finally-coming-to-apple-tv> [<http://perma.cc/J3ZX-CK4D>].

may be purchased without a cable subscription²⁰² will surely delight some fans. This has long been hailed as the beginning of the end for cable, or at least the beginning of a shift of power back into consumers' hands.²⁰³

However, not only is it too early to determine these effects, but one of the unspoken truths about cable packages versus à la carte programming purchases is that channels like HBO actually subsidize less popular but no less necessary cable channels such as the Discovery Channel, A&E, and the National Geographic Channel. Before Walter White, AMC's most profitable character was probably Michael Myers, and its *Halloween* marathons, although perhaps not a national treasure, probably deserve a space in the cable landscape that will be effectively lost if consumers can begin to pay for HBO on its own. For consumers with wide-ranging tastes, the cost of these bundles may quickly add up to a cable subscription. The answer must come from within the current cable structure, not outside of it.

CONCLUSION

The Comcast-Time Warner Cable merger is no more, but no sooner did that deal fail than Charter Communications began its own bid for Time Warner Cable. It is clear that the merger between massive cable MSOs is now the order of the day, particularly in an era when they feel squeezed on several fronts by new competitors in smaller black boxes.

The average consumer probably does not think much about how they receive their cable, probably not any more than Carl and Wendy do until they are actually on the phone with one another. But over 100 million Americans receive cable, and they spend a substantial amount of time watching it.²⁰⁴ Future cable mergers are

202. See Emily Steel, *Cord-Cutters Rejoice: CBS Joins Web Stream*, N.Y. TIMES (Oct. 16, 2014), <http://www.nytimes.com/2014/10/17/business/cbs-to-offer-web-subscription-service.html> [<http://perma.cc/8JKE-VCHU>].

203. See Brian Merchant, *HBO Finally Killed Cable*, MOTHERBOARD (Oct. 15, 2014, 3:26 PM), <http://motherboard.vice.com/read/hbo-killed-cable> [<http://perma.cc/RMW4-PQRA>].

204. BUREAU OF LABOR STATISTICS, AMERICAN TIME USE SURVEY SUMMARY (2015), <http://www.bls.gov/news.release/atus.nr0.htm> [<http://perma.cc/V3PN-VBBQ>] (indicating that Americans spend about 2.8 hours per day watching TV, the leisure activity that took up the most time).

going to impact all of these households whether they understand them or not, and it is not at all clear that federal regulation is adequately prepared for the long-term consequences of measuring cable companies market-to-market. This strategy has no clear end point for the size of Charter, Comcast, or any other cable company. It risks throwing the cable world into one in which the largest provider can extract money from programming companies, which comes out of the pockets of those under lesser rule.

The DOJ and FTC must take this opportunity to change their measures for the future. It is too difficult to say whether Charter-Time Warner Cable, measured nationally, would clear the threshold of the HHI such that regulators would sue to block a similar merger under this new rule; it is entirely possible that they could both approve the merger and amend their market measurement process. Whatever they do, however, they must do with the understanding that consumer news, entertainment, and culture depend on their next move.

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