Remarks of
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Viewpoint Diversity and the Public Interest: Considering Freedom of Expression[1]

Thank you for inviting me here today.

I appreciate the work of the Media Institute and I applaud your goals: to foster freedom of speech, a competitive media and communications industry, and excellence in journalism.

These are issues that I've thought about for a long time, really since I was an undergraduate at Brown University. There I worked on the student-owned and operated radio station, WBRU-FM. I was the News Director of the station in 1972, when four of us drove to Miami to cover the Democratic Convention. Each of us thought we could be the next Edward R. Murrow or Fred Friendly . . . we were a bit too scruffy to succeed and much too inexperienced, but we really wanted to deliver the news and we were the best collegiate journalists we knew how to be.

That's also when I had my first encounter with the Federal Communications Commission. I rode a bus from Providence to Boston to take a test at the FCC's office there and received my third-class engineer's license. This allowed me to turn on the station's transmitter at 6 a.m. once a week when I was a disk jockey. Broadcasting to college students at 6 a.m. meant for a small audience of course; except for the kids still partying until dawn who would call in to request "In-A-Gadda-Da-Vida" or "Stairway to Heaven".

I'd like to talk today about how we should think about freedom of expression as an important governmental interest – and why we should do so. This has been an interest of mine for a long time. I acknowledge that nothing I say today has any necessary application to pending issues or Commission activities that have been subject to recent public discussion. And I don't mean to call out any particular industry – although much of the relevant legal discussion comes from cases dealing with cable regulation. And these really are personal views; I've written about this question before.

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[1] These remarks reflect personal views and not necessarily those of the Federal Communications Commission. Portions of these remarks are drawn from prior writings. *See* Jon Sallet, *Antitrust Policy and Communications Regulation: May the Twain Meet,* 14 COLO. TECH. L.J. 59 (2015); Jonathan B. Sallet, Technology and Democracy, Remarks at the Twelfth Annual Aspen Institute Conference on Communications Policy (Aug. 11, 1997). Mr. Sallet would like to thank William Dever of the Office of General Counsel for his invaluable assistance.

I would like to raise a series of questions today because I believe that the Media Institute is a forum particularly well-suited for a discussion of the values we find in freedom of expression. In fact, I believe that each of your core goals support freedom of expression – and in fact that they connect to even deeper values about the continuing human quest for truth – a theme to which I will return at the end. Of course, much of policymaking and even constitutional adjudication is about balancing various factors, and so agreement on the importance of freedom of expression does not tell us how the balancing should come out in any particular instances. We always need to pay attention to dynamics that are changing the nature of communications – the Internet first and foremost – as we think about such things.

But I do believe – and this is the core of my remarks today – that appreciation of the importance of freedom of expression is important and that it must be part of the discussion as public policy is created and law is shaped. After all, the FCC has long looked to the multiplicity of voices as a fundamental element of free speech and has relied upon diversity in speech as an important goal. The fundamental inquiry – which I will ask in various ways but not even attempt to answer – is "when should that value be advanced, in what circumstances, and how?"

Media Ownership

The Commission's media ownership rules further three goals of the Communications Act: competition, localism and diversity. And diversity has been long recognized to include viewpoint diversity, by which we mean the "availability of media content reflecting a variety of perspectives."[2] Localism serves a similar interest, fostering "a system of local stations that provide programming responsive to the unique concerns and interests of the [local] audiences . . . ."[3] So we have here important non-economic interests that have been long recognized to promote the purposes of the Communications Act.

And they have played an important role. For example, in the last Quadrennial Review proceeding, the Commission modified the newspaper/broadcast rule and retained the radio/television cross-ownership rule – based on diversity alone. By contrast, the local television and radio ownership rules were based on promoting competition; the dual network rule is based on both competition and localism. In our last NPRM, the Commission specifically asked how these three goals can work together.

The Chairman has publicly said that he will circulate the next Quadrennial Regulatory Review by the end of June of this year. No doubt that will spark public discussion. For present purposes, I just want to note that the Commission has traditionally evaluated its media ownership rules based on a combination of its core goals, though the importance of each goal has varied for each specific rule. Today, I'd like to focus on the circumstances in which the goal of viewpoint diversity by itself may be sufficient to support Commission action.

Cable Regulation

Let's start by recognizing that antitrust law can advance the goal of diversity of speech. Indeed, one of the best articulations of the public interest in a diversity of viewpoints came in an antitrust case. In *Associated Press v. United States* in 1945, Justice Hugo Black observed that "[The First] Amendment

[2] *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182, Notice of Inquiry, para. 71 (2010).

[3] *Id.* at para. 54.

rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ."[4]

In that case, the Court affirmed a judgment that the AP violated the Sherman Act, for example, by prohibiting its members from selling news to non-members and also by allowing each member to block non-member competitors from membership.

In rejecting a challenge that the government's enforcement action violated the First Amendment rights of association members, the Court reasoned that: "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom."[5]

As the AP case makes clear, the enforcement of the antitrust laws in speech industries can serve free speech interests.

The next question is: What happens if traditional antitrust economic concerns are not present?

Judge Kavanaugh's View

This question has been directly addressed by Judge Kavanaugh of the D.C. Circuit in a series of opinions, including his concurrence in *Agape Church, Inc. v. FCC*.

As we all know, cable regulations have been subject to intermediate scrutiny because they are not based on the content itself. Under intermediate scrutiny, a restriction will be upheld if it advances "important governmental interests unrelated to the suppression of free speech" and does not "burden substantially more speech than necessary to further those interests."[6]

Judge Kavanaugh's analysis focuses on the relevant governmental interest as the restraint of market power.[7] Judge Kavanaugh concludes: "absent a finding of market power, the Government may not infringe on the cable operators' editorial discretion. . . . [b]ecause cable operators no longer wield market power, the Government can no more tell a cable operator today which video programming networks it must carry than it can tell a bookstore what books to sell or tell a newspaper what columnists to publish."[8]

Judge Kavanaugh's view is important and it is unquestionably correct that constitutional questions must be tested against the facts as they exist at the time of Commission action. But it is not so clear that the basis for Commission action is, as he concludes, limited to instances of market power. For example,

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[4] *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

[5] *Id.*

[6] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997) (*Turner II*).

[7] *Agape Church, Inc. v. FCC*, 738 F.3d 397, 413 (D.C. Cir. 2013) (*Agape Church*) (Kavanaugh, J., concurring) ("*Turner* identified the important governmental interest underlying the regulations as the interest in counteracting the effects of monopoly."); *see also Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 988 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("Applying [program carriage requirements] to a video programming distributor that lacks market power . . . violates the First Amendment . . . ."); *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1324-26 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (arguing that FCC's ban on exclusive contracts between cable operators and affiliated video programming networks failed intermediate scrutiny based on lack of market power).

[8] *Agape Church*, 738 F.3d at 414-15 (Kavanaugh, J., concurring).

when reviewing transactions, the Commission has traditionally emphasized its role in promoting competition in a context broader than traditional antitrust analysis (although always informed by such analysis).[9]

Similarly, in *Verizon v FCC*, the D.C. Circuit expressly rejected the contention that the Commission had to identify market power in order to impose Open Internet regulation. In that case – an appeal of the Commission's 2010 Open Internet Order – the court found that broadband providers have the incentive, technical and economic ability to harmfully discriminate against edge providers on the Internet.[10] They have this ability in part because they can each act as a "gatekeeper" with respect to edge providers that might seek to reach their end-user subscribers with content, including services that compete against their own Pay TV packages. But recognition of that gatekeeper status did not require a finding of market power in the traditional sense of that term.[11]

Justice Breyer's View

In any event, my focus is on the presence of diversity as an independent basis for Commission action and here we turn to the Supreme Court's *Turner II* decision in 1997, which concerned the 1992 Cable Act.

In *Turner II*, cable operators challenged the requirement that they carry local broadcast signals, the so-called "must carry" rules. They argued that their First Amendment rights were infringed by the requirement that they carry broadcast content not of their choosing.

The majority, per Justice Kennedy, held that three asserted governmental interests were important: "(1) preserving the benefits of free, over-the-air local broadcast television; (2) promoting the widespread dissemination of information from a multiplicity of sources; and (3) promoting fair competition in the market for television programming."[12]

In fact, Justice Kennedy's opinion specifically noted that "[t]he dissent proceeds on the assumption that must-carry is designed solely to be (and can only be justified as) a measure to protect broadcasters from cable operators' anticompetitive behavior. . . . Federal policy, however, has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation."[13] In *Turner I*, the Supreme Court had noted that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[14]

Justice Breyer's concurrence, which supplied the fifth vote for the majority's outcome, similarly focused closely on the interests of free expression. And he concluded that, without regard to the goal of stopping anti-competitive conduct, the must-carry requirement should be upheld because of the strength of its purpose of preserving the "widespread dissemination of information from a multiplicity of sources."

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[9] *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93 (1953); *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (holding that "the requirements of Section 11 of the Clayton Act and Section 309(a) of the Communications Act are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors").

[10] *Verizon v. FCC*, 740 F.3d 623, 645-48 (D.C. Cir. 2014).

[11] *Id.* at 648.

[12] *Turner II*, 520 U.S. at 189-90.

[13] *Turner II*, 520 U.S. at 194 (emphasis added).

[14] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*Turner I*).

Justice Breyer explained that this "basic noneconomic purpose" had long been a foundational element of federal communications policy – a policy that "seeks to facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve."[15]

It is true that Justice Breyer characterizes the cable system as a "bottleneck" but he is careful not to suggest that such systems actually engage in any anti-competitive actions that would necessarily be remedied by a "fair competition" approach. (In this regard, his reasoning is like the D.C. Circuit's analysis in *Verizon v. FCC*.)

I think Justice Breyer's concurrence is important because it suggests that the public interest in free expression and diversity of views can be, in and of itself, a sufficient basis for action, even in the context of intermediate scrutiny under the First Amendment.

Open Internet

Indeed, the Open Internet Order specifically recognizes that diversity of viewpoints and information is important, as a factor independent of competition issues. This is not a new thought. In the 1996 Telecom Act, Congress told us that "[t]he Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[16]

When the most recent Open Internet proceeding began in 2014, the Commission specifically focused attention on freedom of expression, noting that 87% of Americans were using the Internet in 2014 and quoting Pew Research Internet Project as observing that Internet usage has had "wide-ranging impacts on everything from: the way people get and share news . . . the way they learn; the nature of their political activity; their interactions with government; the style and scope of their communications with friends and family; and the way they organize in communities."[17] And so the Commission asked a series of questions, starting with: "how should we consider the potential impact on social and personal expression of an Internet whose openness was not protected?"[18]

Subsequently, the Commission's Open Internet Order concluded that the Internet's openness is critical to its ability to serve as a platform for speech and civic engagement.[19]

So, when the Commission adopted the so-called General Conduct Rule, it expressly pointed to the importance of free expression. As the Commission explained, "[p]ractices that threaten the use of the Internet as a platform for free expression would likely unreasonably interfere with or unreasonably disadvantage consumers' and edge providers' ability to use [broadband]."[20]

Conclusion

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[15] *Turner II*, 520 U.S. at 227.

[16] 47 U.S.C. § 230(a)(3), (a)(5).

[17] 2014 Open Internet NPRM, FCC 14-61, para. 35.

[18] *Id.*

[19] 2015 Open Internet Order, FCC 15-24, paras. 6, 77.

[20] 2015 Open Internet Order, para. 143.

I offer these thoughts because I believe that freedom of expression serves very important societal purposes. Consider what Oliver Wendell Holmes, Jr. meant to tell us when he suggested that people:

> may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[21]

Free expression is always an important individual right. But the notion of a marketplace of ideas captures two other very important principles. First, that the best antidote to "bad" speech is more speech. We believe in the instructive power of debate and civil discourse.

Second, the value of speech accrues not just to the speaker but also, as in the commercial marketplace itself, to the consumer of speech. In other words, a healthy debate of "clashing" viewpoints not only provides an outlet for expression but also a means by which listeners have access to speech with which to inform their own views, whether they speak themselves or not.

Let me take a broader historical perspective for a moment. I believe that there is a sense in which democracy and competition can be seen as products of the Scientific Revolution. Let me explain.

The pursuit of modern science depends on the existence of individuals empowered to discover the truth. When Galileo said that the earth revolves around the sun, he relied on facts. But a number of scholars at the time refused even to look through his telescope to examine the evidence. They felt that received wisdom was more important than observation. Or, as Groucho Marx supposedly said, "Who you gonna believe, me or your own eyes?"

So, not surprisingly, the idea that any person could discover scientific truths was followed by the idea that the people could govern themselves. I don't believe that it is a coincidence that the Scientific Revolution was followed by the Enlightenment. Or that the year 1776 gave birth to both our Declaration of Independence and Adam Smith's "The Wealth of Nations".

In other words, the metaphor of diversity of speech as a marketplace is not just a turn of phrase. It is the identification of a deep connection between competition – as individual firms contest market share – and the marketplace of ideas – as ideas similarly battle each other. Judge Learned Hand made this point in his lower court decision in the *Associated Press* case: The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[22]

I've asked a series of questions today about how we should regard freedom of expression. Just to repeat myself, I'm not suggesting that the answers – whatever they may be – have any necessary application to current or pending issues. But I ask them because I hope that the Media Institute and others will consider them. Because I do believe that these questions do, and that they should, all connect to your own basic goals – to enable the discovery of truth through journalism, through a competitive media and communications marketplace and, of course, through freedom of expression.

Thank you.

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[21] *Abrams v. United States,* 260 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[22] *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).