

Testimony of Tim Wu, Professor of Law, Columbia Law School

House Judiciary Subcommittee

on

Regulatory Reform, Commercial and Antitrust Law

“Net Neutrality: Is Antitrust Law More Effective than Regulation in  
Protecting Consumers and Innovation?”

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Thank you for inviting me to testify about the prospects of using antitrust law, and in particular the powers of the Federal Trade Commission, to protect the norms related to Net Neutrality and the Open Internet.

I stand second to no one in my respect and admiration for the Federal Trade Commission and the men and women who work there. I enjoyed the time I spent at the Commission, and I think the agency has a strong institutional culture appropriately focused on the consumer. The Commission’s decisions are thoughtful and relatively immune from undue political influence. Moreover, as an agency that oversees so many different industries, it is inherently less vulnerable to so-called regulatory capture. I should also say that I am a believer in the antitrust law, which I think has a critical role to play in protecting the competitive process.

In short, I think the Commission is good at what it does and that the antitrust laws are important. Nonetheless I do not think the Commission is the right agency to oversee communications and media policy, as its enforcement of Net Neutrality rules would necessarily imply. The basic reason is straightforward. As I see it, the Commission is optimized to deal with two issues, both described in Section 5 of the Federal Trade Commission Act. The first is protection of the competitive process; the second is detecting and punishing the deception of buyers. These are, to be sure, important tasks. But they implicate only a subset of the important values and policies at stake.

In particular, there are three very important public values that I fear FTC oversight might not address:

*Free Speech & the Political Process.* There is, in our times, an intimate relationship between Internet policy, free speech and the political process. At the risk of stating the obvious, the Internet now serves as an incredibly important platform for both political and non-political speech of every possible description. In this respect, it probably comes closer than any

other speech technology to creating Oliver Wendell Holmes' vision of a marketplace of ideas. The Internet has also served as the launching pad for numerous political movements and campaigns, and has tended to provide a place for outsider parties and candidates to challenge the establishment.<sup>1</sup>

When we understand the Internet as a speech and political platform, it is clear that protecting the open Internet – dealing with matters like discrimination as between competing forms of content – has obvious implications for both free speech and the political process. You might say that to protect the open Internet is much the same thing as protecting the United States as an open society.

This becomes obvious when we look abroad, to countries where the Net Neutrality norms are less established and routinely violated. In many places around the world, we find the Internet censored by both government and private entities. Consequently it has become an important part of State Department policy to try and promote an open Internet abroad. As Secretary of State John Kerry remarked in April, “we need to continue to stand as we have for open markets, for open societies, and for an open Internet. ... The places where we face some of the greatest security challenges today are also the places where governments set up firewalls against basic freedoms online.”

Unfortunately, issues like protecting an open society or safeguarding the political process are not, I'd suggest, ones that the Federal Trade Commission was designed to deal with. The Commission is, rather, designed to protect the competitive process. It approaches that problem generally by relying on sophisticated economic analysis. There is much to say in favor of this approach for competition policy. But economic analysis was never designed to reflect diffuse but important values like speech or a healthy political process. Questions like how it might continue to protect an open society and prevent excessive control over political speech are not really the kind of things the Commission is designed to think about.

Consider a few examples. Imagine an Internet carrier slows down Internet news sites of a particular political viewpoint. Consider a mobile carrier deciding it will decline to allow on its network any site that asked for political donations. These are forms of conduct that raise important issues, but simply do not register in a competition analysis, particularly if the action entailed no particular economic advantage for the parties involved. But they would obviously raise important concerns about the political or speech environment in the United States. The examples given may be blatant, but I

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<sup>1</sup> Some of this can be credited to the neutral design of the network, which tends to level the playing field between larger and smaller speakers. See Robin Lee & Tim Wu,

want to suggest that speech concerns are inherent in many of the questions faced in any Net Neutrality dispute, or the underlying rules.

*Other Non-Economic Values.* The point about speech and the political process is a specific example of a broader point. The Federal Trade Commission, as its name suggests, is inherently focused on *trade* – the buying and selling of goods and services. Unfortunately, many of the highest value uses of the open Internet are not actually trade in goods or services. They are, rather, transactions whose value cannot be easily measured. Take, for example, an extended family that shares pictures over email or Instagram. This might arguably be one of the highest values of the network, but it doesn't show up in any calculation of gross domestic product. For grandparents usually don't pay their sons and daughters to sell them pictures of their grandchildren, at least in my experience.

Non-economic values are an inherent part of the media and communications industry. For that reason the Federal *Communications* Commission has long been sensitive to any number of non-economic concerns, such as the importance of regionalism, diversity in speech, and others. That has not been the history of the Trade Commission. Consequently, conduct that might affect non-commercial uses of the Internet might not be easy for the Trade Commission to take cognition of, because of its focus on anticompetitive practices and consumer deception. The lack of a quantitative, commercial value threatens to make such harms invisible.

*Innovation.* Protection of the open Internet has, over the last several decades, functioned as a major innovation policy for the United States. Once again at the risk of pointing out the obvious, since the time of the AT&T breakup countless firms have grown up on the nation's computer networks, creating a major driver of economic growth in this country. Since the 1990s, the United States has returned to a position of clear global leadership in the high technology industries, a position that seemed at times threatened in the 1980s and 1990s.

One way or another, the light-handed protection of open Internet norms over the last twenty years has served to protect the Internet as an innovation platform. I am not saying that the process has been pretty, but it has been effective. The question is whether the antitrust law is well equipped to continue that practice. In theory, the Sherman Act or the FTC's prohibition on unfair methods can be interpreted to try to accomplish some of the same goals. Unlike speech or other non-economic harms, the protection of innovation is a stated goal of antitrust policy, so I will admit the matter is worthy of debate.

The problem is that the tradition in competition practice has been to focus on price-related harms – such as, classically, price-fixing cartels, or exclusionary conduct designed to maintain monopoly prices. As even economists acknowledge, competition policy has struggled to incorporate innovation or dynamic-efficiency concerns in its analysis.<sup>2</sup> I’m not saying that this might be impossible, by any means. But it would require an antitrust approach that is far more focused on innovation, as opposed to pricing harms, that we currently see.

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If antitrust norms do not capture everything at stake in the protection of an open Internet, might the Commission’s statute be amended to better equip it to oversee Net Neutrality norms on the Internet? This is, in theory, possible, but I think institutional history and agency expertise take longer time to change that statutory language. The agency, as I said earlier, has a particular, Progressive-Era focus on commercial interactions, anticompetitive conduct, and consumer deception. It knows what it is looking for, and does what it can with the resources it has (I also think it should have more resources, but that’s another matter).

Making the Commission the new guardian of an open Internet might, I think, require the agency equivalent of a brain transplant. For the agency to safeguard the open Internet would be to make it an agency dedicated to the protection of speech, innovation and non-economic values. I don’t think this would be impossible, but it would require the development of different kind of expertise and mindset at the agency. And, of course, that would come at the expense of losing some of the focus that the agency has now, rendering it less effective at enforcement of consumer protection and antitrust norms. That, at least, is something to be concerned about.

I thank you for the opportunity to discuss these issues with the Subcommittee, and I welcome any questions.

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<sup>2</sup> Tim Wu, “Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most,” 78 *Antitrust Law Journal* 313 (2012).