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CONVERGING MEDIA TECHNOLOGIES AND STANDING AT THE FEDERAL COMMUNICATIONS COMMISSION

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With digitalization the media become translatable into each other—computer bits migrate merrily—and they escape from their traditional means of transmission. A movie, phone call, letter, or magazine article may be sent digitally via phone line, coaxial cable, fiberoptic cable, microwave, satellite, the broadcast air, or a physical storage medium such as tape or disk.[1]

We are in the process of leaving an analog world and entering a digital one. For example, we once thought that audio, video, and data were different and discrete types of communication, but now we see them converging. They are all bits.[2]

INTRODUCTION

The digital age anticipated in William Gibson's fiction[3] and cultivated by the Media Lab's research[4] has arrived.[5] The merger of communica-

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1. STEWART BRAND, THE MEDIA LAB 18 (1987).

2. Nicholas Negroponte, *The Bit Police: Will the FCC Regulate Licenses to Radiate Bits?* WIRED, May/June 1993, at 112.

3. *See, e.g.*, WILLIAM GIBSON, NEUROMANCER (1984); WILLIAM GIBSON, VIRTUAL LIGHT (1993).

4. BRAND, *supra* note 1. (One hopes that the digital age is closer to one envisioned by Brand. The world Gibson anticipates is rather bleak. *See* GIBSON, VIRTUAL LIGHT, *supra* note 3, at 128-31, 187.)

5. This paper, for example, was researched using several computerized databases. The data were then transferred from those databases via a high-speed digital communications system to a personal computer. There, the information was reformatted and searched on the personal computer. The paper itself was prepared using word processing and its grammar and spelling were checked electronically. As the paper is prepared for publication, it will be edited using the same word processing techniques and typeset from diskette to page using some form of computerized typesetting. It then will join a database of law review articles available for retrieval electronically, and the process will continue. None of these steps is technologically innovative; yet, not more than fifteen years ago, most of them were impossible.

tions and computers is evident in a variety of new products and services.[6] Recently, digital radio became available through the Internet, a network of networks available to universities and some commercial users.[7] Cellular telephone, still considered a recent form of competition to land-line based service, is itself being challenged by digital mobile radio.[8] Additionally, there are projects for full text data retrieval,[9] digital newspapers and journals,[10] satellite telephone systems,[11] long distance learning projects, and constantly emerging alternative uses.[12] While computerization is a major driver of many of these changes, new uses for existing systems also appear from time to time. For example, major local and long distance telephone carriers announced discussions concerning partnerships with cable television[13] and the merger of a major long distance company with a cellular telephone company presents new competition for local telephone services.[14] New competitors for the

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6. In the related area of free speech law, Rodney Smolla has described a similar effect. "Forms of communication are converging, collapsing the legal distinctions that once brought a semblance of order to free speech policies. For most of this century societies could draw lines of demarcation separating print media, broadcast media, and common carriers. New technologies, however, are rendering those divisions obsolete." RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 322 (1992). This concern was presented forcefully in a recent decision rejecting the limitation on telephone company cross-ownership of cable facilities. Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909, 920 n.18 (E.D. Va. 1993).

7. John Markoff, *Turning the Desktop PC into a Talk Radio Medium*, N.Y. TIMES, Mar. 4, 1993, at A1.

8. Anthony Ramirez, *A Challenge to Cellular's Foothold*, N.Y. TIMES, Apr. 1, 1993, at D1.

9. Mead Data Corporation's Lexis/Nexis and West Publishing's Westlaw are familiar to the legal community.

10. Both the Internet and the privately owned networks provide some form of news and journal retrieval service. On the Internet, the service is called Usenet.

11. Motorola has emerged as a player in satellite telephone service and proposes using a world-wide system of geostationary satellites to support its project. John Burgess, *Global Connections: Linking Up on Satellite Networks*, WASH. POST, Mar. 8, 1993, at F5. This aspect of satellite telephone systems is part of a larger challenge to the notion of monopolized local service. The remaining premise of that aspect of telephony and the barriers erected to prevent subsidization of competitive services by monopolies is under attack. *See* Marc Levinson, *Wait, Hold the Phone!*, NEWSWEEK, Apr. 12, 1993, at 42, 42-45.

12. Long distance learning projects are now an educational staple. *See* Isabelle Bruder, *Redefining Science: Technology and the New Science Literacy*, ELECTRONIC LEARNING, Mar. 1993, at 20, 21; Mark Ivey, *Long-Distance Learning Gets an 'A' at Last*, BUS. WK., May 9, 1988, at 108, 109-10. The author is familiar with a project at Ohio State University which used intercontinental satellite transmission to link classes in New Zealand and the United States.

13. Anthony Ramirez, *A War Within a Single Wire*, N.Y. TIMES, Oct. 27, 1993, at C1 (nat'l ed.); John J. Keller & Mark Robichaux, *MCI Talks to Entertainment Firms, Cable TV Concerns about Partnerships*, WALL ST. J., Mar. 30, 1993, at B6.

14. Edmund L. Andrews, *The A.T.&T. Deal's Big Losers*, N.Y. TIMES, Aug. 25, 1993,

communications dollar continue to emerge as the underlying technologies merge.[15]

This convergence of technologies fundamentally changes the competitive structure of industries. No longer are the telephone and other forms of communications media necessarily separate. The recent efforts of telephone companies and cable television to invade each others' turf and the forceful efforts of publishers to exclude the phone companies speak of this convergence.[16]

Yet the form of regulation for communications is rooted in the 1930s and the now haphazard separation of electronic media. The fundamental structure of the Communications Act of 1934 roughly divides the electronic media into common carrier communications and competitive broadcast.[17] The introduction of radio into telephone and telephone into broadcast, however, presents a problem within this framework. Because service provision is still licensed,[18] competitors must seek Commission

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at D1.

15. Much of the debate concerning cable regulation, for example, centered on the ability of the telephone companies and cable companies to enter each others' respective commercial areas. Under current law that is not permitted. *See, e.g.*, *Telephone Competition*, J. COM., Mar. 8, 1993, at A14; Carla Lazzareschi, *Baby Bell Wants in on Cable, Long Distance*, L.A. TIMES, Mar. 3, 1993, at D1; Pat Widder, *A Busy Picture for FCC*, CHI. TRIB., Feb. 28, 1993, at C1. AT&T, in particular, is attempting to move into a variety of activities across media. John J. Keller, *High-Tech Play*, WALL ST. J., Apr. 22, 1993, at A1. The current legal premise may not last long, however. In August 1993, a federal district court concluded that the federal cable-phone cross-ownership restrictions were invalid on First Amendment grounds. Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909, 932 (E.D. Va. 1993).

16. Edmund L. Andrews, *A Merger of Giants: The Policy Issues; A Marriage of Media*, N.Y. TIMES, Oct. 14, 1993, at D10; Geraldine Fabriknat, *Bell Atlantic Deal for 2 Cable Giants Put at $33 Billion*, N.Y. TIMES, Oct. 13, 1993, at D1. The debate concerning holding company entry into the information business had been long and loud in the antitrust case divesting AT&T. In United States v. Western Elec. Co., 900 F.2d 283 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990), the court appeared to liberalize the standards for allowing operating companies to enter some of the markets for information transfer. For a similar critique of the Bell Atlantic and Tele-Communications merger, see C. Edwin Booth, *Tollbooths on the Information Superhighway*, N.Y. TIMES, Oct. 26, 1993, at A15 (nat'l ed.).

17. Title 47 of the United States Code contains the significant provision discussed here. Subchapter II of Chapter 5 of the Act, 47 U.S.C. §§ 201-227 (1988), concerns the regulation of common carriers such as telephone. Subchapter III of Chapter 5, 47 U.S.C. §§ 301-399b (1988), concerns the regulation of broadcasts such as television and radio.

18. American Tel. & Tel. Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992). For a discussion of the case and its effects on contract services, see Richard E. Wiley & Jeffrey S. Linder, *Tariff Tyranny*, BUS. L. TODAY, Jan./Feb. 1993, at 13. This Article does not address the question of whether "detariffing" certain services is appropriate. That discussion is part of a larger debate concerning the role and need for regulation in these emerging markets. *See, e.g.*, Paul S. Dempsey, *Adam Smith Assaults Ma Bell with His Invisible Hands: Divestiture, Deregulation, and the Need for a New Telecommunications Policy*, 11 HASTINGS COMM.

approval for their service offerings. This licensing entails an administrative process of some kind,[19] and that process opens the possibility of competitors using the process both to enhance and injure competitors and competition.

The administrative hearing, historically premised on the regulation of a monopoly, however, appears ill-equipped to handle the presence of competitors. Simply put, common carrier regulation assumes the existence of such economies of scale that monopolization is the natural byproduct. Competitors should not be economically possible. The agency's function, then, is to balance the interests of the company in providing a reasonable return on investment with the consumer's interest in fair and nondiscriminatory prices.[20] The existence of competitors, whose presence could be either beneficial or detrimental to the regulatory process, breaks down the fundamental assumption driving the whole process. Some parts of the market may in fact be competitive.

While the Federal Communications Commission ("FCC") has recognized and even encouraged the development of competition in the marketplace,[21] its administrative process remains mired in threshold standing requirements that make the adjudicative process a relic of a bygone era.[22] In the federal courts, standing is the requirement that a party seeking to bring suit has a claim of injury that a court deems it can remedy.[23] At the FCC, standing takes on a similar meaning when competitors seek to intervene or complain about the practices of a

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& ENT. L.J. 527, 606 (1989) ("For the moment, let the states continue to experiment with different mixtures of *laissez faire* and economic regulation.").

19. Tariffing is likely to occur in a truncated form for services that are deemed to operate in competitive markets. Wiley & Linder, *supra* note 18, at 15-16.

20. *See* F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 481-86 (2d ed. 1980); JAMES C. BONBRIGHT ET AL., PRINCIPLES OF PUBLIC UTILITY RATES *passim* (2d ed. 1988).

21. *See, e.g.*, *In re* Policy and Rules Concerning Rates for Competitive Common Carrier Servs., 85 F.C.C.2d 1 (1980) (First Report and Order) [hereinafter Competitive Common Carrier First Report]; *In re* Policy and Rules Concerning Rates for Competitive Common Carrier Servs., 84 F.C.C.2d 445 (1981) (Further Notice of Proposed Rulemaking) [hereinafter Competitive Common Carrier Rulemaking Notice].

22. For purpose of this discussion, a distinction is drawn between adjudication and rulemaking. Under the Administrative Procedure Act and FCC practice, all interested parties are permitted to participate in rulemaking. The range of represented interests can be very diverse. In adjudication, however, both the rules and practice of the commission are more rigorous. *See infra* notes 32-33 and accompanying text. Whether the division between rulemaking and adjudication is appropriate is beyond the scope of this paper. For a critique of the traditional division, see CHRISTOPHER EDLEY, ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990).

23. *See infra* notes 27-89 and accompanying text.

communications company, but the Commission defines competitors—and by definition the marketplace—as those who currently are competing with the party under review. Potential competitors are left to the side.[24] The result is a strange process in which all interested parties may participate in setting the rules to permit change, but only incumbents may seek to use the adjudicatory proceedings that are available to develop and protect the marketplace.

The rationale for this exclusion is far from clear. Potential competition represents a valuable interest that should receive some protection. Economists, antitrust lawyers, and the FCC in its role of rulemaker agree that potential competitors are part of the workings of an effective marketplace.[25] The problem more likely revolves around the proper political role of the agency in performing adjudication. In this regard, choosing the appropriate model of agency action may largely determine the appropriateness of standing. However, in choosing the appropriate model, use of purely process-based grounds is itself ambiguous.

Alternatively, standing for potential competitors may be justified by looking at the specifically desired outcomes. If one assumes that outcomes based on net benefits are desired, then the FCC should set up procedures that will achieve those outcomes. Accurate and complete information would be critical in such an approach, and potential competitors could provide the agency with that information.[26] A logical result in the changing communications environment thus would permit potential competitor standing.

This Article develops the thesis that potential competitors should be recognized in three parts. Part I sets out the history of standing law and places the FCC's decisions within that framework. Part II then considers the policies standing law seeks to advance and analyzes the potential competitor's contribution to those policies. In Part III, the Article suggests an alternative model of administrative practice that would more clearly encompass standing for potential competitors. The Conclusion then discusses the use of that model in the evolving communications marketplace.

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24. *See infra* notes 32-112 and accompanying text. For a discussion of competitor standing in tax cases, see Thomas E. Martin, Comment, *Competitor Standing to Challenge Internal Revenue Service Practices*, 47 U. CIN. L. REV. 109 (1978).

25. *See infra* notes 119-36 and accompanying text.

26. *See infra* notes 158-66 and accompanying text.

I. STANDING AT THE FCC: A STATUTORY EXCEPTION AND ITS DEVELOPMENT

A. Introductory Concepts

Standing to raise a claim in an administrative or judicial tribunal raises fundamental issues concerning the availability of government processes to secure a particular set of rights or form of government action.[27] In essence, it stakes out the competing roles that are to be given voice and sanction if the claim is successful.[28] Standing also defines the judicial role of the courts and agencies.[29] What can be heard is a judicial issue. Fundamentally, then, standing frames a division between the different branches of government, and within agencies defines the process that will be available to establish claims. If a party is claiming injury to its economic well-being, the case is akin to a private action to limit government action in some way.[30]

Defining the person who could assert that interest, however, has been

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27. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459 (1965); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 672 (1973); Kevin A. Coyle, Comment, *Standing of Third Parties to Challenge Administrative Actions*, 76 CAL. L. REV. 1061, 1067-68 (1988).

28. William Fletcher has set out the "black letter" concepts which are "numbingly familiar":

> The purposes include ensuring that litigants are truly adverse and therefore likely to present the case effectively, ensuring that the people most directly concerned are able to litigate the question at issue, ensuring that a concrete case informs the court of the consequences of its decisions, and preventing the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches. Under present doctrine, a plaintiff can have standing only if he satisfies the "case or controversy" requirement of Article III of the Constitution. To satisfy Article III, a plaintiff must show that he has suffered "injury in fact" or "distinct and palpable" injury, that his injury has been caused by the conduct complained of, and that his injury is fairly redressable by the remedy sought. If a plaintiff can show sufficient injury to satisfy Article III, he must also satisfy prudential concerns about, for example, whether he should be able to assert the rights of someone else, or whether he should be able to litigate generalized social grievances. Assuming that Article III has been satisfied, Congress can confer standing by statute when, in the absence of a statute, a plaintiff would have been denied standing on prudential grounds.

William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222-23 (1988).

29. David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37.

30. JAFFE, *supra* note 27, at 503.

a fitful process. Initially, the Supreme Court determined that only those suffering a legal injury defined by either the common law or by statute were entitled to challenge government action, but the illogic of this position and the changing view of the roles of intervenors led to a broader conception of the standing requirement. Writing in 1972, Kenneth Culp Davis could correctly assert, "[t]he present law of standing differs no more than slightly, if it differs at all, from the simple proposition that one who is hurt by governmental action has standing to challenge it."[31] In the years since, however, the Supreme Court and the FCC have done little to further that notion. The Court has restricted access in several ways that harken back to the initial standing standards, and the long-recognized role of a competitor to challenge administrative action at the FCC reflects very little of the changed competitive environment in which the agency acts.

On its face, the statutory structure of standing at the Commission is the appeal and challenge provisions contained in the Communications Act.[32] Although a statutory provision granting "rights" to interested parties or to those aggrieved by an agency decision seems to immunize standing from changing constitutional standards, the right to appear before the Commission in administrative proceedings has often moved with judicial constructions of standing. In recent years, that construction has narrowed. Likewise, the Commission and the reviewing courts have defined standing in ways that limit access to the adjudication process.

In practice, standing at the FCC has been narrowed to include only three kinds of parties: competitors suffering signal interference; direct economic competitors; and audience members.[33] The first two present obvious competition concerns; both are seeking to use the economic assets of a community, either bandwidth or advertising revenue. Audience members, however, can be competitors as well, especially when narrowly defined standing as a competitor is not available. The potential competitor, however, remains outside the scope of the current standing rules, often because it does not meet the injury in fact test that the Commission recognizes both explicitly and implicitly.

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31. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT 419 (3d ed. 1972).
32. 47 U.S.C. §§ 309, 402 (1988).
33. National Broadcasting Co. v. FCC, 362 F.2d 946, 954 (D.C. Cir. 1966).

B. Constitutional Development of Competitor Standing under the Legal Interest Test

Standing as a separate constitutional concept is of recent origin.[34] In its initial form, the courts required a person to base a suit on a legal interest. They defined a legal interest by common law property right, contract, tort, or statute.[35] This test was often fatal to a suit charging governmental interference with competition since the claim alleged in substance that the injury arose out of lawful competition, not an injury to a legal interest.

In a classic example of the test's application to lawful competition, the Supreme Court, in a challenge to the authority of the Tennessee Valley Authority ("TVA") to enter into contracts to provide power to regions already served by private utilities, found that the private utilities did not have a legal interest on which to sue.[36] The TVA conceded that it would cause damage to the utilities, but the Court could not find any illegal competition or exclusive right to a franchise on which to support an action.[37] Under the legal interest test, there could be no injury if the competition itself was legal.[38] Legal interests that did provide standing rested on inequality of treatment[39] and unlawful competition.[40] Likewise,

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34. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1375-78 (1988). There is some debate as to the origins of the doctrine in common law writs such as mandamus. *See generally* JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE PUBLIC LAWS 55 (1978); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961). Winter, however, correctly notes that cases identifying standing as a jurisdictional issue are of recent origin.

35. DAVIS, *supra* note 31, at 419-22; JAFFE, *supra* note 27, at 505-14.

36. Tennessee Elec. Co. v. Tennessee Valley Auth., 306 U.S. 118 (1939).

37. *Id.* at 137, 139-40.

38. *Id.* at 139 ("The local franchises, while having elements of property, confer no contractual or property right to be free of competition either from individuals, other public utility corporations, or the state or municipality granting the franchise.").

39. In The Chicago Junction Case, 264 U.S. 258 (1924), the Court found that competitors had standing to challenge an order permitting the vertical integration of terminal railroads with the New York Central Railroad. Competitor standing arose because government approval of the integration under the 1920 amendments to the Commerce Act "inflicted [an injury] by denying to the plaintiffs equality of treatment." *Id.* at 267. "[A] legal interest exists where carriers' revenues may be affected." *Id.* Importantly, however, the Commerce Act itself provided for suit involving the validity of an order. The Court concluded that the right to bring suit extended to competitors who would be injured by a resulting order that was favorable to the applicant. *Id.* at 267-68.

40. In City of Chicago v. Atchison, Topeka & Santa Fe Ry., 357 U.S. 77 (1958), an existing service provider was permitted to intervene in a suit by a competitor opposing an application of certification standards unique to the latter. The Court concluded that the intervenor had a right to protect itself from unlawful competition presented by a successful challenge of the certification requirements.

a competitor might argue standing if a statute provided a basis for the claim[41] or if the government's action infringed on an exclusive franchise provided by a state or locality.[42]

In applying the legal interest test, a basic constitutional theme emerges that reappears in the more recent standing decisions. The Supreme Court appears to have struggled with the definition of its own powers. In stating that a party must be asserting a legal interest on which to base standing, the Court attempted to contrast the traditional common law litigant with a party seeking to petition for a more general change in the legal structure. As the Court repeatedly stated in *Perkins v. Lukens Steel Co.*,[43] the courts will not vindicate a general interest in policy; that is a matter for legislative resolution.[44] Fundamentally at issue is a separation of powers.[45]

Although many of the seminal standing cases at the FCC arose before the Court's rejection of the legal interest test in 1970, competitors frequently and successfully asserted standing to present issues to the Commission in adjudicative proceedings. The initial reason for that success was the Court's recognition of a statutory right on the part of competitors to be heard on issues serving the public interest. From this premise, the circuit courts developed additional alternatives for existing competitors and members of the listening public (who very well might be competitors) to challenge a variety of actions sought by regulated parties.

The bedrock on which standing at the FCC in broadcasting cases was set is *FCC v. Sanders Brothers Radio Station*.[46] In that case, a newspaper sought a broadcast license.[47] An existing licensee opposed the application on the basis that potential competition was harmful.[48] The Court rejected the narrow claim that the Commission should have considered the impact of the competing license on the welfare of the existing licensee, Sanders. It found that the Communications Act did not provide a mechanism for protecting existing licensees from the emergence of new competition as

41. The Chicago Junction Case, 264 U.S. at 268; *see also* Tennessee Elec. Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38 (1939) (recognizing but not finding the exception); Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1937) (same); Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 931-32 (D.C. Cir. 1955) (same).

42. *See, e.g.*, Frost v. Corporation Comm'n, 278 U.S. 515 (1929).

43. 310 U.S. 113 (1940).

44. *Id.* at 125.

45. *Id.* at 131-32.

46. 309 U.S. 470 (1940).

47. *Id.* at 471.

48. *Id.*

long as the quality of the use of the license was not implicated.[49] Importantly, the Court drew a distinction between broadcasting, which it described as remaining essentially competitive, and telephone service, which it concluded was a common carrier service.[50] While the ability to perform might be affected by additional competition and therefore a competing application might raise a performance issue, "economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license."[51]

The Court's failure to recognize an existing licensee's legal right to be protected from competition should have been fatal to the appeal under a legal rights model of standing, but it was not. Though Section 402(b)(2)[52] provided a right to an appeal by any other person aggrieved by a decision of the Commission, the Commission argued Sanders had no appeal since it did not have a right to be protected from competition.[53] Although the logic appeared impeccable, the Court rejected it. The Court recognized an alternative basis of standing for the competing licensee.

> Congress had some purpose in enacting § 402(b)(2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.[54]

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49. *Id.* at 473 ("We hold that resulting economic injury to a rival station is not, in and of itself, and apart from consideration of public convenience, interest, or necessity, an element the petition must weigh, and as to which it must make findings, in passing on an application for a broadcasting license.").

50. The Court stated:

> In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such.

Id. at 474.

51. *Id.* at 476.

52. Communications Act of 1934, ch. 652, § 402(b)(2), 48 Stat. 1064 (1934) (current version at 47 U.S.C. § 402(b)(6) (1988)).

53. *Sanders Bros. Radio Station*, 309 U.S. at 477.

54. *Id.* at 477.

The injured competitor had standing to challenge the license approval and "to raise . . . any relevant question of law in respect of the order of the Commission."[55]

Sanders is significant in two respects. First, the Court opened a new door to standing. Sanders Brothers did not have a property right in the license. "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."[56] Nonetheless, Congress created a right to appeal issues of public policy and law. Now, the Court has handed that right to an existing licensee. Sanders, therefore, could raise arguments that affected its license, but did so in the context of a statute protecting the "public interest." In essence, the competitor served to protect a set of interests that were public and not private. There was, according to the Court, no private legal interest to protect. Second, the rationale for extending the right to appeal is equally important. The argument is premised on the ability of some party to present an effective appeal. Recognizing that the agency framework did not guarantee the proper recognition of competing claims, the Court cast about for a way of assuring their presentation to an appellate court. A disgruntled competitor armed with the public welfare provided that necessary check.

C. The Emergence of the Injury in Fact Test and Audience Participation

The artificiality of the legal interest test, however, made it an easy target for critics. Its circularity was readily apparent.

> In refusing to take jurisdiction, judges have said that the challenger must have a "legally protected right." But on its face that seems no answer at all, for if the court asserted jurisdiction and the challenger won, he would be legally protected by the remedy the court gave. He would have a "right" to that remedy.[57]

Equally disconcerting was its circumvention by statute. *Sanders* presents

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55. *Id.*
56. *Id.* at 475.
57. VINING, *supra* note 34, at 5 (1978).

an example of Congress' creating standing where it would not otherwise exist. Likewise, a competitor challenge nearly identical to that presented by the *Tennessee Electric* case succeeded on the standing issue because Congress in 1959 amended the TVA's statutory authority to limit its extension into areas previously served by private utilities.[58] The Court distinguished the prior case on the basis that the competition had become potentially unlawful due to the congressional assertion that TVA was no longer permitted to extend its lines to previously-served municipalities.[59] Though there was no explicit provision extending a right to assert the claim administratively, the Court nonetheless could (correctly) discern that the complaining utility was a member of the protected class under the general provision limiting competition.[60]

Beyond the rather shabby logic that held the test together, practical changes in the economic environment did not support its continuation. Simply put, the economy was much too complicated to conclude that orders affecting a third party directly did not affect indirectly the person asserting standing. "Those associated with business enterprise were easily able to perceive how officials typically changed a corporation's freedom to pursue its ends and participate in the flow of material benefits, not by a direct order, but by engineering change through orders or permission given to others."[61] Thus, the same complexity that begat the agencies (because Congress and state legislatures could not contend with day to day management of industrial regulation) likewise encouraged the expansion of parties who could assert claims. The expansion was an obvious and logical step.

The Court substantially revised the test for standing in *Association of Data Processing Service Organizations*.[62] In this case, data processors challenged a decision of the Comptroller of the Currency that permitted banks to offer data processing services to banks and bank customers.[63] The lower courts dismissed the suit based on a finding that the competitors lacked standing to challenge an order providing for legal competition.

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58. Hardin v. Kentucky Utils., 390 U.S. 1 (1968).

59. *Id.* at 6.

60. *Id.* at 7.

61. VINING, *supra* note 34, at 27. Additionally, and apart from the concerns raised *infra* in this section, the nature of concerns of legal importance to individuals could not be captured within the common law rights under the legal interest test. As these interests took on significance to society at large, the legal structure needed to find ways to accommodate them. *Id.* at 27-33.

62. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

63. *Id.* at 151.

The Supreme Court reversed, finding that the competitors needed only show some "injury in fact."[64] In doing so, the Court attempted to separate the determination of the merits from that of standing and thus remove the circularity of the legal interest test.[65] Finding that Congress had not restricted review of the decision, the Court concluded that the competitor's injury, "some future loss of profits,"[66] was sufficient to confer standing.

While an economic interest as a basis for standing had some intuitive appeal, it did not address the issues that other "publics" might have with FCC decisions. In other areas of administrative practice, public participation was a growing reality as courts rethought the role of the administrator. The more the courts conceived the administrator as an arbitrator for various "publics," the more likely they would also find reasons for admitting the public into the administrative process on a formal basis.[67] Once again, an appeal of a Commission decision provided the vehicle for this development.

In the *United Church of Christ* case,[68] the District of Columbia Circuit Court of Appeals anticipated the more generalized standard that would emerge in *Association of Data Processing Service Organizations*. Audience members challenged the license renewal of a broadcast station on the basis that its discriminatory coverage of racial issues violated the Fairness Doctrine. The FCC denied standing, applying the legal interest test and noting that the injury was general in nature.[69] Relying on the private attorney general rationale and the congressional extension of rights

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64. *Id.* at 152.
65. The Court stated:

> The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

Id. at 153
66. *Id.* at 152.
67. The classic discussion of the growth of the participative model is Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1711-90 (1975). Of course, public actions of this sort have to overcome the sense that private attorneys general are not real players. As a result, there is an obvious distrust of this sort of standing. *See* Bob Eckhardt, *Citizens' Groups and Standing*, 51 N.D. L. REV. 359, 361 (1974).
68. Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).
69. *Id.* at 999.

to those positioned to protect the public interest, the court found that audience members could challenge the grant of the license renewal as the best champion of the public interest.[70] In this context, "[s]tanding is accorded to persons not for the protection of their private interest but only to vindicate the public interest."[71] The dangers associated with an explosion of parties asserting claims against the licensee could be constrained by agency rules and practice.[72]

This decision was unusual both in its rationale and effect. Its rationale avoided the traditional legal interest test and premised standing on a generalized expectation of good government. In effect, it provided standing to all viewers merely on the basis that they were viewers, independent of any economic interest in the outcome. As the case was decided contemporaneously with the expansion of standing the Supreme Court would soon inaugurate with *Flast v. Cohen*[73] and *Association of Data Processing Service Organizations*, the decision should not be seen as too much of a surprise. Nonetheless, it remains a high mark for expanded standing.

Moreover, *United Church of Christ* opened a new avenue for competitor standing. A competitor might be able to assert standing on alternative bases as a result of the *United Church of Christ* case. On the one hand, it could rely on *Sanders* to assert economic injury. On the other hand, a potential competitor might also be a member of the audience and be able to raise standing arguments in the public interest on that ground. Thus, the case provided another arrow in the quiver of the competitor seeking to use agency process to affect the marketplace.

D. Constraints on Standing in the Courts and at the Commission

Although *United Church of Christ*, *Association of Data Processing Service Organizations*, and *Flast v. Cohen* seemed to open the possibilities for far ranging constitutional standing, the emerging conservative majority on the Court did not augur well for further expansion. For example, the Court began a process of refining the injury in fact test. Three developments contributed to that result. First, the Court refined

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70. *Id.* at 1003-05.
71. *Id.* at 1001.
72. *Id.* at 1004-06.
73. 392 U.S. 83 (1968). In *Flast*, the Court recognized a limited right of a taxpayer to bring suit to enforce limitations on congressional spending power.

its definition of what constituted an injury. Second, the Court narrowed the causation requirement. Third, the Court adopted a remediation requirement. Likewise, the Commission took a similar constrained view of standing, choosing to limit access to only judicially recognized parties. Together, these decisions formed the basis for denying standing in a variety of cases in which some injury in fact might be detected.

At the Court, injury itself has proven elusive under the injury in fact test. First, it must be particularized to the complainant.[74] This need for a concrete injury thus prevented suits by members of the Sierra Club challenging the commercial use of national forests,[75] reservists challenging a potential congressional conflict of interest prevented by the Constitution,[76] builders challenging zoning ordinances,[77] and civil libertarians challenging the transfer of government property to a Bible college.[78] In a related context, the injury must be certain.[79] Belief in the cause is not a substitute for actual injury, even though it might provide the desired adversity.[80] While a statute may provide for the kind of injury that the Court has required,[81] it is not a substitute for finding some injury has occurred.[82]

The causation element of the injury in fact test requires a showing that the alleged constitutional or statutory violation caused the alleged injury.

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74. Valley Forge Christian College v. Americans United for the Separation of Church and State, 454 U.S. 464, 485 (1982) (lack of standing due to failure to identify a direct personal injury); Warth v. Seldin, 422 U.S. 490, 499 (1975) (citizens not directly injured by discriminatory town zoning ordinance were denied standing); Schlesinger v. Reservist Comm., 418 U.S. 208 (1974) (injury must be concrete as opposed to generalized and abstract); Sierra Club v. Morton, 405 U.S. 727, 735 (1972) (organization whose members were not alleged to be injured lacked standing). For an early discussion of *Sierra Club* anticipating the use of local residents to assert organizational standing, see Louis X. Amato, Case Note, *Standing: A Public Action Requires a Direct Private Wrong*, 27 U. MIAMI L. REV. 225 (1972).

75. *Sierra Club*, 405 U.S. at 735.

76. *Schlesinger*, 418 U.S. 208.

77. *Warth*, 422 U.S. at 499.

78. *Valley Forge Christian College*, 454 U.S. at 485.

79. *See* Whitmore v. Simmons, 495 U.S. 149 (1990); Gilmore v. Utah, 429 U.S. 1012 (1976). In each of these cases, the alleged injury, execution of a third party's death sentence, was held not to affect the complainant. In *Whitmore*, the prisoner challenged the standing of the third party complainant to lessen the chances of a death penalty being imposed on him under a statute that required comparative review. The appeal that he sought for a third party would then form a part of the comparative evidence against which his own punishment would be judged.

80. *Valley Forge Christian College*, 454 U.S. at 486.

81. Sierra Club v. Morton, 405 U.S. at 732; Warth v. Seldin, 422 U.S. at 500; Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) (statute provided a right to truthful information).

82. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2144 (1992).

The Court initially created a substantial amount of trouble for itself in the famous *SCRAP* case, in which it recognized the standing of a group of law students who complained about transportation tariff rates because they would frustrate recycling.[83] Since then, the Court has backed away from extended chains of causation, instead requiring a much closer relationship between injury and violation.[84]

Finally, the Court had required that the injury be a subject which a court order can remedy.[85] Again the Court has often ignored the obvious in its attempt to limit access to the courts. In one of the classic dissenting statements found in recent standing cases, Justice White criticized the Court's failure to find likely remediation because of the state's failure to enforce a criminal statute to protect the support rights of illegitimate children.

> The Court states that the actual coercive effect of those sanctions on Richard D. or others "can, at best, be termed only speculative." This is a very odd statement. I had always thought our civilization has assumed that the threat of penal sanctions had something more than a "speculative" effect on a person's conduct. This Court has long acted on that assumption in demanding the criminal laws be plainly and explicitly worded so that people will know what they mean and be in a position to conform their conduct to the mandates of law.[86]

Notwithstanding this irony, the Court in this decision and others has required some showing that a court order will remedy the alleged injury.

More importantly, while the instrumental goal may be to assure a viable case or controversy presented by motivated parties, the Court also has noted that avoiding interference with other branches of government justifies the occasional avoidance of real constitutional questions such as

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83. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973). For a critique of the causation rationale, see Gene R. Nichol, Jr., *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185 (1981).

84. *See, e.g.*, *Valley Forge Christian College*, 454 U.S. at 485 (finding that the plaintiffs "fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees").

85. Linda R.S. v. Richard D., 410 U.S. 614 (1972); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976).

86. *Linda R.S. v. Richard D.*, 410 U.S. at 621.

the transfer of real estate to church schools.[87] Undoubtedly, this careful analysis of injury, causation, and remedy has caused standing determinations to shade into decisions on the merits, and often the cases appear to be nothing more than decisions of whether a claim is stated.[88] Nonetheless, the Court retains the belief that the injury in fact test does not address the merits of the claim, but only the proper party to assert it,[89] and it justifies the limitation on a need to maintain an appropriate separation of powers.

Thus, the Court is making a fundamental statement about the allocation of political authority when it renders a standing decision. It is defining a division between judicial and legislative authority.[90] As the Court has moved away from deciding certain types of claims by imposing ever-narrower injury, causation, and remediation requirements, it is not only choosing not to decide but also placing that decision in the hands of another branch of the government. The Court has turned the injury determination itself into a policy-setting component. For there to be a justiciable injury, a court must find not only some factual injury to the complainant, but also that the injury is in a form of which a court can take cognizance.[91] After 1970 and the recognition of the injury in fact test, the first element is easily satisfied: all sorts of economic and psychic injuries may exist to base a claim. The second element may prove more difficult, for a court must be comfortable that it can fashion

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87. *Valley Forge Christian College*, 454 U.S. at 473-75; *see also* Warth v. Seldin, 422 U.S. at 500 (various consumer and commercial groups without standing to challenge restrictive zoning).

88. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 760 (1984) (challenge to Federal Government's grant of tax exempt status to schools that discriminated on the basis of race).

89. Naturally, a whole literature has developed around the absurdity of the Court's decisions. Some of the literature is reverential. *See, e.g.*, C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862 (1985); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). Much is not. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Thomas P. Lewis, *Constitutional Rights and the Misuse of "Standing"*, 14 STAN. L. REV. 433 (1962); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977); Note, *Standing on Shaky Ground*, 57 GEO. WASH. L. REV. 1408 (1989). Professor Gene Nichol has written a series of articles criticizing the Court's various attempts to restrict access to standing. Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915 (1986) [hereinafter Nichol, *Injury*]; Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68 (1984); Nichol, *supra* note 83. The structure of that debate is outside the scope of this article.

90. EDLEY, *supra* note 22, at 197.

91. Nichol, *Injury*, *supra* note 89, at 1930.

an appropriate remedy that will address the alleged injury and do so without interfering with the other branches of government. As the injury becomes less particularized and more policy oriented, the Court is more likely to defer to another branch for a solution.

Not surprisingly, the division between policy and adjudication carries into agency actions as well, but there the division appears to occur at a point that appears less well thought out. Despite the broad philosophical strokes favoring expanded standing in *Sanders* and *United Church of Christ*, current FCC practice does not support a far-ranging reading of either case. Instead, the Commission has adopted an approach that limits access to adjudicatory proceedings to existing competitors and incumbent license holders. In language reminiscent of the Supreme Court's standing cases, potential competitors' claims are too tenuous to justify standing.

E. The Broadcast Standing Decisions

In Title III broadcast cases, competitor standing is based on the current position of the challenger in the market. For example, in *Dry Prong Educational Broadcasting Foundation*,[92] an existing station challenged an application for a new noncommercial license. In granting standing to the existing station, the Commission concluded that the application "will cause economic injury by creating an additional competitor in its market."[93] The Commission has further defined the existing marketplace by looking to the geographic area served and the expected audience under a proxy of format.[94] In contrast, a challenger without a station in the market did not present an economic injury.[95] Thus, a prior competing applicant for a license currently in a proceeding to transfer ownership did not have standing in *Pinelands, Inc.*;[96] in that case, the FCC found that the injuries were too speculative because the would-be competitor was "not currently an economic competitor."[97] Similarly, an applicant for a competing license is not afforded standing in a proceeding transferring an extant licensee from one company to another on the ground that it is not an existing competitor.[98]

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92. 7 F.C.C.R. 496 (1992).
93. *Id.* at 496.
94. Family Stations, Inc., No. 86-354, 1986 F.C.C. LEXIS 2667 (Sept. 24, 1986).
95. Application of Irene M. Neely & Grace C. Holmbraker, 49 F.C.C.2d 311 (1974).
96. 71 Rad. Reg. 2d (P & F) 175, 181 (1992).
97. *Id.* at 181 & n.20.
98. Family Television Corp., 59 Rad. Reg. 2d (P & F) 1344 (1986).

Despite this narrow standing requirement, potential competitors still may affect the proceeding with varying success. One alternative is to assert standing as an audience member. In *WGSM Radio, Inc.*,[99] for example, several local corporations which were not competing licensees challenged an assignment of a license. The principals of the corporations had standing as listeners, and their standing was imputed to their corporations.[100] Second, the FCC has a rather uniform habit of turning the standing determination on its ear. Having found that a party does not have standing to assert a challenge, the Commission nonetheless will determine the challenge on its own authority.[101] The effect is interesting. The challenging party finds an issue of interest to the Commission, frames it, and then is excluded from the proceeding. Then, it is also arguably excluded from the appeal since it was not a party to the administrative proceeding.[102] In effect, the challenger may lose the standing argument, win a hearing on the claim, and lose on the merits of the claim with no right to an appeal. This resolution seems unfair and counterproductive.

As developed by the FCC, a competitor's standing in broadcast cases is defined by its current position in the market. If the party has a license in the applicant's market, it is a competitor. If it does not have a license, it is a potential competitor and its claims or injuries are speculative.

F. Common Carrier Cases

The cases addressing the claims of common carriers follow a similar pattern despite differences in underlying statutory provisions and assumptions about the technology.[103] For example, a competitor successfully asserted standing as a competing carrier in *Local Area Telecommunications, Inc.*[104] Similarly, a competing common carrier for long distance

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99. 2 F.C.C.R. 4565 (1987).

100. *Id.*

101. *See, e.g.*, Las Americas Comm., Inc., 5 F.C.C.R. 1634, 1635 (1990), *vacated on other grounds by* 6 F.C.C.R. 1507 (1991). In fact, in each of the cases noted above in this section, the Commission took a similar approach.

102. DAVIS, *supra* note 31, at 206.

103. As noted previously, broadcast and telecommunications are regulated under different titles of the Communications Act. The titles plainly contemplate differences in applicable technology, i.e. radio broadcast versus wire, and differences in market structure, i.e. competitive versus natural monopoly. The technological assumptions, and with them the market assumptions, are failing. *See supra* notes 1-16 and accompanying text.

104. 1985 F.C.C. LEXIS 3079 (June 25, 1985).

service was permitted to assert a claim against a Bell regional holding company for its failure to maintain a termination point for carriage.[105] Likewise, a domestic radio service successfully asserted standing to challenge a license transfer to Western Union from a competing carrier in its service areas.[106] Each of these cases presents a situation similar to the successful broadcast cases: Two parties are seeking to serve the same customer base, the success of one affects the other, and as a result the Commission grants standing.[107]

Similarly, a potential competitor in the common carrier cases fares just as poorly as its broadcast cousin. If the competitor is not currently operating in an applicant's market, it is without standing because the alleged harm is too tenuous.[108] Similarly, the failure to carry a particular type of signal raises a colorable challenge to standing by a potential competitor.[109] The Commission has gone so far as to suggest that it is not interested in adjusting relations of parties to affect prospective competition.[110]

Of course, challengers have failed on more typical grounds as well. For example, the Commission sometimes has determined that a claim is without merit.[111] Alternatively, the challenger has failed to show injury.[112] But in large part, the competitor cases seem to turn on whether the challenger is an existing competitor.

G. Maintaining "Haves" and "Have-Nots"

The broadcast and telephone decisions suggest that the FCC is drawing

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105. American Satellite Corp., 64 F.C.C.2d 503, 507-08 (1977).

106. Northern Mobile Tel. Co., 39 F.C.C.2d 608 (1973).

107. *See also* Telefonica Larga Distancia de Puerto Rico, 4 F.C.C.R. 4496 (1989) (application for long distance carriage); General Elec. Co., 3 F.C.C.R. 2803 (1988) (international and domestic fax and telex services); North Am. Tel. Ass'n, 1985 F.C.C. LEXIS 3568 (April 5, 1985) (customer premises equipment); Pacific Power and Light Co., 42 F.C.C.2d 375 (1973) (common carrier radio services).

108. Mobile Communications Corp. of Am., 2 F.C.C.R. 5902 (1987).

109. Southern Satellite Sys. Inc., 62 F.C.C.2d 153 (1977) (addressing merits of challenge without decision concerning standing of Western Union, although Western Union was not carrying signals on behalf of cable companies).

110. Telenet Communications Corp., 70 F.C.C.2d 1144 (1979).

111. New York City Transit Auth., 4 F.C.C.R. 4488 (1989) (refusing to address the standing issue after a determination that the claim was without merit); Eastern Microwave, Inc., 1983 F.C.C. LEXIS 595 (March 1, 1983) (deciding that copyright issues are not for FCC decision).

112. Morrison Radio Relay Corp., 31 F.C.C.2d 612 (1971) (holding that competitor failed to show that it suffered from adverse effects due to competition).

a line around its adjudicatory docket that precludes it from having to decide certain types of competitive issues. A decision concerning the licensing and transfer of cellular regions creates divisions within the marketplace. When a new entrant challenges those divisions, the potential competitor cannot be heard. Similarly, potential entrants into satellite services and long distance are left on the sidelines. As a result, those first to secure a license may exert considerable control over the FCC docket. The incumbents may use standing as a club to protect themselves from new applicants and as a shield in their own proceedings to prevent the interference of potential players.

Importantly, more is at stake than judicial notions of fairness. These decisions have the potential of framing the emerging competitive environment in telecommunications. As industries merge, there will be attempts on the part of existing players to sustain whatever market advantage they may have. The current rules allow these players access to Commission proceedings to establish their claims. In contrast, the new player (whether a new entity or an existing company shifting existing technology into new uses) faces a barrier of standing that may prevent its claim from being heard or reduce its claim to an administrative afterthought. The creative challenger then would face hurdles that the incumbent does not, a cost that may prove destructive.

II. THE MEASURE OF THE STANDING

To suggest that the results of the cases protect existing competitors to the detriment of potential entrants, however, does not address the more important question of whether that policy is consistent with the gatekeeping function of standing. Analytically, the Commission's cases turn on the notion of injury. In the situations raised by potential competitors, the FCC perceives either no injury or one too tenuous to raise a significant claim to participation. Yet some sort of harm is presumably perceived by the intervenor; otherwise, it would seem wasteful for it to expend valuable resources on seeking intervention. Although it is plainly conceivable to restructure a claim for standing to fit an alternative basis such as audience participant and thus avoid the pitfalls of being a potential competitor, this false face on the claim may result in a distortion of the real losses that the potential competitor encounters.[113] Unless injury is

113. A recent case is instructive. In Coalition for the Preservation of Hispanic

reduced to a mask by which agencies hide some sort of political agenda,[114] there is some content to the decisions that represents an analytic choice among alternative definitions of agency behavior.

In the Supreme Court decisions concerning constitutional standing requirements, the root of the decision is a separation of powers question. This concern for the proper allocation of judicial and political authority in turn affects the injury requirement and its multiple elements. As the Court itself has become more conservative in its view of its own political role, it has narrowed the injury requirements.[115]

Though the expansion and contraction of standing at the FCC seems to track the Court's historical tendencies, the analytic question presented by agency standing is slightly different from that presented by judicial standing. When an agency is defining the types of cases it will permit through petition or intervention, the underlying issue of separation of powers in constitutional standing is not as apparent, since the agency itself is checked by each of the constitutional branches through legislative authorization, executive appointments, and judicial review. Internally, however, the agency may focus its own actions into policy (rulemaking) and adjudicatory paths in a manner similar to that of constitutional separations. This division results from statutory requirements to set policy and to adjudicate and from a need for a division of labor to accomplish those tasks. As in the constitutional division, the division within the agency is not likely to be well-defined, and process tools such as those used by the courts to divide policy and judicial activities are an analogy the agency might use to clarify activities. Thus, injury in fact as a test of agency standing takes on the role of dividing agency activities,

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Broadcasting v. FCC, 931 F.2d 73 (D.C. Cir.), *cert. denied*, 112 S. Ct. 298 (1991), the court concluded that the audience was not the appropriate advocate to challenge license on the grounds of improper foreign ownership. Despite the obvious public interest overtones, the court stated that "viewers seem an odd group to lead the enforcement, as genuine victims would by definition fail to notice the insidious effects" of foreign ownership on content (i.e. propaganda). *Id.* at 80. This argument for denying standing invokes a causation or remedy test that is not consistent with the public interest standing recognized in *Sanders*: the audience apparently does not have a realizable interest, while the military or some other governmental agency might.

114. Joseph Vining has discussed the problems created by standing requirements that are satisfied by facetious assertions of injury as a means to present public law arguments. VINING, *supra* note 34, at 124-35. The classic example of this mask-like quality is found in taxpayer litigation. It seems unlikely that the plaintiffs in *Flast v. Cohen* were very concerned about the impact on their tax returns from the successful assertion of their claims. On the other hand, the underlying public law claim concerning the separation of church and state was probably very significant to them.

115. *See supra* notes 90-91 and accompanying text.

and commission decisions concerning standing can be analyzed in a similar way. Instead of a separation of powers in the constitutional sense, however, the underlying issue is the more narrow one of a division of labor within the agency between those subjects that are settled in such a way as to warrant the application of specific rules to sets of facts and more broadly asserted claims of policy.

If the analogy is sound, then the analytic question of injury as in the constitutional standing cases divides into two inquiries. First, the intervenor must demonstrate that it has suffered an injury of some sort. Second, the injury must be in a form that a court or commission should recognize;[116] that is, the competitor must be asserting injury to a value that is publicly recognized and is a proper subject for judicial resolution.[117] Though economic injury in situations where the competition is legal is a late entry into the standing stable, it is nonetheless plain that an economic injury is now encompassed within the meaning of injury.[118] Thus, there is little problem in a potential competitor asserting an economic injury as a basis for standing. The more difficult issue is the second: the Commission and the courts do not seem willing to elevate the public value represented by the potential competitor. Arguably, either potential competition is not perceived as valuable or the decision makers sense some constraints on their own roles.

A. Potential Competition as a Public Value

These standing cases present the narrow issue of the value of potential competition. Competition obviously is an accepted value within society. Review of various approaches to regulation and economics, moreover, suggests there is little argument that potential competitors represent a real social interest in the regulation of the marketplace.

Certainly the FCC views potential competition as important in its rulemaking. In two decisions relating to common carriers, the Commission sought to streamline the regulation of carriers that were not dominant in their respective markets draw from the basics of the economic and antitrust literature. In the *Competitive Common Carrier First Report*, the Commission focused its attention on market power.[119] It went on to state

116. Nichol, *Injury, supra* note 89, at 1930.
117. *Id.* at 1943.
118. *See supra* notes 32-56 & 62-66 and accompanying text.
119. Competitive Common Carrier First Report, 85 F.C.C.2d at 21 (1980).

the factors it used to relieve some companies from filing tariffs: "Among these are the number and size distribution of competing firms, the nature of barriers to entry, and the availability of reasonably substitutable services."[120] In the *Competitive Common Carrier Rulemaking Notice*, the Commission attempted to refine its notion of the marketplace by recognizing degrees of market power that might be affected by potential competition.[121] It concluded, "regulation of the behavior of firms that otherwise is constrained by actual or potential competition disserves the public interest."[122] In effect, then, the FCC adopted a broad definition of competition and competitors that included existing players and likely entrants.

The economic and antitrust legal theory used to support these two decisions also views competition in a much broader light than that suggested by the FCC's standing decisions. The economist addresses the effect of changes of marginal prices and elasticities of supply and demand to determine market power. A court applying antitrust standards to determine market power would substitute product and geographic markets as proxies for the economic determination. In either case, the result is a definition of competitors looking beyond the existing players in the present market.

The standard economic definition of market power (and therefore the relevant market) presents a different initial question. It is based on the company's ability to profitably sustain price above marginal cost and is a function of both a firm's marginal costs and the supply and demand elasticities that it faces.[123] In short, market power is measured as the difference between price and marginal cost as a percentage of price.[124]

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120. *Id.*

121. Competitive Common Carrier Rulemaking Notice, 84 F.C.C.2d 445, 499 (1981) ("The commenting parties have presented a considerable amount of evidence demonstrating that even some of the carriers that we have classified as dominant are subject to sufficient potential competition so that detailed regulatory scrutiny of their operations is neither warranted nor justifiable.").

122. *Id.* at 500.

123. Herbert Hovenkamp, *Antitrust Analysis of Market Power, with Some Thoughts About Regulated Industries*, in TELECOMMUNICATIONS DEREGULATION: MARKET POWER AND COST ALLOCATION ISSUES 1, 5 (John R. Allison & Dennis L. Thomas eds., 1990).

124. The Lerner Index is a widely accepted calculation of market power. The index is stated as L=(P - MC)/P where P is the firm's charging price and MC is the firm's marginal cost of production. David L. Kaserman & John W. Mayo, *Deregulation and Market Power Criteria: An Evaluation of State Level Telecommunications Policy*, in TELECOMMUNICATIONS DEREGULATION: MARKET POWER AND COST ALLOCATION ISSUES 65, 71 (John R. Allison & Dennis L. Thomas eds., 1990).

This calculation can also be expressed as a function of the firm's price elasticity of demand.[125] Three problems, however, limit the usefulness of this measure. First, it is difficult to find the data to calculate marginal cost and price elasticity. Second, any result would be historical and fail to account for future effects. Third, other factors such as regulation and strategic choices cannot be calculated.[126] As a result, market power does not appear as a metric in antitrust litigation.[127] Nonetheless, the price regulation found in classical competitive markets assumes the existence of potential competitors. While the "wide-spread diffusion of economic power" assures that current prices stay in check, free entry and exit assure continued efficiency.[128] The classical market values potential competition.

A potential competitor also plays a key role in the alternative theory of contestable markets.[129] A contestable market is characterized by hit-and-run entry; that is, competitors may enter and leave the marketplace easily and without cost.[130] This notion of hit-and-run entry requires the existence of potential competitors. As Baumol explains, "Even a very transient profit opportunity need not be neglected by a potential entrant, for he can go in, and, before prices change, collect his gains and then depart without cost, should the climate grow hostile."[131]

If the conditions of contestability exist, then competitive prices emerge. The existence of positive returns will cause a competitor to enter the market and undercut the incumbent's existing gains. Since any higher priced output will be driven from the market, the price will be driven to marginal cost. Consequently, in a perfectly contestable market, a firm cannot use predatory pricing as a weapon for unfair competition.[132] Fundamentally, the market is enhanced by potential competition in a contestable market.

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125. *Id.*
126. *Id.* at 72.
127. Hovenkamp, *supra* note 123, at 5.
128. CAMPBELL R. MCCONNELL, ECONOMICS 35 (9th ed. 1984).
129. For an explication of the theory of contestable markets, see WILLIAM J. BAUMOL ET AL., CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1982). The discussion which follows is drawn from William J. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, 72 AM. ECON. REV. 1 (1982) and Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111 (1983).
130. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, *supra* note 129, at 3.
131. *Id.*
132. *Id.* at 4-5.

As a proxy for the economic calculation, antitrust has developed a "markets" definition to determine market power.[133] At the heart of the approach is a comparison of the share of a market defined by product and geographical components. The product market defines those products that buyers will substitute or competitors will produce if the seller appreciably raises its prices.[134] The geographic market is that area in which an increase in price would either drive buyers to search outside the geographic area or cause outside producers to enter.[135]

> The goal here is to identify a group of buyers and sellers whose purchase and production decisions jointly determine the price at which the specified good is sold. Extraneous buyers and sellers whose decisions do not affect the market price must be excluded, and those that do influence price must be included.[136]

At the end of the analysis, the market is defined by those producers of products that are a substitute for each other: these producers are the competitors. This definition of the competitive marketplace naturally entails both existing and potential competition because any company currently providing a substitutable product would be included in the market. In addition, price changes are expected to induce new players to enter unless there are significant barriers to entry. Thus, the antitrust definition looks beyond current players to potential ones.

In each of the apparently relevant legal-economic approaches, potential competition and competitors are equal or near-equal players. The potential competitor is no less significant than its entrenched brethren. Its value to society is readily apparent.

B. Propriety of Administrative Resolution of Potential Competitor Claims

Although potential competition is a valuable interest, the proper Commission procedures to recognize this interest depend on the role assigned to administrative agencies. Fundamentally, there would appear

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133. Hovenkamp, *supra* note 123, at 5.
134. Kaserman & Mayo, *supra* note 124, at 68-69.
135. *Id.* at 67-68.
136. *Id.* at 67.

to be two problems inherent in this determination. First, the Commission must be the proper political actor for resolution of this sort of claim. Second, it must be able to structure a process that avoids distorting or impeding the resolution of claims. Although the second problem does not appear to be too significant, the solution to the first is at best ambiguous if no prima facie outcome is specified, and this difficulty may explain the Commission's refusal to address claims of potential competitors in adjudicative proceedings.

1. Instrumental Concerns: Can Agencies Deal with a "Flood of Litigants?"

One potential problem is that hordes of potential competitors will interfere with efficient adjudication. Though often raised,[137] these instrumental concerns should not prevent the recognition of potential competitors. Certainly, administrative process can be used abusively to prevent effective competition. The FCC has addressed similar issues concerning abuse of process[138] and the release of confidential data.[139] The point is that instrumental concerns can be met. The Commission need not ignore competitive reality in order to oversimplify the administrative process because of fears about abuse of process. If abuses occur, it has the authority and procedures to check them.

2. Alternative Definitions of the Agency in Administrative Practice

The more difficult question is the legal and political one. Whether standing is granted may depend on the role the agency is expected to play. That role is itself a balance of competing values. Inherent in administrative law is a tension between the technical requirements of

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137. The administrative agency can be expected to challenge additional participation of members of the public based on the arguments that alternative procedures exist, the arguments are heard anyway, and hordes of intervenors will overwhelm agency practice. Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994, 1004 (D.C. Cir. 1966). One student author observed that the FCC raised other procedural hurdles after the courts lowered the requirements for standing. Note, *Selection of Administrative Intervenors: A Reappraisal of the Standing Dilemma*, 42 GEO. WASH. L. REV. 991, 1012-13 (1974).

138. Utica Tel. Co., 5 F.C.C.R. 2791 (1990); Martin-Trigona, 2 F.C.C.R. 5561 (1987); ATS Mobile Tel., Inc., 35 F.C.C.2d 443 (1972); American Television Relay, Inc., 11 F.C.C.2d 553 (1968).

139. American Tel. & Tel. Co., 55 F.C.C.2d 5 (1975).

reasoned decision making and the political demands within a democracy for participation and expression of popular will in the outcomes of that process.[140] In his classic article on administrative process,[141] Richard Stewart has identified two models of administrative process that attempt to resolve the political demands placed on agencies. In the traditional-incremental model, the agency's role is narrowly defined to expert administration of an industry segment, the value of potential competition is subsumed within agency expertise, and policy choices reside not only outside of agency adjudication, but outside of the agency in total. In the alternative representational model, however, potential competitors might have an important place because the role of the commission is to further political accommodation. The problem then resolves into deciding among the potential roles that the agency might assume.

The traditional-incremental model resolves the tension between administrative discretion and political demands by defining the task of the agency within narrow statutory guides. Three principles are important. First, the action of the agency is benchmarked against its statutory authority, and actions outside that authority are not permissible.[142] The statutory authorization defines the necessary accommodation. Second, the agency's procedures must be designed to assure that the agency complies with its substantive mandate.[143] In this regard, basic due process rights assure that the agency does not interfere with personal or property rights unless supported by substantial evidence determined by an impartial fact finder, after a hearing, and based on a record. Finally, the process must afford an opportunity for judicial review as a final check on administrative discretion.[144] Under this constrained model, the agency operates as "a mere transmission belt for implementing legislative directives in particular cases."[145]

The policy underlying this model is the perception of the agency as an expert system.[146] As described by James Landis, the expert agency

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140. *See generally* BRUCE A. ACKERMAN ET AL., THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY 1-3 (1974). In a recent book, Christopher Edley divides the issue into expertise, fairness, and politics. EDLEY, *supra* note 22.

141. Stewart, *supra* note 67.

142. *Id.* at 1672-73.

143. *Id.* at 1673-74.

144. *Id.* at 1674-76.

145. *Id.* at 1675.

146. THOMAS K. MCCRAW, PROPHETS OF REGULATION 213-14 (1984). Absent from the discussion is the notion of the different kinds of expertise. Expertise may have multiple meanings. *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U.

responds to a demand for institutions "to maintain a continuing concern with and control over the economic forces which affect the life of the community."[147] In place of the inexpert judge,[148] the agency brings flexibility and expertise.[149] The very narrowness of the assigned task assures professionalism.[150] Indeed, this professionalism modifies and reduces the level of judicial review.[151]

In contrast, two important principles ground the representational model. First, the agency serves as a forum for affected parties to advance their views. In this model, political accommodation takes place daily through agency decision making. Thus, the model assumes broad rights to initiate and intervene, to participate in hearings, and to appeal based on minimal standing requirements.[152] Second, it assumes that the agency will consider and accommodate multiple views in its decision making process. As Richard Stewart summarizes the model, "the problem of administrative procedure is to provide representation for all affected interests; the problem of substantive policy is to reach equitable accommodations among these interests in varying circumstances; and the problem of judicial review is to ensure that agencies provide fair procedures for representation and reach fair accommodations."[153]

The policy underlying the representational model is a fundamental distrust of the agency's competence or fairness. Professionals and academics had found agencies subject to all sorts of undemocratic maladies: capture by the regulated entities; cronyism; low quality; and delay.[154] Much of that argument appears strongly in the *United Church of Christ* decision.[155] The appellate court rejected the view that the FCC itself is the primary voice for the public interest; instead it looked to the

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PA. L. REV. 549, 574 (1985).

147. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 8 (1938).

148. *Id.* at 31.

149. *Id.* at 98.

150. *Id.* at 98-100 (discussing checks on judicial misinterpretation of agency action).

151. *Id.* at 144.

152. Stewart, *supra* note 67, at 1723-56.

153. *Id.* at 1759.

154. MCCRAW, *supra* note 146, at 218-19. For a broader discussion of the various theories of regulation influencing this debate, see BONBRIGHT ET AL., *supra* note 20, at 44-56. Indicative of this problem is Colin Diver's observation that agencies will tend to favor the views of the affected industries and under-represent the values of unorganized beneficiaries. Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L. J. 65, 99 (1983).

155. Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

community for the primary discussion about the legitimacy of the station's license renewal request.[156] This approach is a far cry from the one viewing the agency as expert expressed by Landis in 1938.

Although whether the transformation of administrative law to the representative model has been or should be completed is much in issue, not only as to standing but also as to other aspects of administrative law,[157] what is important to the issue of potential competitor standing is that there are alternative models on which sound policy can be built. Unfortunately the results are not consistent between models. If one accepts that potential competition is valuable, then the question is whether the agency or some other political entity should be setting the rules. This decision in turn depends on the role assigned to the agency. If its role is largely defined as an industry expert, then the need for potential competitors is largely ignored. On the other hand, one who perceives the agency as incapable of fulfilling the expert's role or who rejects elitist and non-democratic aspects of the model may choose to broaden participation.

At best, the choice is difficult; at worst, ambiguous. Initially there is no statutory or historical claim one way or the other. As the discussion of standing in the first part indicated, standing law itself is somewhat inconsistent and reflects changing views of the agency's role. On policy grounds, the choice is not any easier. On the one hand, the traditional model has the appeal of limits on agency discretion, but the reality of undefined agency standards and the constantly changing business environment suggest that reliance on the traditional model would be misplaced. The alternative representational model offers voice to the affected parties, but challenges notions of constraints. If the strengths of each were joined, however, a better rationale for a particular standing standard might be found.

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156. *Id.* at 1004-05. The court stated:

> Unless the Commission is to be given staff and resources to perform the enormously complex and prohibitively expensive task of maintaining constant surveillance over every licensee, some mechanism must be developed so that the *legitimate* interests of listeners can be made a part of the record which the Commission evaluates.

Id. at 1005.

157. For a discussion suggesting the decline of interest representation in administrative law, see Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 575-90 (1985). Christopher Edley suggests an alternative normative approach that would account for the various functions of the agency, i.e. expertise and representation, within the framework of judicial review. EDLEY, *supra* note 22, at 213-64.

III. RETHINKING STANDING USING A PROGRESSIVE MODEL

Moving beyond the traditional and incremental models of agency may provide another alternative to analyzing the standing problem. Both of the models previously discussed are essentially procedural; they do not necessarily look at the outcomes or suggest a framework for judging the appropriateness of the outcomes arrived at by the agency. However, because the results of agency action can be important, looking at methods to enhance those outcomes may be an important analytic tool.

Along these lines, Susan Rose-Ackerman has argued that agencies should analyze their actions as an attempt to maximize the net gains promoted by a statute.[158] Based on the belief that agency action is centered on the location of market failures and that the current allocation of resources and benefits is debatable,[159] the suggested analysis would focus on outcomes to adjust that allocation rather than processes to reach them. Within the broad grants of statutory authority afforded to agencies such as the FCC,[160] the agency would be responsible under this view for establishing "that they have maximized net benefits subject to statutory, budgetary, and informational constraints."[161]

In this substance-based view of agency action, the role of information to the agency becomes critical. The agency must establish a range of options and their costs and benefits.[162] To obtain that information, the agency must provide incentives for potentially affected parties to provide timely and accurate information.[163] Although much of the policy making logically would move to rule making,[164] nonetheless agency adjudication would remain important in the implementation of policy choices.

This substantive model solves two difficult problems presented by the

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158. SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE 33-34 (1992).

159. *Id.* at 18, 34. The analysis, however, does not attempt to achieve distributive justice. It only identifies the potential effects that may occur and leaves to the political branches the taxing decisions necessary to "correct" the redistributive effects. *Id.* at 18-19.

160. Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 478-79 (1985). Rose-Ackerman uses the social choice literature to explain the problem of attempting to bind the agency to legislative intent. ROSE-ACKERMAN, *supra* note 158, at 34-38.

161. ROSE-ACKERMAN, *supra* note 158, at 39.

162. *Id.*

163. *Id.*

164. *Id.* at 41.

standing analysis under the traditional and representational models of administrative law. Because it is substance-based rather than procedure-based, it avoids the dichotomy between expert and democratic goals. The model assumes that maximization of wealth is intended unless the legislature has demonstrated otherwise.[165] While this choice would appear to diminish the need for outside participation for potential competitors, that limitation would be misplaced. The model merely places a high burden on those who would seek to challenge the outcome as being inconsistent with the statutory presumption. "A presumption in favor of net benefit maximization will increase the political costs for narrow groups who must obtain explicit statutory language in order to have their interests recognized by court and agency."[166] Potential competitors nonetheless would play an important role in determining whether wealth maximization was being achieved by the proposed or existing policy and would have the clear interest to advance those concerns.

By the same token, the instrumental concerns raised by the agency, such as burdens of additional parties and extraneous arguments and the attendant delay, would also be mitigated. The standing argument would focus on issues other than the superficiality of an injury determination. Rather, the determination would be based on whether the potential competitor could advance arguments or concerns based on the statutory presumption. If the potential competitor were advancing information to further those goals, then the agency would grant standing. Otherwise, the potential competitor would have to point to some particular statutory allowance that permitted the special claim of standing.

CONCLUSION: LEGAL AND ECONOMIC MODELS AND COMMISSION STANDING

A tinge of unreality surrounds standing law. As a logical construct, it is not very logical. Often the courts and commissions appear to use standing law as a way of making decisions in the guise of avoiding them.[167] This sense is heightened in the FCC's standing decisions. The Commission ignores the very competition that it has sought to encourage when competitive issues might be presented. Moreover, it ignores parties

165. *Id.* at 39.
166. *Id.*
167. Tushnet, *supra* note 89.

who are logically in a position to understand the direction the market is likely to take.

A comparison of the economic assumption of competitive or contestable markets and the Commission's definition of competitors for standing readily discloses the differences in the role assigned to potential competitors. Competitive and contestable markets are thought to be driven both by players and potential players. The potential competitors are important as a check on the actions of incumbents. If the incumbent is too brash and raises price, lowers output, lowers quality, or fails to adopt cost saving advantages, the potential competitor is assumed to seize that opportunity and exploit it. That exploitation is the driver that results in the cherished consumer surplus. In contrast, the potential competitor in FCC cases is a nonentity. Its injury is called speculative or too tenuous. Nowhere is its value as a check on the incumbent recognized in its own right. In short, the definition of a competitor for standing fails to account for the very role it is supposed to serve.

In the language of standing law, the Commission and the courts currently are saying that a potential competitor will not suffer an injury as a result of Commission action. Whether the reason is based on lack of causation ("too tenuous") or lack of overlapping markets ("no interest" or "no remedy"), the argument is that there is no injury in fact. As the discussion of the industry and the competitive models the Commission and courts use suggests, however, the simplistic boundaries do not reflect the competitive forces at work.[168] Real injury may be ignored when practice fails to allow potential competitors into the process on a full party basis.

The standing decisions ignore the very complexity of the communications industry. It is no longer neatly divided into telephone and broadcast components. Instead there is a convergence of computers and communications and a variety of alternative technical pathways to perform the communications portion of the process; the role of competition from a variety of segments is becoming more real. Band-width and natural monopoly may be relegated to some sort of historical problem while potential injuries have become even less tenuous or speculative. Choices concerning the distribution of cellular licenses, the accretion of power over satellite transmission, or access to points of termination on the phone system will have real impacts on the competitive future of nascent industries. The conservative flavor of the standing decisions that

168. *See supra* notes 1-16 & 119-136 and accompanying text.

recognize only the incumbents thus may in itself constitute a barrier to entry that is wholly unwarranted.

The Commission's habit of mooting standing by considering the competitor's claims on its own motion after denying standing does not mitigate the problem. Whatever special expertise the Commission might have, it does not have the personal incentive to pursue a particular competitive claim. Indeed, by denying standing it may already have reduced the importance of the potential competitor's issue to second-class status.

In many cases, the potential competitor should be afforded standing. Plainly, the Commission has embraced competition to further the public interest.[169] Agency action should therefore provide an opportunity for competitors to enter and exit the market with minimal difficulty. If the Commission were to encourage competition to advance public welfare, it would not play favorites with the parties seeking to influence the policy decisions shaping the legal environment. Potential competitors would have a central role in the policy implementation as well as its creation. Their role in adjudications, therefore, would not be covered by inappropriate masks disguising their role in the new marketplace.

Finally, recognizing potential competitor standing in communications cases is consistent with the Supreme Court's often repeated policies supporting the injury in fact test.[170] Certainly, a potentially competing party could be just as adverse as a competing party. The potentially competing party would present a concrete claim. Moreover, for those concerned with legislative philandering by the courts, there is less potential for judicial legislation when the agency itself is cast into a policy-making role by Congress. Simply put, the Commission need not fear poor decision making due to a lack of adversariness.

The more difficult problem is defining the role that the agency will play in redefining communications regulation. Inherently there is a contradiction in regulating prices and entry in an emerging competitive marketplace. Nonetheless, the Commission is charged with some degree of regulation until Congress restructures the Communications Act. If the Commission plays the role of expert, then potential competitors have little chance of asserting a right to standing. Such a role on the part of the Commission appears inconsistent with long-standing doctrine concerning

169. *See supra* notes 113-17 and accompanying text.
170. *See supra* note 26.

competitor injury. On the other hand, the Commission could play the role of arbitrator among the various publics including potential competitors. If it is to do so, however, it will have to accept in an honest fashion a much more consistent and encompassing role for potential competitors. More practically, however, it could look to the intended results of legislation and shape the process to achieve them. If it did, the potential competitor would play an important role in providing the Commission with some of the information necessary to make difficult and important decisions.