Oral History of Judge Stephen Williams
Session 5
June 9, 2013

MR. Nuechterlein: This is Jon Nuechterlein, and today is June 9, 2013. Before I turned on the tape recorder, the Judge said he had an additional interesting thought about court collegiality, and I told him to hold the thought until the tape recorder was on, and now it is on.

Judge Williams: I said earlier something about the general proposition that the left-right split was less important than it had been in my earlier days on the court. I have been trying to find words to characterize the other split: I guess it's a sort of attention to judicial craftsmanship. That is a vague phrase, I guess. I am thinking in terms of what happens when a writing judge circulates a draft. Obviously, we all make mistakes, and if the other judges respond with what I'll call craftsman-like suggestions—suggestions trying to prune things that don't need to be in the decision, to prune actual errors—that process can go very smoothly with a judge, regardless of ideology, who is really committed to those craftsmanship goals. But with a judge who … does not seem quite so concerned about these craftsmanship qualities, it can just be torture. …

Mr. Nuechterlein: What would you describe as some of the good principles of good craftsmanship?

Judge Williams: Certainly not having mischaracterizations of other cases. Not using very broad language on issues that, in their broad form, may be highly controversial and difficult whereas in a restrained form are unobjectionable. Those two certainly. [Also,] simply logic, trying to pursue logic pretty carefully. Those ones.

Mr. Nuechterlein: So what do you think causes some judges to depart from those principles? They seem pretty uncontroversial, as you describe them. Most judges should aspire to logic, construing precedents accurately, and not being needlessly controversial.

Judge Williams: … There are degrees of intelligence, and on the whole, everything else being equal, more is better than less. And I guess the other thing is focus. What is the particular judge focused on? There are a lot of things other than those [craftsmanship] characteristics that the judge can be focused on. Maybe extracurricular activity. Maybe the goal of writing a splashy opinion. Those are a couple of things that come to mind. …

I just read a short article by Mike Boudin on Judge Friendly's dissents.[27] One thing he observes is that Friendly's dissents were pretty much equally divided to the extent that there were any ideological division in the judges on the panel — they are pretty much equally divided between dissents from Democratic appointees and dissents from Republican appointees. My suspicion is that is probably generally true on our court nowadays. That would be true of most dissents: most dissents don't fit into a simple ideological slot. I was thinking of asking a clerk to search my own separate opinions to see what comes up there.

Mr. Nuechterlein: That is probably a change from 25 years ago.

Judge Williams: Absolutely. Certainly the dissents that I remember.

Mr. Nuechterlein: I have always wondered — there are these two turns of phrase that can conclude any dissent: one is "I respectfully dissent," and the other is "I dissent." Does anyone attribute any significance to the presence or absence of that adverb?

Judge Williams: I don't know. The gossip is that one of my former colleagues, when presented with a draft dissent by a clerk, made one change and that was to delete "respectfully." I take it that for him at any rate it meant something.

Mr. Nuechterlein: Today we are going to focus on what I loosely call "business law" cases, particularly the regulation of competition within various industries. As I look through my list, all but one of those industries could be classified as a high tech industry. I want to begin with antitrust and a particular focus on the *Microsoft* case.[28] When I think of antitrust law in the lower courts, I don't think specifically of the D.C. Circuit, and I get the sense that the D.C. Circuit does not get as many antitrust cases.

Judge Williams: I think that is absolutely true.

Mr. Nuechterlein: Is that simply because defendants don't have their principal place of business in the District of Columbia, and there is no statutory provision that makes the D.C. Circuit always an available forum?

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[27] Michael Boudin, *Friendly, J., Dissenting*, 61 Duke L.J. 881 (2012).

[28] *Microsoft* was also a topic of discussion in Session 4.

Judge Williams: That must be it.

Mr. Nuechterlein: It is somewhat anomalous given the number of antitrust-like issues that the court addresses coming out of the regulatory agencies.

Judge Williams: Yes.

Mr. Nuechterlein: So the *Microsoft* case arose, as I am remembering, before your court in the year 2000?

Judge Williams: Oral argument was before us in the winter of 2001.

Mr. Nuechterlein: I remember it well because I had just left the FCC and was about to join Wilmer, and I remember listening to it on the radio. It was really quite a gripping argument, and it went on forever as I remember it.

Judge Williams: Well, it was two days, although the second day, things sort of petered out.

Mr. Nuechterlein: So the case was heard en banc initially.[29] Could you say a little about how that came to be?

Judge Williams: Well, I recall it quite vividly. I was somewhere, I think it was at an ALI meeting in Philadelphia, and an e-mail came around from Chief Judge Edwards. … He didn't say what the topic was, except that it was about *Microsoft*. So I remember being puzzled and exchanging an e-mail with another judge asking what this could relate to. Today, I would just call Harry.

Mr. Nuechterlein: You knew that Judge Jackson had issued an order in the district court …

Judge Williams: No doubt the appeal was pending before the court, but the decision to treat it initially en banc had not yet been made. We did gather at the time specified, and Harry proposed that we do just that. His reason was that there were seven non-recused judges — if it went to a panel and the panel split, there would be no way in which the case could be en banced under the rules then prevailing, under which a recused judge counted as a 'no' on en banc.[30] It was a

[29] Typically, the court sits en banc only after a three-judge panel has issued a decision. It is unusual for the court to bypass a panel altogether and hear a case en banc from the outset.

[30] Federal Rule of Civil Procedure 35(a) was amended in 2005 to exclude disqualified judges from the vote count.

mathematical truth. It seemed that, for something as important as this appeared to be, to follow a procedure in which en banc was simply mathematically impossible was not a good idea. So we all agreed without much hesitation and were probably in part influenced by the thought that this was an intriguing case and we would all like to be involved in it.

Mr. Nuechterlein: Did it seem to you at the time that the likelihood of Supreme Court review would be lower if the court [went] en banc?

Judge Williams: I didn't think of that. If I did think of it, I would have thought yes, that was probably true.

Mr. Nuechterlein: Your point about recusals makes me want to ask a question about them. Presumably there were recusals because people owned Microsoft stock.

Judge Williams: I think that's the case, yes.

Mr. Nuechterlein: I recall that Justice O'Connor recused herself in every case involving AT&T because she owned AT&T stock. Wouldn't it make sense simply to require federal judges to divest themselves of an individual company's stocks if there is any material likelihood that they are going to be asked to adjudicate a case involving that company?

Judge Williams: There is an exhortation in the Canons [of Judicial Conduct] that judges do just that. Obviously on its face that is an attractive suggestion. I assume that the only reason it [isn't a requirement] is that, under current law, a judge could be exposed to a huge capital gains tax, depending on when the judge bought the stock, and people in Congress were reluctant to impose that burden. That in turn would be soluble by having some sort of roll-over provision. Why Congress would not do that I have no idea.

Mr. Nuechterlein: So, back to *Microsoft*. The readers of your transcript 30 years from now may not immediately know what the *Microsoft* case was about. Microsoft makes an operating system that, at the time, had something like an 80-95% market share, depending on how you defined the market. And there were various claims in the case that Microsoft had illegally preserved its monopoly power by suppressing middleware such as Netscape or Java. The district court, which was Judge Thomas Penfield Jackson, found Microsoft to have violated Sections 1 and 2 of the Sherman Act. He then

imposed a rather extraordinary remedy — splitting up Microsoft into two different business units, even though Microsoft was a unitary company and there wasn't any easy way to accomplish that. So the two main issues in the case were (a) was Microsoft liable under the antitrust laws and (b) if so, what would an appropriate remedy be.

Judge Williams: The first of those issues divides up into the tying claim and what the Europeans [would call] "abuse of a dominant position."

Mr. Nuechterlein: Correct. If I am remembering this correctly, the Court of Appeals upheld the district court with respect to the latter theory — illegal monopolization — but rejected the district court's finding of an illegal tie. You imposed a rule-of-reason analysis rather than a per se analysis..

Judge Williams: Yes — we remanded for that modified view to be applied, but my recollection is that, on remand, the Justice Department dropped [the tying claim]. Let me just add that, on the monopolization argument, we also sorted out different types of acts. So that some of the things that had been found to be unlawful by the district court, we found that the case had not been made.

Mr. Nuechterlein: In fact, all the theories against Microsoft involved allegations of unlawful single-firm conduct. As we know, ever since the Chicago School arose in the '70s and '80s, there has been significant academic debate about the proper scope of antitrust prohibitions on single-firm conduct. Yet this was a unanimous opinion, finding violations of Section 2 of the Sherman Act. I have two questions about that, one procedural and one substantive. The procedural one is that this was a huge opinion, had many different parts, was very controversial at the time — and yet the entire opinion was unanimous. There is not a single separate statement by any judge. It is marked "per curiam," which means the whole court took responsibility for everything in it. That is extremely unusual [for such a case].

Judge Williams: How did it happen? I think the members of the court thought that—in a case of what seemed to be its importance (whether it was really important I guess history may have different views on or support different views, but it seemed very important at the time)—we all felt that if we could agree, that was enormously desirable. One thing is that, if we agreed, that probably increased

the probability that what we were saying was right. That is not always the case, but we had a sense that it was true.

Mr. Nuechterlein: Can I stop you there? That does sound somewhat counterintuitive. It is true that, in a political context, consensus usually marks the point of social balance. But if you are talking about trying to find the right answer to a question of complex legal doctrine, compromise isn't necessarily the way to get there.

Judge Williams: It isn't necessarily, that's certainly true. But I think we had a feeling, right or wrong, that searching for agreement meant listening to each other really carefully — and that the law was probably not so inscrutable or chaotic that if we did that we would not be able to reach a correct unanimous conclusion. One personal thing. I had the feeling, which I articulated to myself, but I also thought that there were two judges who were likely to be at opposite ends of the spectrum on this [set of issues], those might be Judge Tatel and me. But I also had experience with him by that time and found him to be a good listener — and a good speaker, obviously. So I proposed that we do some joint preparation, and we did. And that was extremely helpful.

Mr. Nuechterlein: Much of the first half of the opinion is focused on distinguishing between what might be called "competition on the merits" by a monopolist, which is pro-competitive and OK, versus "anticompetitive acts," which are not OK. And that line can be rather tortuous. …With respect to the monopolization discussion in the opinion, there is not a lot of theoretical hand-wringing about the ability of courts to distinguish between procompetitive and anticompetitive behavior by dominant firms.

Judge Williams: An absolutely accurate and fair point. As it worked out, in the first place, there are Supreme Court cases, which [we cited], which appear to create a kind of balancing test. Is there a purpose for a particular policy or act that is completely consistent with competition? Is there a purpose to be discerned from the act that is *not* consistent with competition? And then the Supreme Court appears to create, although it is not 100% clear, a kind of balancing test. So, in principle, there is the question of how on earth do you balance these [procompetitive and anticompetitive effects]? In fact, if you look at the sections of the opinion that deal with this, no occasion was ever presented to do the balancing. … For some things, Microsoft never offered a purpose consistent with

competition, so that ended the matter, at least if the government had given an indication of an anticompetitive purpose and effect. … Certainly failures of Microsoft or the government [*i.e.*, to give such an indication] at either of those stages produced the result without any balancing at all. You'll see that no balancing in fact goes on in the opinion. …

Mr. Nuechterlein: The Antitrust Division had not yet fully articulated its "no business sense test," which it later articulated in its amicus brief in *Trinko*.[31] … [W]hat courts often say about single-firm conduct cases is that antitrust law should suppress activity that over the long term will harm consumer welfare in some measurable sense (in the net) and that it should permit conduct that over the long term will help consumer welfare, in the net. The distinction between those two things is going to vary from context to context; it is going to be a heavily empirical question. And it is not really susceptible to neat doctrinal formulas.

Judge Williams: I agree one hundred percent, and I am sure the Antitrust Division … would have to agree on that. I think the basic idea was to have a test that ordinary mortals and more specifically judges could apply and that would have a relatively high prospect of coming out right over the long run. And I think the appeal of that [no business sense] test, which you say was formulated clearly by the government only in *Trinko*, is that it doesn't involve this mystical weighing. The argument against that test would be that it allows too many possibly anticompetitive acts because, as long as there is a legitimate business purpose, that is the end of the case, or so it appears under that formulation. So what do you do when there is a little legitimate business purpose and a big anticompetitive purpose? At least in principle, you allow it to go forward. And if you don't allow it to go forward, then you are back to weighing.

Mr. Nuechterlein: One question I often have is, if we had it to do over again — if we could go back to the late 19th Century and write the Sherman Act from scratch — whether would we decide to include a Section 2 in it. I think most people believe there is a role in the law for prohibitions on anticompetitive single-firm conduct, but that is not an uncontroversial proposition. I have heard intellectually respected people argue that, over the long term, the line-drawing is so intractable and the risk of suppressing productive conduct is so

[31] *Verizon v. Trinko*, 540 U.S. 398 (2004).

great that we would be better off if we simply narrowed the scope of the antitrust laws to multi-firm conduct. Do you have views on that?

Judge Williams: I think [I have] the sort of conflicted feeling that a great number of people have. I see that as a highly intellectually respectable argument. Actually, I went on a program for the FTC in which we presented to judges and lawyers in the Caribbean [about U.S. antitrust law]. We [discussed] a Third Circuit single-firm misconduct case. One of the lawyers we were addressing came up with beautifully articulated arguments as to what competitors of the [defendant] in fact could have done to get around the obstacles supposedly created by its conduct, which was found to be unlawful by the Third Circuit.

Mr. Nuechterlein: Is this the *LePages'* case?[32]

Judge Williams: No, it isn't *LePage's* ; it's *Dentsply*.[33] And he seemed to do a fantastic job on that. But that certainly doesn't exclude the possibility of cases where the anti-monopolization rule can be useful. My understanding is, and this is totally vague, certainly we've never seen any effort to pull it together in the actual *Microsoft* litigation; it largely became moot.[34] I don't know if that's true; I have read intelligent people saying that.

Mr. Nuechterlein: Can you think offhand of a judicial intervention in single-firm conduct that has received consensus approbation by the antitrust academy?

Judge Williams: That is a wonderful question. The answer is no, but that may not prove much because I can't be said to have my fingers on the pulse of the antitrust community.

Mr. Nuechterlein: One of the challenges in the *Microsoft* case was that the industry was obviously changing very rapidly. In some ways, the case already looks sort of quaint in part because of the rise of non-PC computer hardware that people now use in their everyday lives

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[32] *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003).

[33] *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005).

[34] Although this passage is obscure, JUDGE WILLIAMS appears to be stating that the *Microsoft* decision, while correct on the merits, produced only incidental consumer benefits because technological change promoted competition faster than the litigation process could.

[*e.g.*, smartphones]. Microsoft Windows no longer has the scary position it seemed to have twelve years ago. Early on in the opinion, the court acknowledged that, in high tech industries, courts should be more reluctant to impose strong remedies than to find liability because the remedies might more easily become immediately obsolete.

Judge Williams: Yes — the broad concept about the special problem of high-tech industries keeps popping up in the opinion, and I know it was critical, for example, in the treatment of the tying claim. I think the court did see that as a problem throughout. In fact, if you look at the violation findings by the district court that we actually affirmed, they were very narrow bits of Microsoft behavior, which undoubtedly seemed big to the victims at the time, but they were pretty specialized and narrow things, and I can't believe we did much harm by striking them down. That doesn't mean we accomplished a great deal by doing that.

Mr. Nuechterlein: There is also the question whether the middleware threats that the suit was designed to preserve were genuine threats to Microsoft.

Judge Williams: Yes. Now the one thing on that – my recollection is there were e-mails from Bill Gates himself, which clearly took the view that they were.

Mr. Nuechterlein: But he might have been wrong.

Judge Williams: He absolutely might have been wrong. Absolutely. No, it's interesting — corporate chiefdom is slightly paranoid. Does that mean that the assumptions that he bases his fears on are sound? How do you treat them? You might say he was in a better position to appraise them than we were.

Mr. Nuechterlein: True. There is an interesting passage in the opinion about the role of causation in antitrust analysis. Once you have concluded that a particular form of conduct is anticompetitive and could harm nascent competition, the court appears reluctant to engage in a full-throttle investigation of whether that [nascent] threat was a genuine threat.

Judge Williams: You're talking about the threat to Microsoft?

Mr. Nuechterlein: Yes — once it was found that Microsoft took anticompetitive acts that could disadvantage nascent potential competition …

Judge Williams: I see.

Mr. Nuechterlein: … the court doesn't look particularly hard at whether that nascent potential competition would have been a serious threat over the long term.

Judge Williams: Again, I think that probably seemed a perfectly good way of treating the matter because, for the things for which Microsoft was found to be liable — they were things for which it had no explanation, no justification at all.

Mr. Nuechterlein: By the way the opinion is sort of interesting as well in that, although it is per curiam, different sections have very different voices.

Judge Williams: Have they been run through computers yet to determine which voice was at work at each?

Mr. Nuechterlein: I have my suspicion about which sections you may have played a particular role in, but I suppose that is still off the record?

Judge Williams: Yes I think it is.

Mr. Nuechterlein: OK — the final portion of the opinion was the unpleasant matter of disqualification. The case itself had sort of a fraught history, in that the D.C. Circuit disqualified two district judges who had been involved in Microsoft matters. First, Stanley Sporkin in the prior round.[35]

Judge Williams: Yes — I had forgotten that. What had he done?

Mr. Nuechterlein: I am having a hard time remembering, but I think it had something to do with his relying on too much on a book that he found particularly useful.[36] It wasn't in the record, but he liked it, and he acknowledged very publicly that he was relying on this extra-record material. And there were just various remarks of his that a panel of the D.C. Circuit, which I believe you were not on, found problematic.

Judge Williams: It comes back to me now — yes.

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[35] *United States v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995).

[36] James Wallace & Jim Erickson, *Hard Drive: Bill Gates and the Making of the Microsoft Empire* (1993).

Mr. Nuechterlein: Then the Court of Appeals en banc disqualified Judge Jackson [in the later case].

Judge Williams: Just for the record, [he had] prolonged conversations with a journalist about the case, while the case was going on, in which he shared his views with the journalist apparently. One has to assume that, to some extent, the journalist, at least by body language, must have responded to those.

Mr. Nuechterlein: Yes. This was obviously a big moment in Judge Jackson's career, and yet as far as I can tell, he wasn't given any opportunity to submit anything to the Court of Appeals.

Judge Williams: That's interesting.

Mr. Nuechterlein: And so there is a process question.

Judge Williams: You mean if it had been done in the form of mandamus then the brief would have come nominally from him, although in all likelihood someone from the Justice Department would have prepared it?

Mr. Nuechterlein: Although, in this case, the Justice Department didn't know about what he had done until after he had issued his final judgment, because he had embargoed [the article]. Then, at oral argument, DOJ refused to defend what he had done. So no one was defending what he had done before the court of appeals.

Judge Williams: Is that true? I thought there was some, perhaps not full-throttle defense. But there was none whatever?

Mr. Nuechterlein: I was just reading this section of the opinion yesterday, and there is an extended quote from the DOJ attorney saying that "I have no brief to defend Judge Jackson's discussion of this case with the press."

Judge Williams: Am I not right in thinking the Department did oppose his being removed from the case?

Mr. Nuechterlein: That is possible. Yes.

Judge Williams: That is interesting. I had forgotten that. I am trying to think how normal recusal litigations go. When it's mandamus, the order is directed to the court, let's say the district judge in question, to explain himself. It seems to me on those we have actually gotten

briefs from the government, presumably done in coordination with the judge. It must depend upon where the objection is coming from. Maybe the lion's share of them comes in criminal cases where it is the defendant who is calling for recusal. I think that is the most frequent claim for recusal. So that does create, I think, a sort of logical entry point for the judge's views. But you're right there wasn't one here. I think apart from this criminal defense situation, which is probably the lion's share of them, what happened in our case is probably typical. I don't think there was any dispute about the facts — of course, if one side is unrepresented, it's hardly surprising there's no dispute about the facts. It's hard to say the facts [here] were indisputable, but I think there was a basic story that did seem to be unquestioned. I think there had been some motion before Judge Jackson that had given him an occasion to set forth whatever. …

Mr. Nuechterlein: The opinion is interesting in that, towards the end, you acknowledge that Judge Jackson was feeling some degree of pressure because Microsoft was conducting a PR campaign at the same time, and it was apparently driving him crazy because he viewed the PR campaign as consistently distorting what was happening at trial. And he was aware that this was one of the highest-profile cases of that time and wanted to make sure the record was set straight. Your opinion acknowledges that judges are subject to a strong impulse to get the truth out and defend the exercise of the rule of law in the face of distorting PR campaigns. But you also point out that that's just corrosive to the public perception of the judiciary.

Judge Williams: I don't know if it was said [in the opinion, but,] as you pose it now, my reaction [to judicial frustration with a party's PR campaign] would be [to ask]: what are the methods of getting the record clear, and [is] the method of getting the record clear by statements on the [trial] record? Statements on the record would present a problem because the parties and the press hearing the judge [would] issue rebuttals … And at least beyond some incredibly hard-core types of misrepresentations, [we'd] probably think this was showing off a tender skin, so there would be limits on that. …. But to have private conversations with a journalist seems like a really, really bad way of doing it.

Mr. Nuechterlein: So I have a segue here — let's see if it works. The two judges that were disqualified from the collection of Microsoft lawsuits in the

last decade of the 20th century were Judges Jackson and Sporkin. Those are also the same two judges that you shared a district court panel with in the "must carry" cases.[37]

Judge Williams: A three-judge district court.

Mr. Nuechterlein: So of the three, you were the designated court-of-appeals judge, and the two of them were district judges. The way the [jurisdictional] statute worked is the constitutionality of [the challenged] statute would be assessed by a three-judge district court, with one court-of-appeals judge sitting by designation, and then there would be a right of direct appeal by the loser to the Supreme Court of the United States.

The most important provision at issue in that set of cases was the so called "must carry" provision, which requires cable companies to carry the signals of all broadcasters located within the coverage area of their cable systems. Congress gave a couple of reasons for that requirement. One of them was, without it, broadcasting would wither and die because more and more people were watching TV over cable systems than over the airwaves, and if over-the-air broadcasting was not carried on cable, then the advertising revenues would shrink for broadcast TV and the business model would become untenable.

Judge Williams: In fairness to Congress, you should add that this [dynamic] would leave, they said, people without access to cable utterly deprived [of television].

Mr. Nuechterlein: It would seem, speaking out of school, that a more sensible solution to that concern would be simply to grant vouchers to people to subscribe to cable service.

Judge Williams: There were lots of alternative methods.

Mr. Nuechterlein: Another rationale given by Congress is that local broadcasters were unique sources of news and other local coverage in particular communities and that, if they were not carried by cable systems, then viewers of TV over cable systems would lose access to local coverage.

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[37] *See generally Turner B'casting Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner B'casting Sys., Inc. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

Judge Williams: That seemed to move the case into the content-specific aspect of First Amendment law. That [statutory promotion of local coverage] was never a [constitutional] concern at least [for] the Supreme Court majority.

Mr. Nuechterlein: It wasn't a concern of the district court majority either. There were two phases to this case. One of them was in the early '90s and involved, among other things, the proper standard of First Amendment review. That was *Turner I* . And then *Turner II*. You were in the dissent in the district court in each phase of the case. … In the first case, there was a majority opinion written by Jackson, and Sporkin concurred in the opinion but also wrote separately. You dissented. [On appeal,] the Supreme Court [held] that intermediate scrutiny would be the legal standard, and the case was remanded to the district court for fact-finding on whether Congress had met that First Amendment standard. Sporkin resolved the [second] case on summary judgment on the ground that the statute could be deemed to have satisfied that standard. You would have resolved the case on summary judgment the other way. And Jackson was in the middle, saying "I don't think we have enough facts yet to rule on these cross-motions for summary judgment, but because I must vote one way or the other, I will vote with Judge Sporkin."

Judge Williams: It appears, as you recount it, a complete non-sequitur.

Mr. Nuechterlein: That occurred to me as I was reading this last night.

Judge Williams: I'd certainly forgotten it.

Mr. Nuechterlein: In your initial dissenting opinion in '93, you found that the must-carry provision triggered strict scrutiny because it was a content-based form of regulation of speech.

Judge Williams: I assume that was on the basis of the congressional purpose to protect the unique characteristics of what the locals had to say.

Mr. Nuechterlein: Yes, that is correct. It raises interesting first principles of free speech jurisprudence because there was nothing viewpoint-based [in the must-carry statute].

Judge Williams: It was not viewpoint-related.

Mr. Nuechterlein: Purely content-based. And [Congress's] sense was that it is good

for an informed electorate to have access to broadcaster-supplied local coverage, so let's make the cable companies carry this local coverage. You would have applied strict scrutiny to that judgment. Which was a perfectly defensible way at the time of viewing the First Amendment. But it does seem to be a very categorical approach because [the statute] doesn't raise concerns about censorship or the government favoring one side or the other.

Judge Williams: It's true. My recollection is … that the Supreme Court hasn't articulated clear criteria about when non-viewpoint but content-based discrimination gets particular types of scrutiny. My recollection also is there are certainly more cases that said flat out: "[if] content based, [then] strict scrutiny." Maybe I was over-applying it. … The plurality opinions in both [*Turner*] cases are just about the same. They go off essentially on a bottleneck monopoly theory, and that struck me as just desperately weak.

Mr. Nuechterlein: You are saying the bottleneck theory is desperately weak, not because cable was not a bottleneck …

Judge Williams: It was terribly easy to get around it from a customer's point of view. The A/B switch seemed to be the single biggest obstacle, but the record showed you could get one for $70.[38] …

Mr. Nuechterlein: This was also earlier in time before the rise of satellite [TV services]. In the 1993 opinion, you said: "In considering cable, Congress confronted a very real problem — one for which it has an easy remedy entirely consistent with the First Amendment. The problem is that cable systems control access 'bottlenecks' to an important communications medium."[39]

Judge Williams: That is interesting. So I bought it in the first round.

Mr. Nuechterlein: You did. But you pointed out that [there was] a non-content-based solution to the problem of bottlenecks, which is to impose a common carriage principle on the cable systems.[40] Which is ironic

[38] Affixed to a television, an A/B switch allows consumers to switch easily between cable signals and over-the-air broadcast signals.

[39] *Turner B'casting Sys., Inc. v. FCC*, 819 F. Supp. 32, 57 (D.D.C. 1993) (Williams, J., dissenting).

[40] *Id.* ("There are well-developed regulatory responses to this sort of situation. The 'bottleneck' holder may be ordered to serve all parties that meet neutral criteria for service. The Federal Communications Commission itself administers just such regulations in assuring that interstate long-distance telephone companies have access to local telephone networks.").

because I think they would have hated it, the very cable systems [that challenged the must-carry law].

Judge Williams: Right, right, right.

Mr. Nuechterlein: So this went up to the Supreme Court, and they decided Solomonically to adopt a standard of intermediate scrutiny. The case came back down, and you had additional proceedings on whether Congress had met its intermediate First Amendment burden. Maybe I wasn't following this closely enough, but this struck me as an odd exercise. You are in essence holding Congress to a sort of APA obligation in connection with an exercise of regulatory power. I can't recall now whether it's relevant what the facts are that were not before Congress. In other words can you have freestanding fact-finding in that First Amendment setting?

Judge Williams: I think this is a completely unresolved question of constitutional law. You know that the Supreme Court, from time to time, strikes down a statute on the basis of its finding that the facts do not sustain a congressional viewpoint. My recollection is that we sort of fudged the issue on both sides as to whether the presence [or absence] of a fact before Congress made any difference, but that obviously does take the Supreme Court into a somewhat unusual role. On the other hand, if there's going to be serious review of constitutionality of statutes — and one hopes there should be, particularly for the First Amendment — [the courts] certainly can't let Congress just assume a bunch of facts that have no basis in reality.

Mr. Nuechterlein: This was a set of cases in which your position lost not once, but twice before the Supreme Court — although in both cases, as I recall, in close votes.

Judge Williams: The second one was 4-4-1 with almost no overlap between Breyer's separate opinion and the plurality opinion.

Mr. Nuechterlein: How does it feel when the Supreme Court objects to a position that you care a lot about and have written on?

Judge Williams: It's disappointing, but it's the nature of the job, so I don't go home and weep. …

Mr. Nuechterlein: [Let's] move on to another topic in communications law: the FCC's efforts over the last fifteen years to implement Congress'

directive that the FCC cap the number of total subscribers nationwide that any cable system (or affiliated group of cable systems) can reach.[41] The theory underlying this legislation is that, if too many people watch TV over the same affiliated group of cable systems, then that [group] would have undue power to suppress independent programmers. So Congress told the FCC to limit the reach of cable systems so as to ensure that independent programmers would not face market power by a monopsonist in the market for distribution for cable programming. As I articulate that issue, one question that immediately comes to mind is that this legislation seems in some tension with the Chicago School's insight that, with well-established exceptions, concerns about vertical leveraging of monopoly power are misplaced. It may be that there was an exception to that principle here. But Congress' basic concern was, rationally or irrationally, that cable systems would discriminate in favor of their own programming and against programming of independent entities.

As a result, it limited the number of subscribers that any given cable system could reach, and it directed the FCC to come up with a number. The FCC had a variety of mathematical formulas that led it to say that programmers really needed an open field of something like 40% of viewers nationwide in order to reach an efficient operating scale. But then it didn't draw the natural conclusion that the number should be 60%. It … cut that figure in half to 30% on the ground that there might be collusion between two unaffiliated cable companies to discriminate against independent providers of programming. This coming back?

Judge Williams: I do remember the 30% figure, and I do remember some strange moves the Commission was making. I suspect we said — I don't remember saying this, but it sounds as if we might well have said it — why do you think collusion is likely, and if collusion occurs, why not stop it?

Mr. Nuechterlein: What was interesting is that the [court could have] reached the same outcome through traditional APA analysis. There were a variety of empirical holes in the FCC's analysis, which by themselves would have warranted a remand.

Judge Williams: Wasn't it sort of an APA [decision] with a First Amendment

[41] The opinion discussed in this portion of the interview is *Time Warner Enter. Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

flavor? Or First Amendment with an APA flavor?

Mr. Nuechterlein: Well, that is what I was going to ask about. There is a First Amendment dimension to the case: you basically apply intermediate scrutiny, and you say this imposes on the FCC a particularly strong need to justify what it has done. As I was reading the opinion, I came to the conclusion that the FCC would have lost either way — whether you imposed a First Amendment overlay or not.

Judge Williams: That's interesting. I think the answer is quite possibly yes, but when you fix your glasses for viewing through a First Amendment lens, you don't have to address the exact question of whether [viewed through another] lens it would come out the same way.

Mr. Nuechterlein: Although what is interesting — and remember this tape is being embargoed for some period of years — you were on a panel that produced an opinion a few weeks ago in the *Tennis Channel* case.[42] One of your colleagues [in a concurring opinion] had an extended First Amendment analysis of why the FCC's reasoning didn't pass muster. And you wrote the opinion for the court, which was extremely short and said the FCC analysis had no empirical basis [for finding that Comcast Cable had 'unreasonably restrain[ed] the ability of an unaffiliated video programming vendor to compete fairly,' in violation of Section 616 of the Communications Act].

Judge Williams: … without getting into the nature of the legal standard at all.

Mr. Nuechterlein: This was probably an exercise in judicial humility. You didn't perceive a need to have a long discussion of First Amendment jurisprudence in the case because it wasn't necessary. As I was reading the *Tennis Channel* opinion, I was thinking of this stylistically: there is some contrast to the cable ownership case, where you [also] didn't strictly need to discuss the First Amendment.

Judge Williams: Oh, that is interesting. Huh. Huh. So you are suggesting that maybe the Williams of 2013 approaching the cable ownership case might just have said, "let's forget about the First Amendment." My recollection, which may well be wrong, is that … the First

[42] *Comcast Cable Commc'ns v. FCC*, 717 F.3d 982 (D.C. Cir. 2013). The concurrence discussed here was by then-Judge Kavanaugh.

Amendment had some sort of role in appraisal of this statute [that] was not disputed. Once you get below intermediate scrutiny, there is not much left so if they did agree on some First Amendment role, you are already at intermediate. … I guess that I didn't think we were in significantly dangerous territory in what we said about the First Amendment there. …

Mr. Nuechterlein: Different judges have different attitudes about the First Amendment in business law cases. Justice Kennedy … has a very expansive view of the First Amendment's role in these cases. From my own personal perspective, there are lots of forms of government intervention in the media/communications marketplace that are wrongheaded, but that I would not personally invalidate as violations of the First Amendment, because I view the First Amendment as being designed mostly to ensure that there is a robust exchange of views in society and the government doesn't censor them.

Judge Williams: Right. I certainly understand that position, and I am sympathetic with it to a degree. But I think it certainly is the case that by [enacting] what looks like purely economic or purely structural rules, Congress can seriously impinge on the robustness of the debate. …

Mr. Nuechterlein: I want to turn briefly to a couple of cases that you authored in the first decade of the 21st century. We still don't have a term for that decade; some people call it the "aughts," but that doesn't seem to have caught on.

Judge Williams: I agree — it is a nameless decade.

Mr. Nuechterlein: One was in 2002 and another in 2004 — *USTA I* and *USTA II*.[43] "USTA" stands for United States Telecom Association, the trade association for the incumbent telephone companies. In each case, it was challenging the FCC's rules governing access by new entrants to the incumbent telephone companies' facilities for the provision of competing local services, and the FCC had adopted a fairly aggressive pro-sharing regime under its original 1996 rules [implementing the Telecommunications Act of 1996]. The Supreme Court [held in 1999] that the FCC had not explained why

[43] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

it was not doing what Congress told it to do, which was to limit the facilities subject to sharing obligations to those facilities whose absence would "impair" the ability of new entrants to provide service.[44] That subsequently became known as the "impairment" standard. The FCC took a very narrow view of that restriction on its authority to impose sharing rules even after the Supreme Court's remand. The result was these two cases, *USTA I* and *USTA II*, in which you ultimately invalidated the FCC regime that made the local telephone companies hand over, in most cases, all the network facilities needed to provide competing telephone service.

Judge Williams: [That regime] meant that a competitive local exchange carrier could thrive, theoretically at least, with no facilities at all.

Mr. Nuechterlein: That's right.

Judge Williams: Entirely as a paper phone company.

Mr. Nuechterlein: Yes. One thing that is interesting about that case to me is that it reveals the intersection of competition regulation with antitrust law. The FCC had a [minimalist] view of the impairment standard that I suppose is linguistically consistent with the language of the statute. But your reaction was that Congress could not have meant the impairment limitation to be that weak — it had to have something more like the essential facilities doctrine in mind, and even though this is not an antitrust case, it's still appropriate to look antitrust doctrine [to inform statutory interpretation].

Judge Williams: And one of my two opinions [was] criticized for relying on [the] Breyer dissent [in *Iowa Utilities Board*], but the Breyer dissent made essentially the point about the incentive effects of the FCC's rules. In the first place, [they created] a disincentive for the competitive [local exchange carriers] to actually do the things Congress dreamed would come of all this. And they similarly, in combination with of course the pricing rule, created a disincentive for the incumbent [local exchange carriers] to invest anything if it was immediately going to be made available to the competitors for free.

Mr. Nuechterlein: The FCC had a contrary vision of what Congress was trying to accomplish. The FCC, I think, basically concluded that these new

[44] 47 U.S.C. § 251(d)(2); *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

entrants, which are called "CLEC s," would be unlikely to duplicate the core local facilities in ILEC network because those are the ones most subject to economies [of scale and] density.

Judge Williams: Yes.

Mr. Nuechterlein: And so, according to the FCC, Congress may have had a much more modest vision of competition in mind, in which CLECs would basically become resellers of incumbent telephone companies' services and compete on the bases of marketing, customer service, and to some extent price. So according to the FCC, although it didn't put it in these terms …

Judge Williams: What you say is interesting because I don't recall their ever articulating such a theory — that [facilitating] completely synthetic CLECs is just fine.

Mr. Nuechterlein: Yes, you had to give them a couple of drinks before they would acknowledge it. There was a hope that CLECs — over time, once they got a foothold in the market — would begin deploying their own facilities and distinguishing their services on the basis of their networks and not just customer service and marketing. But there was also a sense that, if that didn't happen, it wasn't such a big deal because the ILECs were so profitable that the cheap sharing arrangements weren't ultimately going to doom the ILECs if the prices were set right for these facilities. And that Congress just wanted there to be an easier resale option. Now, one reason the FCC understandably didn't phrase this point in such bold language is that there is a separate resale provision in the same legislation that has a different pricing scheme attached to it.

Judge Williams: Yes indeed.

Mr. Nuechterlein: One thing that is interesting about your opinions is that you were fairly assertive about divining a congressional purpose underlying the '96 Act and invalidating an expert agency's view of the right way to [interpret] that purpose.

Judge Williams: That's interesting —

Mr. Nuechterlein: For full disclosure, I have been involved in this industry, and I think the outcome you chose was the right outcome. I think history also confirms that, because this was all about a contest for access to conventional telephone company networks, which are becoming

obsolete in any event [in light of] internet protocol services. And the FCC regime had nothing to do with those.

Judge Williams: Right. No one was even arguing, as I recall, for this alternative view of the congressional purpose, so it seemed reasonable — and clearly was the reading Steve Breyer had of it — that the object was to actually encourage something like conventional competition …

Mr. Nuechterlein: … Does the story of the Telecommunications Act of 1996 raise any interesting questions about monopoly industries in transition and the best way to govern them?

Judge Williams: The fascinating thing there seems to be Congress' hope that what it was doing was deregulatory. At the same time it was looking forward to broad sunlit uplands of competition, the route [it chose for] that was an incredibly intensive form of regulation. …

Mr. Nuechterlein: Justice Scalia aptly pointed out in his 1999 [*Iowa Utilities Board*] opinion reviewing the FCC's first set of rules that Congress wasn't very clear about what it expected to happen in the wake of this statute's enactment. It was plainly written by opposing teams of lobbyists, and it may be just a fool's errand to try to figure out what Congress' "purpose" might have been.

So far we have done cable and telephones, and the list of regulated industries would be incomplete if we did not turn to the natural gas industry and your role in FERC jurisprudence. I am going to begin this by saying that I know nothing, or almost nothing, about natural gas regulation. I understand there are some similarities to telecommunications regulation, that the Natural Gas Act is patterned after the Interstate Commerce Act, that the same is true of the Communications Act, that there are bottlenecks, and that various forms of common carrier regulation are imposed — and that is about the extent of my knowledge. What is intriguing to me about you is that this is one of those serendipitous contexts in which someone who was a recognized expert in the field in an academic capacity goes onto a court and becomes the nation's thought leader on the same set of issues in an official judicial capacity.

Judge Williams: I think that's a bit of an overstatement on both sides.

Mr. Nuechterlein: I have a feeling that what I have said is true, but I don't have

enough knowledge to back it up. So you wrote a book called *The Natural Gas Revolution of 1985*…

Judge Williams: It is less than 100 pages.

Mr. Nuechterlein: The book*let* was entitled *The Natural Gas Revolution of 1985*. What happened in 1985?

Judge Williams: The FERC adopted an order, the core of which was to … completely define [its role] by the regulation of natural gas pipelines as pipelines, as sellers of transportation, as opposed to their role as sellers of gas. Congress had already intervened on the question of gas to some extent [in] the Natural Gas Policy Act of [1978]. The initial proposal, which … that book was about, was to essentially separate these two activities so that FERC's function would be confined to something for which there was a logical economic case — the regulation of pipelines as natural monopolists, which they to a significant extent were. … [I]n a sense, [Congress in 1978 ultimately took] the price of natural gas itself out of FERC's jurisdiction. But in the meantime, there was all this gas under prior contracts. … [Although] the gas market had become highly competitive, there were these arrangements by which natural gas purchasers were buying gas at highly inflated prices and being denied access to competitively priced gas. The subject was what [FERC] did to solve that. There were loads of different issues, and a lot of them were purely transitional. Our opinion in [*Associated Gas Distributors v. FERC* [45]] has been criticized for making more work out of some of these transitional issues than should have been the case. And there is a good deal of justice in that critique.

Mr. Nuechterlein: So to back up a bit, when did you first get interested in natural gas regulation?

Judge Williams: Really when I was a visiting professor at SMU — no, I got originally interested in oil and gas when I was a visiting professor at UCLA and talked with Dick Maxwell.

Mr. Nuechterlein: What year was that?

Judge Williams: That was '74-'75 I think. He was very charming person, good to

[45] 824 F.2d 981 (D.C. Cir. 1987).

talk with.

Mr. Nuechterlein: Had you done much work with regulated industries up to then?

Judge Williams: No, I really hadn't. And the strange part of the process was getting a call from SMU saying that they would like me to go there to teach energy law. What is "energy law?" After the visit at UCLA, I had started teaching Oil and Gas at Colorado, but I didn't teach energy law. It seemed to me a reasonable view of energy law was to look at [the field] as a regulated industry, and that is what I did ….

Mr. Nuechterlein: So when you published the monograph, *The Natural Gas Revolution of 1985*, presumably you were in transition from academia into the DC Circuit or very shortly before.

Judge Williams: I think [it] came out before my nomination went to the Senate.

Mr. Nuechterlein: Is it correct to say that you author a disproportionate number of FERC opinions?

Judge Williams: It is. I asked a clerk to check that out and see if one's intuitive sense of that was correct, and it was. …

Mr. Nuechterlein: You were discussing an early FERC opinion that you wrote — can you elaborate on it?

Judge Williams: Sure. Basically the criticism was that we … interfered with what the Commission had done on essentially the distribution of sunk costs. [Professor] Dick Pierce, whom I have a lot of respect for, [argued] that, in the first place, there was no particular logic in how to allocate costs …. It is the perfect sort of subject on which to defer to the Commission, and [that] seems to me a very strong argument. … Maybe [that] should have been the way [the case] came out; had I taken that view firmly, I would have been in the dissent on the issue. … I am pretty sure there are very considerable precedents in which the court gets over-involved in that [issue]. While we are on that [case], the most fun part of it was that there had been two [prior] opinions by a single panel — why they divided it into two opinions, I don't know. Both of them were called *Maryland People's Counsel v. FERC*.[46] Putting aside what the court did [in those cases], it certainly used some very

[46] 761 F.2d 768 (D.C. Cir. 1985); 761 F.2d 780 (D.C. Cir. 1985).

questionable economic language. So the great challenge in [our] opinion was to work the Circuit's way out of that language without doing violence to the *Maryland People's Counsel* decision.

Mr. Nuechterlein: Do you remember what the language was?

Judge Williams: … There is a point in my opinion where I talk about it. … [O]ne of the opinions is by Scalia and the other's by Ginsburg — Ruth, that is. They went on to glory! [Laughter.] … I think it had to do effectively with Ramsey pricing — there is language in those opinions which makes it sound as if Ramsey pricing is outrageous, terrible, bad.

Mr. Nuechterlein: I thought it was efficient.

Judge Williams: [Laughter.] Well, naturally, that is what made me want to improve on the language.

Mr. Nuechterlein: Have you had interactions with policymakers at FERC during your 25 years on the bench?

Judge Williams: There was a chairman, Charles Stalon, who had been chairman of the [Illinois Commerce Commission]. I had dinner with him at one point. I am not sure exactly what stage it was — I think I was on the court. He seemed to be a very analytical, clear thinker — [I thought] it would be wonderful if his role continued. And then [Richard] O'Neill, who has been, and I think is now again, [head of FERC's] equivalent of a policy planning office. I have ended up chatting with him a number of times.

Mr. Nuechterlein: Did you get the sense when you talked to them that they acknowledged your unusually substantial role in the development of natural gas policy?

Judge Williams: I think that's probably true, but I think, in the case of Stalon, it was such early days that [such an acknowledgment] would have been premature.

Mr. Nuechterlein: In my year of clerking for you, there were three clerks, one of whom came from the fossil fuels industry and seemed eager to work with you on FERC cases. And the other two of us were deferential to that wish.

Judge Williams: Did David [Lawson] come from Texas?

Mr. Nuechterlein: He worked in the natural gas or oil industry. He is an engineer by training.

Judge Williams: I didn't know that.

Mr. Nuechterlein: So we let him do all the FERC opinions, and I am wondering whether that is typical of your clerk classes.

Judge Williams: No — I would say it much more usually gets scattered around.

Mr. Nuechterlein: And I assume there is some radical disparity among your clerks in readiness to take on this area of law.

Judge Williams: As some of my judicial colleagues have said, once you get into it, it is not so bad.

Mr. Nuechterlein: And they always seem to be happy to defer to you in opinion-writing.

Judge Williams: Not always, no. There have been definite cases that I was sitting there assuming it would go to me, and the presiding judge assigns it to himself.

Mr. Nuechterlein: All right — I have no further questions to ask about FERC. I didn't really have any good questions to ask about FERC in the first place. … So we will break – you are going off to Boulder, and we will resume in the fall.