

FOREWORD

THE TELECOMMUNICATIONS ACT AT TWENTY-FIVE: THE DEBATE LOOKING FORWARD

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The Telecommunications Act of 1996 was both overdue and premature. It was overdue because, by the time Congress enacted the statute in February 1996, the need for a new regulatory charter for the structure of U.S. telecommunications had been clear for some time. The 1996 Act was also premature, however, because its enactment came on the eve of unprecedented change in telecommunications markets.

Just over a decade prior to the passage of the 1996 Act, the U.S. telecommunications market had undergone its first important change in decades because of a landmark divestiture agreement between AT&T and the U.S. Department of Justice. Up until 1984, AT&T had been an integrated monopoly providing both local and long-distance telephone service to most American consumers. The separation of local calling from long-distance service resulting from the AT&T divestiture decree (the “MFJ”) had the immediate objective of opening up the long-distance market to competition. This was a goal that the MFJ achieved in part by imposing limits on the kinds of services that AT&T and the newly independent local operating companies could respectively provide. However, a dozen years later, although the MFJ opened long-distance markets to competition, it had become an impediment to broader industry evolution as new services and technologies began to emerge. Hundreds of petitions for waivers to the MFJ’s line-of-business restrictions clogged the overseeing court’s docket, and the MFJ did nothing to tackle the entrenched local exchange monopolies.

The 1996 Act directly addressed some unhelpful vestiges of the MFJ and instituted measures to introduce competition into the local exchange monopolies the MFJ had left in place. However, to the extent that the 1996 Act was intended to be the foundation for future telecommunications policy, its focus on local telephone competition proved shortsighted. The proverbial ink was barely dry before technological developments rapidly diminished the importance of local wireline service and raised new, more consequential policy challenges for which the Act provided little guidance. In the words of Olivier

Sylvain, “[i]n this regard, Congress seemed to create new problems even while it credibly attempted to resolve others.”¹ Indeed, U.S. telecommunications in 1996 was on the cusp of dramatic change, the nature of which was not yet sufficiently clear for Congress to chart a policy course. While there were certainly inklings of new technological directions by 1996, Congress did not foresee the speed with which wireline telephone service – the focus of U.S. telecommunications policy up through and including the 1996 Act – would become a sideshow for consumers and carriers alike, while a new class of information technologies would become central to everyday life.

Within a few years of the 1996 Act’s passage, two technologies just emerging on a mass consumer scale in the 1990s had become ubiquitous: wireless communications and internet access. By the end of 1995, as Congress was concluding its drafting of the 1996 Act, there were fewer than thirteen mobile phone subscriptions per one hundred Americans. Within just five years, that figure had nearly tripled and, less than a decade later, the number of cell phone subscriptions exceeded the number of potential subscribers as some people carried multiple devices.² Internet usage followed a similar pattern. In late 1996, a Pew Research Center Survey found that 22% of Americans reported having gone online from home, school or work, and still with only light Internet usage: only 25% of those using the Internet reported doing so every day.³ By 2000, however, usage had grown to over 50% of American adults and had become far more varied, frequent, and intense.⁴ Online access from that point only accelerated: according to FCC data, residential fixed Internet connections grew from just 3 million in 2000 to 75 million in 2010.⁵ With the rise of smartphones in the late 2000s, mobile wireless and Internet access converged, marking the transformation from a world of

1. See Olivier Sylvain, *A New Telecommunications Act: Prioritizing Consumer Protection and Equality*, 37 BERKELEY TECH. L.J. 277, 285. (in this Symposium volume).

2. There are various sources and measures for data on wireless growth. These are World Bank figures that can be found at WORLD BANK, MOBILE CELLULAR SUBSCRIPTIONS (PER 100 PEOPLE) - UNITED STATES, <https://data.worldbank.org/indicator/IT.CEL.SETS.P2?end=2019&locations=US&start=1960&view=chart> (last visited Jan. 29, 2022).

3. PEW RESEARCH CENTER, NEWS ATTRACTS MOST INTERNET USERS, (Dec. 16, 1996), <https://www.pewresearch.org/politics/1996/12/16/online-use/>.

4. JOHN B. HARRIGAN, NEW INTERNET USERS: WHAT THEY DO ONLINE, WHAT THEY DON’T, AND IMPLICATIONS FOR THE ‘NET’S FUTURE 6, https://www.pewinternet.org/wp-content/uploads/sites/9/media/Files/Reports/2000/New_User_Report.pdf.pdf (last visited Aug. 3, 2022).

5. FCC, INTERNET ACCESS SERVICES: STATUS AS OF JUNE 30, 2010 (March 2011), <https://www.fcc.gov/internet-access-services-reports>.

fixed- location voice communications to a world of mobile, information rich, multi-modal communications carried in a consumer's pocket.

The rapid growth of wireless communications and Internet access in the wake of the 1996 Act were initially significant for distinct reasons. Wireless growth and competition quickly reduced, if not mooted, the importance of local wireline competition as well as the distinction between local and long-distance service. This eroding importance of wireline services to consumers was significant because the 1996 Act primarily focused on such services. Indeed, the Act's core provisions aimed to facilitate competitive entry of new local providers by requiring incumbents to "unbundle" parts of their networks for use by rivals. The Act tried to incentivize incumbent local monopolies to comply with the unbundling provisions by offering in return approval to enter the long-distance market once competition successfully emerged in their local service areas. Consumers' growing substitution of wireless service for wireline telephone made entry into local wireline less attractive for new entrants and made entry into long-distance a less lucrative prize for local telephone incumbents. Wireless competition and substitution therefore made the main objective of the 1996 Act less important and its mechanisms less effective.⁶ Even as administrative proceedings and litigation over the 1996 Act's local competition provisions were in full swing, within just a few years after Congress passed the statute, its elaborate network unbundling provisions were serving little purpose.

Rather, the Act's main contribution was proving to be its preemption of state monopoly franchises for local telecommunications, its right-of-way provisions for infrastructure, and its requirement that rival telecommunications carriers exchange traffic from and to each other's subscribers. Those provisions allowed new competitive technologies to reach consumers without barriers from state law protections for incumbents or from adverse network effects resulting from incumbent refusals to exchange calls with rival carriers.⁷

Internet access, like wireless services, provided alternatives to traditional telephone service for individual communications, particularly as email and messaging applications became widely used. The significance of the Internet,

6. For a discussion of the emerging substitution of wireless for wireline service and the diminution in importance of traditional telephone networks, see Howard A. Shelanski, *Adjusting regulation to competition: Toward a new model for US telecommunications policy* 24 YALE J. ON REG. 55, 69–75 (2007).

7. Howard A. Shelanski, *A Comment on Competition and Controversy in Local Telecommunications*, 50 HASTINGS L.J. 1617 (1999), https://repository.uchastings.edu/hastings_law_journal/vol50/iss6/7.

however, was much greater than merely providing a competitive communications platform. As broadband access and Internet usage soared in the United States,⁸ the underlying telecommunications system became even more important as a gateway to essential information and as a facility for key aspects of everyday life rather than as a conduit for personal communications. As many of the contributions to this volume have explained, little in the Telecommunications Act of 1996 foresaw these developments or made the Act well suited to address the policy challenges that resulted from such developments. To name just a few of those challenges: incentivizing the massive build-out of modern communications infrastructure; ensuring that networks remain open to new content, services, and users; ensuring the geographic reach of high-speed networks; avoiding monopoly in the provision of broadband services; and ensuring affordability and access for all consumers of essential communications technology.

The foregoing discussion suggests that the 1996 Act came along at just the wrong time. Congress enacted the law just when imminent but opaque changes would quickly render the Act outdated. Those changes had big implications for both local telephone competition problems the Act aimed to solve and for digital information technologies the Act, and the world, did not foresee. In hindsight, one can draw a variety of lessons from the 1996 Act and the subsequent developments, lessons that might push in somewhat different directions for future policy.

One lesson is that insufficient appreciation of emerging technological changes can lead to costly and counterproductive regulation.⁹ It might not be possible to estimate the resources that went into regulatory battles and federal court litigation over implementation of the 1996 Act, but the figure is certainly enormous. One might draw from this costly lesson a presumption of caution and hesitation about regulating at a moment of technological change and uncertainty. However, that message of regulatory cost and inefficacy, and its implications for regulatory modesty, are not the only or necessarily most important lesson from the 1996 Act. Another lesson is that obsolescent legislative action—even legislative action that was understandable when enacted—can delay and make more difficult the resolution of new challenges created by emerging changes. Even while recognizing that the 1996 Act created a costly regulatory structure whose payoff was, at best, highly questionable, we must also recognize that the 1996 Act's focus on wireline telephone service

8. PEW RESEARCH CENTER, FEATURE: INTERNET/BROADBAND FACT SHEET (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

9. Jonathan E. Nuechterlein & Howard A. Shelanski, *Building on What Works: An Analysis of U.S. Broadband Policy*, 73 FED. COMM. L.J. 219, 222 (2021).

meant that U.S. telecommunication law was unprepared for the challenges the broadband market would quickly bring.¹⁰ One might draw from this lesson an imperative for strong policy action to realign regulation with the policy challenges of new technologies and their societal impact.

As we look back on 25 years of the 1996 Act's implementation, both the lessons of modesty about predicting the course of the telecommunications markets and the lesson about costly regulatory lag in addressing new policy challenges should inform debates over the future direction of U.S. telecommunications policy. At the core of current policy debates are the new world of broadband digital information, its central place in everyday life, work, and education throughout the world, and what policies can ensure the development, resilience, accessibility, affordability, inclusivity, and safety of modern communications services. Policy proposals to address these issues range from purely market-driven, unregulated approaches to full-scale public utility regulation of broadband networks, and include just about everything in between.

No single symposium on telecommunications policy can usefully address every problem or proposal. Instead, a successful symposium raises the level of debate by sharpening the policy focus to the most central problems and more rigorously exploring the differences among competing approaches. By that measure, this symposium on the 25th anniversary of the Telecommunications Act succeeds remarkably. In looking back on the 1996 Act, the articles in this symposium draw on both the cautionary lesson about overregulating by being too backward-looking and the countervailing lesson about under-regulating by being too slow to appreciate emerging problems and challenges. Even while the articles differ in the lessons that serve as their points of departure, all make thoughtful, constructive contributions to tackling the complex challenges of an evolving and increasingly essential communications system.

Several articles in this Symposium, those by Olivier Sylvain, Catherine Sandoval, Christopher Terry and Caitlin Ring Carlson, and Tejas Narechania take as their starting point regulatory gaps in the wake of the 1996 Act. Those articles focus on key problems of accessibility, equity, and consumer protection that have emerged or persisted despite the Act and the technological developments of the last twenty-five years.

In his article "A New Telecommunications Act: Prioritizing Consumer Protection and Equality," Sylvain addresses three policy concerns that he finds the 1996 Act, and indeed the overall body of existing American communications law, inadequately to address. The first is market

10. *Id.* at 223.

concentration, somewhat ironically the motivating issue behind the 1996 Act, which Sylvain argues has simply moved from the old wireline world to the digital broadband world even if with somewhat different players and in different form.¹¹ The second is the uneven and inequitable distribution of broadband service quality.¹² Third, Sylvain focuses on disinformation and the effects of harmful content on consumers.¹³

In focusing on these challenges of modern digital communications, Sylvain's article pushes us to think about the areas where the 1996 Act has caused regulation to lag behind pressing market failures. However, in doing so he is careful not to ignore the past lessons of telecommunications policy; in fact, he draws on them expressly. Sylvain looks beyond the 1996 Act, examining both the FCC's actions long before 1996 and its actions in the 25 years since Congress passed the Act. The lesson Sylvain draws from that history is not one of regulatory overreach but the exact opposite: frequent failure to avoid a slide toward market concentration, preserve equity in access, or impose accountability for harmful content. Implicit in Sylvain's argument is that in considering the 1996 Act, failure to consider the broader surrounding history of under-regulation leads to incomplete, if not incorrect, understanding of current policy challenges. In Sylvain's view, those challenges stem from statutory constraints and regulatory decisions that both predate and post-date the 1996 Act, as well as from the Act's poor fit with ensuing technological changes. He therefore argues for a new statutory framework and more aggressive regulatory posture to address the increasingly significant gaps he identifies between the telecommunications policy we have and the policy consumers need. Sylvain's proposals will spark debate, a debate his article helps to elevate and improve through both its discussion of the current policy challenges for U.S. telecommunications and its imperative for a more comprehensive accounting of history in identifying policy solutions.

Similarly drawing on history that predates the Act, Catherine Sandoval addresses a regulatory challenge that is very different from those related to broadband access. She explains that the technological forces that increased competition for uses like local telephone service did not rescue certain forms of mass media, notably broadcasting, from increased consolidation.¹⁴ While consumers rapidly increased their use of mobile wireless services and the time

11. Sylvain, *supra* note 1, at 305–08.

12. *Id.*

13. *Id.*

14. Catherine J.K. Sandoval, *Prometheus Serving: Incubating Diverse and Inclusive Media in the Public Interest Through Data Democracy* 37 BERKELEY TECH. L.J. 413, 467–78. (in this Symposium volume).

they spent on-line, large owners of radio and television stations expanded their holdings and increased consolidation of the mass-media market. Sandoval labels this “[t]he media consolidation era during the Internet’s expansion.”¹⁵ Indeed, the 1996 Act did little to change the trend of broadcast consolidation. The Act moreover could not change the increased difficulty the FCC, and participants in licensing proceedings, faced in ensuring diverse allocation of broadcast licenses after the Supreme Court’s 1995 decision in *Adarand Constructors v. Pena*.¹⁶ Notwithstanding the FCC’s professed commitment to ensuring diverse ownership of media, minorities’ ownership of broadcast licenses fell in the decades following the 1996 Act.¹⁷

Sandoval sees digital information technologies as both part of the problem and part of a potential solution to the reduced diversity of media ownership. To some extent, proliferation of Internet-based media might obscure reduced diversity in broadcast ownership. By any measure, there are many sources of news and information and many sources of diverse viewpoints available on-line – and a substantial portion of people report the Internet as their primary news source.¹⁸ However, as Sandoval notes, nearly as large a proportion of Pew survey respondents still said they rely on broadcast television and radio for political news coverage.¹⁹ This fact renders control of broadcast licenses of continuing importance despite the expansion of the Internet, in turn highlighting the importance of the FCC’s quadrennial review of media ownership. The regulatory challenge Sandoval identifies is how to ensure that participants in the FCC’s quadrennial reviews have the data and information they need, particularly in the wake of *Adarand*, to advocate successfully for increased diversity in broadcast licensing. Her proposed solution depends in part on the very Internet whose expansion has occurred in parallel with media ownership consolidation. Sandoval makes a strong case for the FTC to increase access to data compiled and analyzed over the past several decades, and to digitize the very resources that advocates need to do the analyses that will help minority set-asides of broadcast licensees withstand strict scrutiny. In this way, the growth of the Internet and expanded Internet access might at least contribute to reversing some of the consolidation in broadcast media.

Christopher Terry and Caitlin Ring Carlson provide broader context for the media diversification challenge that Sandoval’s proposal address. Terry and Carlson discuss in detail the regulatory history of the FCC’s media ownership

15. *Id.* at 422.

16. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995).

17. Sandoval, *supra* note 14, at 456–60.

18. *Id.* at 464–66.

19. *Id.*

proceedings over the past twenty years.²⁰ They argue that the FCC's normative focus on media market competition and quantitative measures of viewpoint diversity have failed address the relative absence of media ownership by ethnic and racial minorities and by women. The authors acknowledge that "substantial viewpoint diversity" exists in today's media market. They argue, however, that the agency's regulatory process provides no transparency into whether market competition and the multiplicity of viewpoints meaningfully includes the viewpoints of underrepresented groups.

Terry and Carlson begin by discussing case law and regulatory proceedings of the 1970's that found an empirical connection between minority ownership and viewpoint diversity. The authors then show how the regulatory focus shifted from the mid 1990's from promoting diversity of ownership to ensuring general competition in the mass media market. The repeal of *Metro Broadcasting* in the Supreme Court's 1995 *Adarand* decision was certainly a setback to minority preferences in broadcast licensing. However, Terry and Carlson argue that even putting aside the stricter scrutiny *Adarand* imposes on preferences and set-asides, the FCC failed over the past twenty years even meaningfully grapple with diversity in its media ownership decisions.²¹

The authors discuss the back and forth between the agency's Quadrennial Review of media ownership regulation and the courts in the cycle of *Prometheus Radio Project* cases that ran from 2003 to 2021, in which the FCC received repeated criticism and remand from the Third Circuit for its lack of action toward a plan for media ownership diversity. The FCC ultimately prevailed before the Supreme Court in justifying the agency's repeal of various media ownership rules. However, Terry and Carlson argue that the very deference the Court ruled the FCC should receive in media ownership regulation could apply to a decision by the agency in upcoming proceedings that relevant data justifies the adoption of policies to increase minority ownership.²² Terry and Carlson's argument strongly supports Sandoval's proposal that the FCC not just take account of such data, but make a comprehensive effort to gather, digitize, and make all such data available to the public. Advocates and stakeholders could then more effectively participate in regulatory proceedings to address the persistent policy challenge of diversity in media ownership.

Tejas Narechania also finds a regulatory imperative in the broadband convergence of the last twenty-five years, which he discusses in his article

20. Christopher Terry & Caitlin Ring Carlson, *Rethinking Adarand After Prometheus: A Rational (Basis) Solution to FCC Minority Ownership Policy*, 37 BERKELEY TECH. L.J. 489, 494–99. (in this Symposium volume).

21. *Id.* at 501.

22. *Id.* at 512, 420–421.

“Convergence and a Case for Broadband Rate Regulation.” Like Sandoval, he identifies the proliferation of on-line content and applications as a factor that has obscured underlying regulatory challenges.²³ Narechania expressly notes the need to distinguish the competitive effects of convergence in the applications layer from the market structure of the transmission infrastructure layer. He finds the focus on applications competition, for example between streaming video services and traditional cable programming, to have obscured the concentration that often exists at the transmission layer through which consumers gain broadband access. The Telecommunications Act, including its 1996 Amendments, implicitly assumes that specific services are closely linked to specific infrastructure. Narechania argues that the Act does not provide an adequate framework for addressing the situation where there is competition in services but not in the underlying infrastructure, the very challenge he identifies in the market structure for broadband access in many parts of the United States.²⁴

Narechania’s article takes a cautious approach to regulation. He is mindful of the pitfalls and historical lessons of utility regulation, and he does not claim that broadband access is everywhere—or even most places—monopolistically supplied. Instead, Narechania notes that broadband competition is uneven, sometimes within small geographic areas. He uses that variation in geographic market structure to compare how broadband price and quality varies with levels of competition and regulation. Narechania finds a systematic correlation in his data sample between broadband quality as the market goes from unregulated monopoly to regulated monopoly to competition. Giving competition credit where it is due, he offers an empirically grounded proposal—and model statute—for some limited forms of broadband regulation targeted at those areas that do not benefit from competition.²⁵ His objective is not to regulate rates of return or prices in the abstract but to overcome the problem of the “stubborn digital divide” that has emerged since passage of the 1996 Act.

Narechania’s article is something of a bridge between Olivier Sylvain’s contribution, which argues for a fundamental rewrite of the telecommunications statutes, and those articles in this Symposium that approach the current and future challenges of U.S. telecommunications policy from a more agnostic or deregulatory starting point. Of the latter articles, Stuart Benjamin’s is closest to Narechania’s in its approach. In his article

23. Tejas N. Narechania, *Convergence and a Case for Broadband Rate Regulation*, 37 BERKELEY TECH. L.J. 339, 341–343. (in this Symposium volume).

24. *Id.* at 345.

25. *Id.* at 358–62.

“Ships Passing in the Night: The Communications Act and the Convergence on Broadband,” Benjamin starts with a premise opposite that of Sylvain’s, that the challenges that have emerged in the quarter century since the 1996 Act do not require a fundamentally new telecommunications statute. Benjamin would let the Communications Act with all its accumulated imperfections and irrelevancies—what he calls “orphans” and “dormant provisions.”²⁶ Yet Benjamin readily acknowledges the impetus to rewrite the Telecommunications Act, especially after its poor fit with the digital era became evident. In Benjamin’s analysis of the technological and market developments of the last twenty-five years, however, the case for such an overhaul of the statutes has become weaker.

Benjamin bases his case not only on the fact that there has been significant expansion in communications related services but also on two important lessons he draws from the regulatory history since the 1996 Act. The first lesson is that many of the now-orphaned provisions of U.S. telecommunications law are not from the decades before the 1996 Act, but from more recent statutory amendments that Benjamin discusses in part II of his article.²⁷ The rapid obsolescence of the provisions that resulted from the intensive debate, lobbying, and analysis that led to the 1996 Act provides reason for Benjamin to be wary of the prospects for any new legislative overhaul. The second lesson Benjamin draws comes from the uncertain impact of FCC regulation since the Act’s adoption. Using the example of network neutrality regulation, Benjamin finds the effects of such regulation very hard to gauge. Because he finds it “hard to confidently ascribe an essential role” to regulation in hindsight, Benjamin counsels caution in pursuing a new statute that would enable new kinds of regulation looking forward.²⁸ We might just end up replacing an outdated 1996 Act with “a soon-to-be-at-least-somewhat-outdated 2021 Act.”

Importantly, even while emphasizing the cautionary lessons from the history of U.S. telecommunications and the 1996 Act in particular, Benjamin recognizes that regulatory challenges remain. He specifically identifies broadband internet access as one of those areas, and he does not discount the need for policy to address such challenges.²⁹ Instead, Benjamin cautions against an omnibus rewrite of telecommunications law and argues in favor of addressing the problems of today’s telecommunications system “with narrowly

26. Stuart Minor Benjamin, *Ships Passing in the Night: The Communications Act and the Convergence on Broadband*, 37 BERKELEY TECH. L.J. 527, 529. (in this Symposium volume).

27. *Id.* at 532.

28. *Id.* at 553.

29. *Id.*

targeted legislation only a few pages long.”³⁰ In this recommendation, Benjamin and Narechania would seem, from different starting points, to have arrived at a point of some agreement. The difference between the two might be that where Benjamin today would “(Netflix) and chill,” Narechania would first make sure there is everywhere sufficient, affordable broadband service to do so.

Jennifer Huddleston also approaches current telecommunications policy with the cautionary lessons of the 1996 Act in mind, but with a stronger deregulatory prescription than Benjamin offers. She addresses the idea of creating a Federal Computer Commission to regulate the Internet and digital technologies. Huddleston pushes back firmly on that proposal, finding that “[a] new regulatory agency to govern technology would come with many concerns that could outweigh any benefits of expertise or clarified authority.”³¹ To reach that conclusion, she discusses how the history of a “light touch approach” to regulation surrounding online speech has led to growth and innovation related to user-generated content and speech. Drawing on her analysis of developments in the on-line content market since the 1996 Act, Huddleston identifies several key problems with creating a regulatory agency to govern the Internet. One such problem is the possibility that a “more regulatory approach can deter innovation not only by creating more barriers, but by shifting the presumption from generally allowing an innovation unless expressly forbidden, to one that presumes permission is needed first.”³² A second concern she cites is that regulation can entrench market power and create barriers to entry, as powerful incumbents more easily adapt to new rules than can new entrants or smaller competitors.³³ Huddleston does not ignore the potential need for policy to address privacy or competition issues, but she argues that the FCC and FTC should work within their existing authority to address those issues. She concludes by counseling that telecommunications policy should draw on the “deregulatory intent” of the 1996 Act to preserve innovation through “appropriate limits on regulatory authority,” not its expansion through new agencies or legislation.³⁴

Christopher Yoo and Tiffany Keung take a neutral approach to the normative case for regulation and instead approach legislative reform from the

30. *Id.* at 531.

31. Jennifer Huddleston, *Does the United States Need a Federal Computer Commission?: Examining the Role of Federal Communications Commissions in the Internet Content Policy 25 Years After the Telecommunications Act of 1996*, 37 BERKELEY TECH. L.J. 567, 578. (in this Symposium volume).

32. *Id.* at 579.

33. *Id.*

34. *Id.* at 587.

standpoint of positive political economy. Instead of focusing on the substantive provisions and lessons of the 1996 Act, Yoo and Keung look at the political bargains through which the statute came to be and analyze the implications for “the next great communications statute.”³⁵ They identify several issues on which telecommunications policy debates are currently focused on and break them down into those in which the interests of different stakeholders largely overlap (privacy and universal service), diverge (section 230 of the Communications Decency Act, antitrust), and are mixed (spectrum policy, pole attachments, and network neutrality).³⁶ Based on these characterizations, the authors find that the history of political bargaining over the 1996 Act suggests that finding sufficient common ground for new communications legislation will be challenging yet achievable. They find, however, that the procedural hurdles of a divided Congress and fractured committee jurisdiction over relevant issues within Congress only add to the political challenges of reaching sufficient agreement on the substance of any new legislation. Yoo and Keung therefore conclude that any major reform of telecommunications policy in Congress is likely years away, even if those seeking such legislation can start to build the necessary political strategies today.³⁷

Daniel Deacon offers a somewhat different, and perhaps less pessimistic, take on potential legislative solutions to current telecommunications policy challenges. Deacon does not advocate for or against specific policies like net neutrality or broadband access regulations. He instead accepts the premise that a variety of policy challenges exists in the broadband world that has emerged since 1996 and asks what institutional structure and regulatory approach might best address those problems.³⁸ Deacon discusses the pros and cons of a variety of alternatives, including antitrust enforcement, existing state and federal regulatory authorities, and legislative proposals from both sides of the aisle in Congress.

The author begins by offering a brief but helpful overview of the efforts to date regarding various aspects of broadband regulation, focusing on the FCC’s network neutrality efforts. After describing what he concludes is a regulatory “morass,” Deacon assesses alternative paths forward.³⁹ He finds

35. Christopher S. Yoo & Tiffany Keung, *The Political Dynamics of Legislative Reform: What Will Catalyze the Next Telecommunications Act of 1996?*, 37 BERKELEY TECH. L.J. 589, 590. (in this Symposium volume).

36. *Id.* at 612–23.

37. *Id.* at 622–23.

38. Daniel Deacon, *Institutional Considerations for the Regulation of Internet Service Providers*, 37 BERKELEY TECH. L.J. 309, 312–20. (in this Symposium volume).

39. *Id.* at 321–337.

various drawbacks in most of the currently proposed alternatives for broadband regulation. He finds antitrust too standard driven and ex-post in its enforcement to provide meaningful policy coherence.⁴⁰ He argues that regulations by states under existing authority would be too unreliable and inconsistent. Deacon then assesses current regulatory proposals from both Republicans and Democrats. He finds both sets of proposals too inflexible and adaptable to the fast-moving environment of communications technologies. In the case of the Republican proposals, he also identifies notable gaps in its prevention of non-neutral behavior by Internet service providers.⁴¹

Deacon moves beyond critique to offer a proposal for moving forward that draws on past regulatory successes while offering meaningful compromise. He draws on Congress's 1993 legislation governing competition and interconnection among commercial mobile radio service ("CMRS") providers. As Deacon describes that legislation, it worked "tolerably well" to prevent discrimination and anticompetitive behavior by wireless providers without bringing the FCC into complicated licensing, operational, and rate-related regulations.⁴² He proposes a similar model for broadband providers, with a "tweak" that would prohibit the FCC from directly regulating broadband rates ("perhaps with carve outs for services designed to serve lower-income individuals and others who have historically benefited from universal service"). As an institutional matter, Deacon therefore finds new legislation to be the best path forward and identifies a precedent for such legislation that could be viable in Congress. As a substantive matter, the path forward that Deacon advocates would prohibit the most intrusive forms of public utility regulation for broadband markets but would allow the FCC sufficient scope for the kinds of approaches advocated by Narechania and by Benjamin.

If the articles in this Symposium demonstrate that different commentators draw different lessons from the 1996 Act and its subsequent application over the last twenty-five years, they also demonstrate that the debate over the future of telecommunications policy is in good hands. Whether the authors take from recent years lessons about overregulation, misregulation, or underregulation, all take seriously the policy challenges that the Internet and its associated infrastructure and applications present, and all are mindful of the care that must be taken in crafting regulatory responses to those challenges. Whatever one's evaluation of the arguments advanced in this volume's articles, this

40. *Id.* at 323–25.

41. *Id.* at 329–30.

42. *Id.* at 334–37.

Symposium stands as an important contribution to a policy discussion of critical importance.