

DOES THE UNITED STATES NEED A FEDERAL COMPUTER COMMISSION?: EXAMINING THE ROLE OF FEDERAL COMMUNICATIONS COMMISSIONS IN INTERNET CONTENT POLICY 25 YEARS AFTER THE TELECOMMUNICATIONS ACT OF 1996

Jennifer Huddleston[†]

ABSTRACT

For the 25 years since the passage of the Telecommunications Act of 1996, the United States has attempted to minimize bureaucracy and regulation around online content and internet platforms. However, as the internet has grown, debates over the appropriate nature of this approach have increased. Some on the left have called for greater regulation to respond to concerns such as hate speech while some on the right feel intervention is necessary to protect conservative opinions. Notably, during the Trump administration, an executive order raised questions to the Federal Communications Commission (FCC) via the National Telecommunications and Information Administration (NTIA) regarding potential rulemaking surrounding § 230.

This Article explores the continuing debates over the appropriate role of the FCC in regulating the internet. In many cases over the last 25 years, the FCC's policies have further codified the American approach to a free and open Internet, avoiding bureaucratic interventions in ways that could stifle speech and innovation. This Article concludes that the less regulatory approach continues to support American innovation in information technology.

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DOI: <https://doi.org/10.15779/Z38736M34N>

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[†] Jennifer Huddleston is Policy Counsel for NetChoice. She has a BA from Wellesley College and a JD from the University of Alabama School of Law.

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I. INTRODUCTION

Congressman Chris Cox stated in a floor speech on the Internet Freedom and Family Empowerment Act, later included in the Telecommunications Act of 1996 and better known as § 230, that the proposal would:

establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. We can make it better.¹

Now over 25 years later, new debates are emerging about the appropriate role of the Federal Communications Commission (FCC) in various online content in the context of its established authority both under the Communications Act of 1934 and the Telecommunications Act of 1996. In many cases, the FCC and its commissioners have made clear their commitment to maintaining a free and open Internet and particularly a desire to avoid intervening in ways that could stifle speech and innovation. But they have also considered regulation related to a variety of issues including § 230.

1. 104 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

As the internet has continued to develop, so too have calls for additional regulation, including some who argue that we need a Federal Computer Commission with expertise and regulatory power to handle various concerns related to digital and technological markets either at the FCC or in some other capacity. The ongoing debates in technology policy, however, reveal an increasing tension regarding the appropriate way for the FCC to continue that commitment with mounting bipartisan political pressure for regulation of various elements of the internet. Important questions have risen as technology has continued to move more quickly than regulation. Is policing here merely a case of regulation catching up to the technology at hand or an opportunity to recognize the benefits that a less regulatory approach has yielded? As a result of this perceived tension, some scholars and policymakers advocate for a more expansive approach to internet regulation including the creation of a new digital regulator separate from the existing FCC, resembling the European model.² Other indicators suggest the Federal Trade Commission may engage in more assertive enforcement on issues such as data privacy or antitrust to emerge as a sort of “federal computer commission.”

This Article will explore whether, 25 years later, the calls to avoid a “federal computer commission” reflect the reality of the regulatory state’s relationship to the internet both at the time of the passage of the Telecommunications Act of 1996 and in the years since. First, this Article begins with a discussion of how the FCC has distinguished its role as regulator between the elements of internet infrastructure and edge providers but retained an overall framework that seeks to embrace innovation and avoids the pitfalls of over-regulation in a rapidly changing field. Then, it continues by examining recent policy issues concerning the FCC’s authority over net neutrality and potential § 230 rulemaking to examine the FCC’s role in internet speech as it relates to concerns about the potential for agency intervention into the internet. Finally, this Article concludes that policymakers should seek to continue a restrained approach to regulatory intervention regarding the internet but clarify appropriate agency authority when necessary.

2. See, e.g., Gene Kimmelman, *Key Elements and Functions of a New Digital Regulatory Agency*, PUBLIC KNOWLEDGE (Feb. 13, 2020), <https://www.publicknowledge.org/blog/key-elements-and-functions-of-a-new-digital-regulatory-agency/>; Tom Wheeler, Phil Verveer & Gene Kimmelman, *New Digital Realities; New Oversight Solutions*, HARV. KENNEDY SCH. SHORENSTEIN CTR. ON MEDIA, POL., AND PUB. POL’Y (Aug. 20, 2020), <https://shorensteincenter.org/new-digital-realities-tom-wheeler-phil-verveer-gene-kimmelman/>.

II. THE REGULATORY STATE AND THE EARLY INTERNET

The internet was still in its infancy at the time of the passage of the Telecommunications Act of 1996. The internet was able to flourish despite its predecessors such as the U.S. Advanced Research Projects Network, better known as ARPANET, being tightly controlled government creations.³ This is due in part to innovations like web browsers and the Worldwide Web combined with sound policy structure such as the Telecommunications Act of 1996 and other early actions that freed the internet from unnecessary regulations. While the internet already existed, the Telecommunications Act of 1996 provided needed updates to the Communications Act of 1934 for the internet to thrive.⁴ The '96 Act also formalized the existing shift to deregulation of this new tool from government control to a freer and more open model particularly with regards to user generated content.⁵ This overall structure significantly contributed to the advancement of American innovation.

A. ORIGINS AND THE INTERNET PRIOR TO THE TELECOMMUNICATIONS ACT OF 1996

The origins of the internet as we know it largely trace back to academic papers in the early 1960s and the Advanced Research Projects Agency Network (ARPANET) created by the Department of Defense in the late 1960s.⁶ Because of its government purposes, the use of ARPANET was tightly regulated and controlled, its use for personal purposes or other unofficial use was forbidden.⁷ But even in these early and technically more strictly controlled days, individuals found creative uses such as the establishment of Star Trek and other shared passions in group electronic mails.⁸ While these networks were largely restricted by a small group of professionals and researchers, by the 1980s the ability to access such network computers was increasing for both

3. Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Larry G. Roberts & Stephen Wolff, *Brief History of the Internet*, INTERNET SOC'Y (1997), <https://www.internetsociety.org/internet/history-internet/brief-history-internet/> (last visited Sep. 28, 2022).

4. H.R. REP. NO. 104-458 (1996), <https://www.congress.gov/congressional-report/104th-congress/house-report/458>.

5. *See id.*

6. *Id.*

7. *See, e.g.*, Christopher C. Stacy, *Getting Started Computing at the AI Lab*, <https://dspace.mit.edu/handle/1721.1/41180> (discussing restrictions on ARPANET use).

8. *See* Emerson T. Brooking & P.W. Singer, *The Very First Social Network*, SLATE (OCT. 2, 2018), <https://slate.com/technology/2018/10/internet-social-media-sf-lovers-arpamet.html>.

authorized and unauthorized use.⁹ Throughout the 1980s, such networking gained popularity for a variety of uses.¹⁰ In 1989, the creation of the World Wide Web effectively gave way to the internet we know today.¹¹

Shortly after, dial-up internet connections became available to the public as opposed to just businesses and researchers. This new mode of connection and communication became more easily accessible with the creation of web browsers such as Netscape and Internet Explorer that allowed users to access the internet without a depth of technical knowledge.¹² As the internet gained popularity, however, some expressed concerns about the content that was available, particularly regarding what could be accessed by children.¹³ At the same time, it was clear that this innovation was growing in popularity and providing a new mode of communication and connection, but it was unclear what, if any, regulatory requirements applied.¹⁴ In this way, the Telecommunications Act of 1996, including the Communications Decency Act and what is now commonly known as § 230, became among the early legislation to truly address online content and the regulatory framework in which this new technology would operate.

B. THE 1996 TELECOMMUNICATIONS ACT AS A CATALYST FOR DEREGULATION AND INTERNET SPEECH

The Telecommunications Act of 1996 provided an update to the then 62-year-old Communications Act of 1934. This was necessary not only because of the then new and disruptive technology of the Internet, but also to increase competition in the telecommunications marketplace.¹⁵ The Act was broadly

9. Giovanni Navarria, *How the Internet was Born: from the ARPANET to the Internet*, THE CONVERSATION (Nov. 2, 2016, 7:38 PM), <https://theconversation.com/how-the-internet-was-born-from-the-arpanet-to-the-internet-68072>.

10. *See id.*

11. *See History of the Web*, THE WORLD WIDE WEB FOUND., <https://webfoundation.org/about/vision/history-of-the-web/> (last visited Jan. 11, 2022).

12. *See id.*

13. *See* Steven Levy, *No Place for Kids?*, NEWSWEEK (Jul. 2, 1995), <https://www.newsweek.com/no-place-kids-184766>.

14. *See* Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475 (1996).

15. *See* Howard Waltzman, *The Telecommunications Act of 1996 in the Twenty-First Century*, 13 ENGAGE 124 (2013), <https://fedsoc.org/commentary/publications/the-telecommunications-act-of-1996-in-the-twenty-first-century>.

deregulatory in nature, seeking to remove impediments to innovation, investment, and competition.¹⁶

This Article focuses only on a small part of the Telecommunications Act of 1996 commonly known as § 230. While some have argued that § 230 should be more narrowly interpreted due to its inclusion in the Communications Decency Act,¹⁷ its intentions are likely better understood by the broader deregulatory framework provided by the 1996 Act as a whole. § 230 began as a bipartisan bill, the Internet Freedom and Family Empowerment Act, co-sponsored by Republican Chris Cox and Democrat Ron Wyden, that established that no interactive computer service would be treated as a publisher of user content and also provided legal certainty about the ability to engage in content moderation without changing the platform's legal liability.¹⁸ This bill was inserted into the Communications Decency Act, which became Title V of the Telecommunications Act of 1996. However, while the Communications Decency Act sought to restrict various materials on the internet through more regulatory intervention, § 230, like the rest of the Telecommunications Act, favored a light-touch deregulatory approach that would help promote innovation and remove barriers to competition.¹⁹

As mentioned in the discussion, *supra*, during the debate over what would become known as § 230, then Rep. Chris Cox clarified that the purpose was not to establish a regulatory authority over the internet by transforming the FCC into the Federal Computer Commission.²⁰ While other parts of the law and subsequent court interpretations clearly established the FCC's authority over the internet as a form of communications,²¹ § 230 does not establish such regulatory authority for interpretations regarding user generated content or the liability for that content.²²

16. See Stuart N. Brotman, *Was the 1996 Telecommunications Act Successful in Promoting Competition?*, BROOKINGS INST. (Feb. 8, 2016), <https://www.brookings.edu/blog/techtank/2016/02/08/was-the-1996-telecommunications-act-successful-in-promoting-competition/>.

17. See, e.g., Zachary Evans, *Clarence Thomas Suggests Section 230 Immunities Applied Too Broadly to Tech Companies*, NAT'L REV. (Oct. 13, 2020, 12:02 PM), <https://www.nationalreview.com/news/clarence-thomas-suggests-section-230-immunities-applied-too-broadly-to-tech-companies/>.

18. See *CDA 230: Legislative History*, ELEC. FRONTIER FOUND., [https://www.eff.org/issues/cda230/legislative-history](https://www EFF.ORG/issues/cda230/legislative-history) (last visited Jan. 11, 2022).

19. See Jennifer Huddleston, *Section 230 as Pro-Competition Policy*, AM. ACTION F. (Oct. 27, 2020), <https://www.americanactionforum.org/insight/section-230-as-a-pro-competition-policy/>.

20. 104 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

21. See *AT&T Corp. v. Iowa Util. Board*, 525 U.S. 366 (1999).

22. See *Reply Comments of Co-Authors of Section 230 of the Communications Act of 1934: Hearing before the Federal Communications Commission*, 104th Cong. 5 (Sep. 17, 2020), <https://www.fcc.gov/record/20200917-reply-comments-of-co-authors-of-section-230-of-the-communications-act-of-1934>.

III. THE FCC AUTHORITY, THE INTERNET, AND THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996 amended the existing regulatory authority of the FCC under the Communications Act of 1934. The changes brought about by the deregulatory approach of the 1996 Act were critically important in unleashing further innovation and competition in a range of telecommunications technology and innovation. As Sen. Ed Markey commented in February 2021 when discussing the impact brought about by investment led by the “paranoia-inducing Darwinian competition,” “before that bill passed and was signed, no one in America had high-speed internet access.”²³ In its deregulatory aspects, it unleashed a wave of private investment and innovation that the FCC helped oversee, including ensuring valuable spectrum resources were utilized in beneficial ways but without regulatory micromanagement that could prevent competition or innovation.²⁴ The result has been, as particularly has been evident during the COVID-19 pandemic, that the United States has a strong and innovative internet infrastructure that is able to adapt to novel demands that has benefited from a range of online opportunities and the economic benefits they bring.²⁵

A. IMPLEMENTING THE LIGHT TOUCH APPROACH TO INTERNET REGULATION

The FCC’s authority to generally carry out the provisions of the Telecommunications Act of 1996 as an amendment to the Communications Act of 1934 have generally been confirmed by the Supreme Court.²⁶ While the FCC may generally regulate communications, the lack of a “federal computer commission” has also spread the responsibility for different elements of the internet to different agencies depending on the policy issue at hand.

ecfsapi.fcc.gov/file/10917190303687/2020-09-17%20Cox-

Wyden%20FCC%20Reply%20Comments%20Final%20as%20Filed.pdf.

23. Alexandra S. Levine, *25 Years of the Telecom Act*, POLITICO (Feb. 8, 2021, 10:00 AM), <https://www.politico.com/newsletters/morning-tech/2021/02/08/25-years-of-the-telecom-act-793230> (quoting Sen. Markey’s comments at an event).

24. See David McCabe, *Bill Clinton’s Telecom Law: Twenty Years Later*, THE HILL (Feb. 7, 2016, 9:00 AM), <https://thehill.com/policy/technology/268459-bill-clintons-telecom-law-twenty-years-later>.

25. See James Czerniawski, *What America Can Teach the European Union About Ensuring Internet Access During the Coronavirus*, NAT’L INT. (Apr. 3, 2020), <https://nationalinterest.org/blog/buzz/what-america-can-teach-european-union-about-ensuring-internet-access-during-coronavirus> (discussing the positive impact of private investment on America’s internet infrastructure’s resilience).

26. See *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (finding that the government has rulemaking authority to carry out the ’34 Act).

The regulation of the internet by different agencies has been focused on the nature of the harm or potential harm that policymakers are seeking to address. For example, the Federal Trade Commission governs many issues such as data privacy and data security under its consumer protection authority.²⁷ Meanwhile, the National Institute of Standards and Technology (NIST) sets standards for cybersecurity and many internet-connected devices.²⁸ Other agencies including the National Telecommunications and Information Administration within the Department of Commerce also play a role in various data issues related to the industries they regulate or specific standards such as cybersecurity.²⁹ The result of dispersed authority based on use case and issue instead of treating the internet and its associated innovations as a single entity to be regulated and controlled by a particular agency, the United States has addressed policy concerns as they arise with a more context related approach.³⁰ Overall, this less regulatory approach means internet innovation is generally free with minimal limitations as opposed to the government permission required approach.³¹

Since the initial framework, further policy elements have reiterated the commitment to an approach that seeks to avoid unnecessary regulation of the internet. A year after the Telecommunications Act of 1996, the Clinton Administration released the Framework for Global Commerce. This 1997 statement reinforced the deregulatory nature of the Telecommunications Act of 1996 and more explicitly established that the internet should be allowed to develop with minimal regulatory intervention.³² Other laws over the course of the late 1990s and early 2000s further clarified the appropriate regulatory response but were tailored to respond to specific concerns of potential harms rather than signaling changes in the overall regulatory scheme. For example, the Digital Millennium Copyright Act (DMCA) provided a notice-and-takedown regime to respond to concerns about intellectual property violations

27. See Tyler Cooper, *FCC vs FTC: Who Polices the Internet After Net Neutrality?*, BROADBAND NOW (Dec. 14, 2020), <https://broadbandnow.com/report/fcc-vs-ftc-police-internet/>.

28. *About NIST*, NAT'L INST. OF STANDARDS AND TECH., <https://www.nist.gov/about-nist> (last updated Jan. 11, 2022).

29. *Cybersecurity*, NAT'L TELECOMM.'S AND INFO. ADMIN., <https://www.ntia.doc.gov/category/cybersecurity> (last visited Jan. 11, 2022).

30. See ADAM THIERER, PERMISSIONLESS INNOVATION 12–15 (2016).

31. *Id.* At 51–56.

32. *The Framework for Global Electronic Commerce*, WHITE HOUSE <https://clintonwhitehouse4.archives.gov/WH/New/Commerce/> (last visited Jan. 11, 2022).

and the appropriate response.³³ In other cases, privacy laws such as the Children’s Online Privacy Protection Act (COPPA) provided clarity and guidance for the appropriate agency to engage in rulemaking in response to a potential harm.³⁴

The framework established by the Telecommunication Act of 1996 also retained significant flexibility and a generally deregulatory approach. This means innovators face few regulatory barriers.³⁵ These lower barriers benefit consumers and speech by increasing the opportunities to create and distribute content online at little to no costs. This approach, contrasted to the more regulatory environment in many other areas, is part of what has allowed a thriving internet economy to emerge in the United States with many companies becoming global leaders in their fields.³⁶ Particularly when it comes to online speech, the legal certainty provided by § 230 coupled with existing First Amendment jurisprudence enables new entrants to offer opportunities for users to create a wide variety of content without fear of potentially company ending liability.³⁷

B. INTERPRETATIONS OF ONLINE SPEECH REGULATION WITHIN THE TELECOMMUNICATIONS ACT OF 1996

The Communications Decency Act would fail on First Amendment grounds following legal challenges in *Reno v. ACLU*, but § 230 would remain as part of the broader deregulatory approach contained in the Telecommunications Act.³⁸ In subsequent legal cases, the courts adopted a broad interpretation of § 230 as a liability shield for platforms to carry user generated content.³⁹ The result has been to lessen the risks associated with the wide range of user generated content, therefore keeping barriers low for the

33. *Overview of the Digital Millennium Copyright Act*, WORCESTER POLYTECHNIC INST., <https://www.wpi.edu/about/policies/copyright-compliance/digital-millennium-copyright-act>. (last visited Jan. 11, 2022).

34. *Children’s Online Privacy Protection Act (COPPA) of 1998*, INT’L ASS’N OF PRIV. PRO.’S, <https://iapp.org/resources/article/childrens-online-privacy-protection-act-of-2000-the/> (last visited Sep. 28, 2022).

35. See Waltzman, *supra* note 15.

36. THIERER, *supra* note 30.

37. Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation*, 72 OKLA. L. REV. 635 (2020).

38. *Reno v. ACLU*, 521 U.S. 844 (1997).

39. *CDA 230: Key Legal Cases*, ELEC. FRONTIER FOUND., <https://www EFF.ORG/issues/cda230/legal> (last visited Sep. 28, 2022).

development of a wide-range of online services, from review sites and the sharing economy, to social media.⁴⁰

Much of the current debate around § 230 stems not from the original passage of the law but from debates about if the courts extended its authority farther than the legislature intended. Following *Reno*, courts dealt with the full nature of liability protection provided by § 230 in *Zeran v. America Online* (AOL). In this case, distasteful postings regarding the Oklahoma City bombing that revealed the plaintiff's phone number had been made on online bulletin boards hosted by AOL.⁴¹ Both the district court⁴² and the court of appeals⁴³ found that the recently enacted § 230 protected AOL from liability for state law negligence claims stemming from user-generated content even when the events in question occurred before § 230's passage. Additionally, the court of appeals rejected the plaintiff's argument that suggested a difference in applicability to a company acting as "distributor" or a "publisher."⁴⁴

While early cases established that § 230 had a rather broad reach, more recent cases have also established that there are limitations to its application as well. For example, in *Fair Housing Council of San Fernando Valley v. Roommates.com* the Ninth Circuit rejected claims that § 230 protected a website from housing discrimination law claims related to dropdowns that allowed users to state preferences for protected classes.⁴⁵ Similarly, a recent decision allowed product liability claims against Snapchat regarding its speed filter to go forward on the basis that it was a product feature and not user generated content.⁴⁶ While case law is often seen as interpreting § 230 broadly, such instances show that courts do not view it merely as a *carte blanche* for all online content. Instead, these cases show that courts carefully examine the distinctions between user-generated content and other speech generated by hosting companies.

40. See Heather Sommerville, *AirBnB's Section 230 Use Underscores Law's Reach Beyond Social Media*, WALL ST. J. (Jan. 10, 2021, 12:00 PM), <https://www.wsj.com/articles/airbnbs-section-230-use-underscores-laws-reach-beyond-facebook-11610298001>.

41. *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

42. *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124 (E.D. Va. 1997).

43. *Zeran*, 129 F. 3d. 327, 332–33.

44. *Id.*

45. *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008).

46. Hannah Denham, *Snap can be sued over speed filter's role in fatal crash, court says*, WASH. POST (May 5, 2021, 6:44 PM), <https://www.washingtonpost.com/technology/2021/05/05/snapchat-speed-filter-court/>.

IV. 25 YEARS LATER: THE CURRENT STATE OF THE REGULATORY STATE AND THE INTERNET

While this light-touch approach has led to a vibrant environment of both user generated content and speech, there are renewed calls for America to shift its approach and consider a specialized regulator to address the various issues that have come with the new uses of data the internet has provided.⁴⁷ 25 years after the 1996 Telecommunications Act, the United States has largely avoided having a Federal Computer Commission and other more regulatory approaches to technology. Yet as the internet has become an increasingly important tool, conversations around the right way to govern a range of issues such as data privacy and online content have become necessary. This Section explores current calls to expand regulatory responsibilities for the Federal Communications Commission regarding online content as well as calls to establish a new digital regulator that would be tasked with directly governing the internet and other aspects of the digital economy. Not only would implementing these regulatory bodies represent significant changes, but they would also have serious consequences for both users and innovation. As a result, policymakers should avoid these calls and instead retain the deregulatory and hands-off framework established 25 years ago that promotes innovation which benefits both entrepreneurs and consumers.

A. RISKS OF A DIGITAL REGULATOR

25 years later, some are calling to embrace a digital regulator in the wake of various scandals and the increasing use of data and technology in all aspects of the economy. This would effectively establish the Federal Computer Commission that the Telecommunications Act of 1996 sought to avoid. Advocates of this approach often point to digital regulators in many European countries and argue that such a regulator is now necessary to provide the expertise for proper policy and rulemaking.⁴⁸ However, this would constitute a much more precautionary and regulatory approach that could limit innovation and the opportunities users have to share and create content.

In some cases, these calls are related to a recognition that existing regulatory tools may struggle to address policy concerns about technology and the need for greater technology expertise.⁴⁹ For example, former FCC

47. Jim Dunstan, *The Arrival of the Federal Computer Commission?*, FEDERALIST SOC'Y (Aug. 27, 2021), <https://fedsoc.org/commentary/fedsoc-blog/the-arrival-of-the-federal-computer-commission>.

48. See Gene Kimmelman, *Key Elements and Functions of a New Digital Regulatory Agency*, PUB. KNOWLEDGE (Feb. 13, 2020), <https://www.publicknowledge.org/blog/key-elements-and-functions-of-a-new-digital-regulatory-agency/>.

49. Wheeler, Verveer & Kimmelman, *supra* note 2.

Chairman Tom Wheeler argues that a digital regulator would be better able to address the specific contours of policy concerns related to digital platforms than antitrust enforcement.⁵⁰ Jason Fuhrman argues for a new data regulator by pointing out that current policy tools may be too slow, cumbersome, or otherwise unpredictable to respond to today's fast moving digital markets.⁵¹ These arguments presume that the ability of agencies to respond to technological changes quickly and appropriately with regulation benefits both consumers and innovators. However, there is debate about the relationship between the pace of regulation and the pace of technological process. While at times a lack of regulatory certainty or the lack of regulation can be problematic for either innovators or consumers, the "pacing problem" where technology outpaces regulatory responses has also at times been a "pacing benefit" allowing new services such as Uber to reach consumers more quickly than a regulatory response.⁵²

A new regulatory agency to govern technology would present many problems that could outweigh any benefits of expertise or clarified authority that stems from a new specialized agency. The United States tech sector has grown to be a global leader under the current approach that focuses on applications and disperses agency authority, rather than a single regulator. As a result, there are several reasons that the United States ought to avoid creating a digital regulator.

First, creating a dedicated agency would be perhaps even more powerful now than at the time of the Telecommunications Act of 1996 given the number of areas of the economy touched by digital transformation and technological change.⁵³ This approach would shift away from the application centric solutions of the current targeted and multi-agency scheme and could lead to inter-agency conflicts due to confusion over the appropriate authority for industry specific applications. Finally, the extreme differences in current viewpoints on what problems exist in the digital space, such as content moderation, could result in dramatic regulatory shifts depending on the party in power and control of the agency.

50. *Id.*

51. See Steve Lohr, *Forget Antitrust Laws. To Limit Tech, Some Say a New Regulator is Needed*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/technology/antitrust-laws-tech-new-regulator.html>.

52. Ryan Hagemann, Jennifer Huddleston & Adam D. Thierer, *Soft Law for Hard Problems: The Governance of Emerging Technologies In An Uncertain Future*, 17.1 COLO. TECH L.J. 37 (2018).

53. See Jennifer Huddleston & Andrea O'Sullivan, *New GAO Report Says It's Time for Federal Data Privacy Legislation. But What Kind?*, THE BRIDGE (Feb. 25, 2019), <https://www.mercatus.org/bridge/commentary/new-gao-report-says-its-time-federal-data-privacy-legislation-what-kind>.

Second, this would signal a shift towards a more regulatory approach to data-intensive industries. This would likely yield a dramatic shift from the current approach where regulators only intervene in the cases where harm materializes to a far more precautionary, preemptive regulation focus. This 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.⁵⁴ In general this approach has yielded less innovation, as can be seen in many European countries who have taken such an approach to tech policy.⁵⁵

Third, even if an agency was created with a limited mandate to only deal with tech platforms and maintain narrowly addressed rules that only deal with harms, such specialized agencies run the risk of agency capture by the very industry it was designed to regulate.⁵⁶ Critics of the current dispersed approach cite the risk that any single agency may fail to consider the full group of actors whose decisions impact the experience of various technologies. Such critics see this as problematic since it may encourage actors to find the regulator most likely to give them their preferred answer.⁵⁷ But a new agency solely focused on digital actors might be subject to regulatory capture by industry incumbents. As the Free State Foundation's Dr. George S. Ford writes in his critique of the calls for a new digital regulator, to achieve its stated goals and overcome these concerns, the creation of a new regulatory body would "hinge on creating something we have never managed to create."⁵⁸

The limited proposed potential benefits of an additional regulatory agency could likely be addressed in other ways. For example, calls for additional expertise could likely be fulfilled by staff at the existing FCC and FTC, or by hiring additional technologists to deal with industry specific concerns at other agencies.⁵⁹ If there are specific concerns around privacy or other online issues, Congress should first consider if this can be addressed by providing existing

54. See THIERER, *supra* note 30, at 23–36.

55. *Id.*

56. Neil Chilson, *Creating a New Federal Agency to Regulate Big Tech Would Be a Disaster*, WASH. POST (Oct. 30, 2019), <https://www.washingtonpost.com/outlook/2019/10/30/creating-new-federal-agency-regulate-big-tech-would-be-disaster/>.

57. See Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 184–191 (2017).

58. George S. Floyd, *Beware of Calls for a New Digital Regulator*, YALE J. ON REG. (Feb. 19, 2021), <https://www.yalejreg.com/nc/beware-of-calls-for-a-new-digital-regulator-by-dr-george-s-ford/>.

59. See Neil Chilson, *How the FTC Keeps Up on Technology*, FTC (Jan. 4, 2018), <https://www.ftc.gov/news-events/blogs/techftc/2018/01/how-ftc-keeps-technology> (discussing how the FTC pursues technological expertise).

agencies the appropriate delegation and resources rather than further expanding the administrative state.

Given these tradeoffs, it appears that creating a Federal Computer Commission through a new agency would still have negative impacts on innovation just as it would have in 1996. Meanwhile, existing agencies already have regulatory authority over many of the policy concerns such as data privacy and antitrust.⁶⁰ If there are concerns that agencies do not have the necessary resources or if clarification around issues such as authority for rulemaking regarding data privacy are needed, then policymakers should look to clarify such existing delegations within the FTC or FCC, rather than the significant regulatory expansion that would occur with the establishment of a new agency.⁶¹

B. RECENT ACTIONS REGARDING FCC AUTHORITY AND ONLINE CONTENT

The policy debates over net neutrality and § 230 provide recent examples of steps that the FCC has taken to regulate online platforms and user speech. These two examples show very different initial approaches to decisions around the agency's own authority to regulate online content and platform decisions associated with it. In both cases, however, an agency decision to refrain from engaging in regulatory action would better reflect the intentions of the light-touch approach laid out in the Telecommunications Act of 1996.

1. *Net Neutrality*

The debate over applying “net neutrality,” the idea that all Internet Service Providers (ISPs) must treat all content equally, has been highly contentious.⁶² At the FCC, this largely concerned the appropriate regulatory classification for ISPs. It also had potential impacts on the requirements to engage in carrying certain content and could implicate online speech concerns.

Prior to 2010, the FCC did not place net neutrality requirements on most providers. In 2010, the Open Internet Order imposed a series of requirements on Internet Service Providers including both traditional broadband and

60. See *The Enforcers*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> (discussing competition authority) (last visited Sep. 28, 2022); *Protecting Consumer Privacy and Security*, FTC, <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy-security> (discussing FTC privacy authority) (last visited Sep. 28, 2022).

61. See Huddleston & O’Sullivan, *supra* note 53.

62. See Cecilia Kang, *FCC Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html>.

wireless providers.⁶³ This includes what have become commonly known as “net neutrality” regulating providers’ ability to prioritize, deprioritize, or even block certain websites or content. The order was challenged in court where it was found that the FCC had no authority to enforce neutrality requirements unless the providers had been declared common carriers and that the FCC itself could not reclassify these providers as such.⁶⁴ In 2014, the court vacated several of the key provisions such as “no blocking” and “no unreasonable discrimination” as beyond the scope of the FCC’s authority, but did not strike down the transparency requirements.⁶⁵ In 2015, the FCC again issued an Open Internet Order, this time classifying ISPs under Title II.⁶⁶ This reclassification allowed the FCC to engage in additional regulations of ISPs similar to its regulation of other communication utilities such as phone companies. In subsequent litigation, the courts ruled in favor of the FCC and the Supreme Court denied cert on the subsequent appeal.⁶⁷ Advocates on both sides of the debate have staunchly defended their version of the FCC’s role in net neutrality regulation.

Then in 2018, the FCC reversed the Open Internet Order and removed the Title II classification.⁶⁸ Among the notable results of this reclassification was the removal of the “net neutrality” requirements; however, this action more generally reaffirmed the FCC’s commitment to a less regulatory approach to internet governance.⁶⁹ This approach should allow increased investment and innovation in internet infrastructure, but also prevents potential concerns that a misclassification could have on speech.⁷⁰ This too was challenged in court. In *Mozilla v. FCC*, the court upheld the FCC’s ability to reclassify ISPs while remanding questions regarding public safety, pole

63. Open Internet Order, 76 Fed. Reg. 60754, 59192 (Dec. 23, 2010), <https://www.fcc.gov/document/preserving-open-internet-final-rule>.

64. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

65. *Id.*

66. FCC Releases Open Internet Report and Order on Remand, Declaratory Ruling and Order, 80 Fed. Reg. 19737 (Mar. 12, 2015), <https://www.fcc.gov/document/fcc-releases-open-internet-order>.

67. *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

68. Restoring Internet Freedom, 33 FCC Rcd. 311 (Jan. 4, 2018), <https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order>.

69. See Brian Fung, *The FCC Just Voted to Repeal its Net Neutrality Rules, in a Sweeping Act of Deregulation*, WASH. POST (Dec. 14, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/12/14/the-fcc-is-expected-to-repeal-its-net-neutrality-rules-today-in-a-sweeping-act-of-deregulation/>.

70. See Brent Skorup, *The First Amendment, ISPs, and Net Neutrality*, PLAIN TEXT (Sep. 3, 2015), <https://readplaintext.com/the-first-amendment-isps-and-net-neutrality-7bb5ec56b795>.

access, and the Lifeline program.⁷¹ This reclassification did not leave consumers without recourse. The FTC retained its role as a consumer protection agency regarding issues in the digital marketplace and would be able to engage in appropriate enforcement action regarding unfair or deceptive practices by ISPs.⁷²

The reclassification shows an uncertainty around FCC authority and appropriate classification of ISPs. Beyond the debate on the policy implications of net neutrality, the potential administrative law questions should not be ignored. Some advocates have pointed out that the appropriate path forward would be clarity from Congressional action around the appropriate classification and regulatory authority for ISPs.⁷³ Such an approach need not solve every policy dispute related to net neutrality, but it is critical for industry, consumers, and regulators to know the extent of the FCC's authority and the appropriate classification of these services in order to continue to invest, innovate, and improve internet services.⁷⁴ Without such clarity, another problem is beginning to emerge in the form of state-level net neutrality policies such as those passed by California.⁷⁵ Not only do these laws raise similar policy concerns to a federal law, but the interstate nature of the internet also means such laws are likely to result in a problematic regulatory patchwork that violates the dormant commerce clause.⁷⁶ While the FCC may not be a federal computer commission, a federal approach on many such policies is preferable to a state-by-state patchwork.

The policy that yielded net neutrality shows that at times the FCC can be a quasi-Federal Computer Commission implementing heavy-handed internet

71. *Mozilla Corp. v. Fed. Comm'n Comm'n*, 940 F.3d 1 (D.C. Cir. 2019).

72. *See* Cooper, *supra* note 27.

73. *See, e.g.,* Nicol Turner Lee, *Why Net Neutrality Needs a Congressional Solution*, BROOKINGS INST. (May 17, 2017), <https://www.brookings.edu/blog/techtank/2017/05/17/why-net-neutrality-needs-a-congressional-solution/>; Douglas Holtz-Eakin, *Net Neutrality Settled Once And For All, Sorta*, AM. ACTION F. (Oct. 3, 2019), <https://www.americanactionforum.org/daily-dish/net-neutrality-settled-once-and-for-all-sorta/>.

74. Holtz-Eakin, *supra* note 73.

75. *See* Cal. Civ. Code § 3101(a)(1)-(2), (4), (7)(A) (as amended by SB-822 in 2018) https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB822; *ACA Connects - Am.'s Comm'ns. Ass'n v. Bonta*, 2022 U.S. App. LEXIS 2621 (9th Cir. 2022) (denying a preliminary injunction that would prevent the enforcement of SB-822)

76. Daniel Lyons, *Net Neutrality and the Dormant Commerce Clause*, AM. ENTER. INST. (June 27, 2019), <https://www.aei.org/technology-and-innovation/telecommunications/net-neutrality-and-the-dormant-commerce-clause/>.

interventions.⁷⁷ In contrast, the Restoring Internet Freedom Order⁷⁸ can be seen as returning the agency to its previous more restrained role and deregulatory approach. In this scenario, as in the years preceding the Open Internet Order, American investment in internet infrastructure has continued to flourish through private investment.⁷⁹ The Biden Administration’s Executive Order on “Promoting Competition in the American Economy” included a renewed call for the FCC to reconsider its approach to net neutrality suggesting that the pendulum may again swing towards a more regulatory approach in this regard.⁸⁰

This example illustrates the need for Congress to, at a minimum, clarify the FCC’s authority on the appropriate classification for ISPs and other internet related matters. To avoid the FCC engaging in regulatory shifts that could lead to it either becoming a Federal Computer Commission that stifles innovation, encouraging a disruptive state patchwork of internet governance laws to emerge in the void, or allowing dramatic shifts in the classifications associated with the internet, the appropriate response is best handled through legislation rather than unclear delegations to agencies.

2. *Calls for § 230 Rulemaking*

In 2020, the Trump Administration in an executive order called for the National Telecommunications and Information Administration to petition the FCC to engage in rulemaking concerning § 230 and online speech.⁸¹ The NTIA submitted a petition regarding potential interpretative rulemaking to the FCC which prompted the FCC to take public comments regarding the petition before the then FCC Chairman Ajit Pai issued a statement saying that he “intend[s] to move forward with a rulemaking to clarify its [§ 230’s] meaning.”⁸² Since this statement, however, no notice of proposed rulemaking regarding the § 230 petition has been given.

77. See Daniel Lyons, *Net Neutrality and Non-Discrimination Norms in Telecommunications: A Historical Perspective*, 54 ARIZ. L. REV. 1030, 1042–143 (2012) (discussing the problematic use of “net neutrality” regulations *ex ante*).

78. Restoring Internet Freedom, 33 FCC Rcd. (Jan. 4, 2018), <https://docs.fcc.gov/public/attachments/FCC-17-166A1.pdf>.

79. See Czerniawski, *supra* note 25.

80. Exec. Order No. 14,036, 86 C.F.R. 36987–99 (2021), <https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy>.

81. Exec. Order No. 13,925, 85 C.F.R. 34079–83 (2020), <https://www.federalregister.gov/documents/2020/06/02/2020-12030/preventing-online-censorship>.

82. Statement of Chairman Pai on Section 230, FCC (Oct. 15, 2020), <https://docs.fcc.gov/public/attachments/DOC-367567A1.pdf>.

Since the initial NTIA petition, debate has emerged regarding whether the FCC has the necessary authority to engage in rulemaking related to § 230. The initial authors of § 230, Chris Cox and Ron Wyden, in comments to the FCC regarding the NTIA's petition argue that it does not have such authority.⁸³ They argue plainly that § 230 “does not invite agency rulemaking.”⁸⁴ Then FCC General Counsel Tom Johnson and others, however, have asserted that the Communications Act of 1934 confers on the FCC the authority to issue rules to carry out the provisions of the Act, including § 230.⁸⁵ He further relies on the Supreme Court rulings in *AT&T Corp. v. Iowa Utilities Board* that the FCC has authority in regards to the Telecommunications Act of 1996 which amended the Communications Act rather than served as a separate act⁸⁶ and *City of Arlington v. FCC* which holds that the court will defer to the FCC's reasonable interpretations regarding the provision of the act.⁸⁷

If the FCC engaged in rulemaking regarding § 230, it would open questions about the agency's broader role in internet governance and in concerns over speech. At first glance, the FCC's decision to claim statutory authority over § 230 would seem to contradict its decision to remove Title II classification in the Restoring Internet Freedom Order and broader comments regarding its role in internet regulation.⁸⁸ Even if the agency were found to have authority, such rulemaking would also raise potential constitutional challenges. A rulemaking requiring government-enforced neutrality would result in the government dictating choices and speech allowed to private actors, raising First Amendment concerns.⁸⁹ This could have significant consequences for both technology and speech and once granted would not be easily undone. Rulemaking of this type would also follow the shifting preferences of those in

83. See Brotman, *supra* note 16, at 4.

84. *Id.*

85. Thomas M. Johnson, Jr., *The FCC's Authority to Interpret Section 230 of the Communications Act*, FCC (Oct. 21, 2020, 10:30 AM), <https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act>.

86. See *AT&T Corp. v. Iowa Util. Board*, 525 U.S. 366 (1999).

87. *City of Arlington v. FCC*, 569 U.S. 290 (2013).

88. Harold Feld, *Could the FCC Regulate Social Media Under Section 230? No.*, PUB. KNOWLEDGE (Aug. 14, 2019), <https://www.publicknowledge.org/blog/could-the-fcc-regulate-social-media-under-section-230-no/>.

89. *NTIA's Section 230 Reinterpretations Violate First Amendment; FCC Lacks Authority to Implement Them*, TECH FREEDOM (Sep. 2, 2020), <https://techfreedom.org/ntias-section-230-reinterpretations-violate-first-amendment-fcc-lacks-authority-to-implement-them/>.

power and could be easily weaponized to create a new “fairness doctrine” and silence political opponents or unpopular opinions.⁹⁰

Advocates of the NTIA petition and FCC rulemaking around § 230 have largely been conservatives who feel that platforms are engaged in a deliberate silencing of conservative voices.⁹¹ This, however, neglects the ways in which the internet has lowered the barriers for all sorts of opinions that might have struggled to gain a platform in a prior era of more limited traditional media opportunities. For example, Sen. Rick Santorum writes, “social media is central to the President’s and most Republicans’ election strategy, allowing them to bypass the openly hostile mainstream media in order to reach our base and convince potential new voters.”⁹² The same could be true for any number of groups who in an analogue era had a more difficult time connecting to each other or having their voices heard.⁹³ In this way, the internet has been an incredibly powerful tool for minority communities, the LGBTQ community, and others to find connections and like voices.⁹⁴ A rulemaking limiting § 230 would limit the outlets available for all voices.

If the FCC engaged in rulemaking per the NTIA proposal, the likely result would be an interpretation that more significantly limits the applicability of § 230 than the approach typically taken by the courts. Among the concerns is that narrowing or rulemaking around § 230 might require viewpoint neutrality. This neutrality may be achieved by forcing platforms to host content they find objectionable or does not fit their intended audience on the basis of the author’s viewpoint or content.⁹⁵ But requiring neutrality would make it impossible to have specialized platforms that seek to create a supportive environment for such communities and goes directly against the intentions of

90. See Jennifer Huddleston, *The Problem with Calls for Social Media Fairness*, THE TECHNOLOGY LIBERATION FRONT (Sep. 6, 2018), <https://techliberation.com/2018/09/06/the-problem-with-calls-for-social-media-fairness/>.

91. See Rachel Bovard, *The FCC Should Address Distortions of Section 230*, FEDERALIST SOC’Y (Sep. 22, 2020), <https://fedsoc.org/commentary/fedsoc-blog/the-fcc-should-address-distortions-of-section-230>.

92. Rick Santorum, *President Trump Should Bend – But Not Break – Big Tech*, THE SPECTATOR WORLD (Aug. 5, 2020, 11:47 AM), <https://spectator.us/life/trump-bend-break-big-tech/>.

93. See Ind. Univ., *Marginalized groups use the Internet to broaden their networks, rather than reinforce ties*, SCIENCE DAILY (Nov. 16, 2015), www.sciencedaily.com/releases/2015/11/151116152215.htm.

94. Billy Easley, *Revising the Law that Lets Platforms Moderate Content Will Silence Marginalized Voices*, SLATE (Oct. 29, 2020, 5:43 PM), <https://slate.com/technology/2020/10/section-230-marginalized-groups-speech.html>.

95. See TECH FREEDOM, *supra* note 89.

§ 230 and the deregulatory environment intended by the 1996 Act.⁹⁶ There are past examples of the FCC engaging in such heavy handed regulation of content in the name of neutrality via the Fairness Doctrine. The Fairness Doctrine required broadcasters licensed by the Federal Communications Commission (FCC) to be certain that their broadcasts were “balanced” and included opposing views by interested citizens.⁹⁷ The result, however, was the doctrine being weaponized to chill speech and violate First Amendment rights in the name of “fairness.” As the Cato Institute’s Paul Matzko discusses in his work on the history of the Fairness Doctrine, this powerful authority was used by the Kennedy Administration to silence conservative radio critics and its removal gave rise to a new wave of political talk radio, particularly on the political right.⁹⁸

In the internet context, FCC-enforced “neutrality” could result in similar issues but with consequences much more acutely felt by the average user. Such a policy would not be limited to only a certain type of platform. It could be used not only to force “liberal” platforms to carry “conservative” content but could also be used to force platforms to carry content that they might find to be objectionable on a deep level such as that which they find to be homophobic, sexist, or racist in the name of “neutrality.”

As the current debate over § 230 continues, it is likely that questions of agency authority will arise including if the FCC or another agency has the ability to engage in rulemaking. Establishing such authority would significantly increase the FCC’s regulatory intrusion into the internet and would displace the light-handed policy that allowed innovation and speech to thrive online.⁹⁹ Even if the FCC has the authority to provide interpretive rules regarding § 230, such authority will still need to be within the bounds of the First Amendment when it comes to government regulation of speech.

C. THE NEXT 25 YEARS OF THE REGULATORY STATE AND ONLINE SPEECH

In many ways, the United States is once again at a turning point when it comes to calls to regulate the internet, particularly when it comes to calls to

96. Emily Stewart, *Ron Wyden wrote the law that built the internet. He still stands by it – and everything it’s brought with it*, VOX (May 16, 2019, 9:50 AM), <https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality>.

97. Audrey Perry, *Fairness Doctrine*, THE FIRST AMENDMENT ENCYC. (May 2017), <https://www.mtsu.edu/first-amendment/article/955/fairness-doctrine>.

98. Paul Matzko, *How JFK Censored Right-Wing Radio*, CATO INST. POL’Y REP. (March/April 2020), <https://www.cato.org/policy-report/march/april-2020/how-jfk-censored-right-wing-radio>.

99. *See supra*, Section III.

regulate online speech. The decision to overturn net neutrality requirements would indicate a continuation of this hands-off approach. In contrast, a desire to expand authority to include § 230 interpretive rules would indicate a much more intrusive approach that could raise questions not only for innovation but also for speech. In both cases, these scenarios show that while the FCC has not become a “federal computer commission” there is perhaps a lack of clarity as to how far its authority over online content extends. This uncertainty has shown concerning and dramatic shifts in regulations around issues such as politically oriented ISP reclassification. 25 years ago, Congress was correctly hesitant to create an army of digital bureaucrats, but it seems that as the internet has evolved, agency responsibilities are unclear.¹⁰⁰ There are now many calls to create a new independent digital regulator, but these come with significant tradeoffs. Instead, Congressional policymakers should clarify delegations to agencies pertaining to internet classification and other digital issues such as data privacy.

V. CONCLUSION

For 25 years, the United States has largely avoided establishing a Federal Computer Commission. The FCC and other regulatory agencies such as the FTC, NTIA, and NIST have established standards or responded to harm when necessary, and the goals of avoiding regulatory burdens to competition have largely succeeded. As increased attention and criticism from both sides of the aisle focus on various parts of the digital economy, this Article proposes the ideal policy solution is not more intervention but rather the United States should continue to take a light-touch approach that avoids establishing a “Federal Computer Commission.” This approach has been critical to allowing not only a variety of innovative services such as social media to emerge, but also in providing consumers with more ways to connect and communicate with one another. It is also important to recognize appropriate limits on regulatory authority, including that of the FCC, so as not to unnecessarily burden innovation through inefficient bureaucracy or chill the opportunities for online speech and risk government intervention into speech decisions for political purposes. The consequences of an expansive view of the FCC’s authority over online speech via an unintended interpretation of the Telecommunications Act of 1996 could shift the law away from its deregulatory intentions.

100. *See* 104 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

