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FOREWORD

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

Howard Shelanski[†]

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.

A NEW TELECOMMUNICATIONS ACT: PRIORITIZING CONSUMER PROTECTION AND EQUALITY

Olivier Sylvain[†]

ABSTRACT

Through the Telecommunications Act of 1996, Congress imposed long overdue duties and structural limits on the telephone, broadcasting, and cable industries. Though the 1934 law was bold and important, legislators unwittingly enabled a handful of companies to concentrate power in those markets.

As needed as it was, the Telecommunications Act also had flaws. Congress's structure-of-the-market approach in 1996 did not protect against disparities in consumers' access. Nor did it (or could it) anticipate the informational harms that the internet would facilitate or enable.

These concerns ought to be the primary focus of reform today. To be sure, the Federal Communications Commission remains essential to promoting equality in the access to and use of communications infrastructure. But the Federal Trade Commission should now also play a greater role in light of the consumer-facing issues that have emerged. And it can do this pursuant to the authority it has under its enabling statute. Congress, too, can do more to liberalize, broaden, and sharpen the Federal Communications Commission's authority.

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I. INTRODUCTION

The Telecommunications Act of 1996 was a significant reform of communications law in the United States. Twenty-five years later, it is time that we take ritual stock of what Congress achieved.

Legislators’ stated aim behind the Telecommunications Act was to promote competition and free-market principles in a legislative field in which Congress, in the 1934 Communications Act, had presumed too much about the progressiveness of centralized command-and-control oversight. The Telecommunications Act pales in comparison in scale and scope to the New Deal statute that it amended. Through it, Congress articulated a momentous shift in regulatory philosophy.

But the amended statute said little about “advanced communications services” or “information services”—the terms that Congress used to describe, respectively, broadband internet service and consumer-facing applications, services, and content. To the extent it said anything, Congress avowedly rejected positive government regulation of the then-emergent technologies.¹ It innocuously added a safe harbor for “interactive computer services” after the full bill had been marked up and reported out of committee.² Today, that provision and the way in which courts have interpreted it are widely seen as

1. 47 U.S.C. § 230(b)(2) (2018).

2. 47 U.S.C. § 230(c) (2018).

3. *See infra* Part V.

essential to internet regulation, even though the incentives that drive content production and distribution are undeniably different from those back then.

Policymakers in 1996 did not really understand how broadband service or the political economy of the internet generally would change even five years later. Nor really could they. Not even the most ardent internet evangelists knew what was coming. Perhaps legislators held the sense of uncertainty in abeyance on the faith that Congress would muster the political will to redress new challenges in the communications market as they emerged. Nor did policymakers anticipate the myriad ways in which consumer-facing services would (have the capacity to) administer almost the entirety of consumers' online experience—that they could cravenly collect consumer data to support advertising to third parties or manipulate consumers through dark patterns and other aesthetic designs.³ The “information services” of twenty-five years ago are, today, the biggest and arguably most legally unaccountable companies in the United States.

A new communications act could do much to recalibrate current law for our time. It could do this by, first, clearly orienting the Federal Communications Commission's authority to affirmatively furthering equality in broadband deployment and service. Second, Congress could also sharpen current law addressed to consumer-facing “information services.” One clear opportunity would be to bring the Federal Trade Commission more clearly into the role of policing consumer-facing companies in service of consumer protection. Online intermediaries and other online services have rested comfortably in the knowledge that current law is too weak or undefined to force them to bear the social costs of their services. These reforms would redress this failing.

This Article proceeds as follows. Parts II and III describe the justifications and subsequent implementation of, respectively, the Communications Act of 1934 and the Telecommunications Act of 1996. I explain the ways in which the governing ideologies and theories of communications policymaking evolved from the mid-century to the 1990s—from a focus on direct consumer programming and service to a structure-of-the-market approach. The next couple of Parts describe the 1996 Act's failings, as important as its structural focus was. Part IV underscores the statute's relative silence about emergent networked technologies, including broadband. And Part V discusses the market consolidation, access disparities, and disinformation and manipulation that prevail today. Part VI roughly sketches out an agenda for reform that prioritizes demonstrable equality in the provision of broadband service and

attends to the consumer-facing experience, particularly in light of prevailing information harms.

II. THE COMMUNICATIONS ACT: ITS PROMISE AND LIMITATIONS

In 1934, Congress consolidated existing regulatory authorities across two federal agencies into a new and independent Federal Communications Commission (FCC). Legislators charged this new agency with the authority to impose “public interest” regulations on the big tech companies of the day.⁴ The statute’s immediate aim was to protect consumers. For example, Congress authorized the FCC to impose common carrier rules on telephone companies and gave it broad authority to regulate radio and television broadcasting through an elaborate licensure regime.⁵

In the following decades, the FCC implemented the 1934 Act confidently if fitfully. With regards to telephony, for example, the agency established access charges and filing requirements. But these never meaningfully curtailed the AT&T monopoly.⁶ To the contrary, over the long run, the agency treated the telecommunications giant’s “universal service” as an inevitable incident of the ostensible “natural monopoly” characteristics of telephony.⁷ Under this view, a large single provider avoids the cost redundancies that would be passed on to subscribers if one or more provider entered the same market.

This commitment to universal service helped to make telephony practically ubiquitous. Along the way, however, the FCC failed to limit the way in which

4. Olivier Sylvain, *Wireless Localism: Beyond the Shroud of Objectivity in Federal Spectrum Administration*, 20 MICH. TELECOMM. & TECH. L. REV. 121, 122 n.2 (2013) (referencing “the ‘public interest’ as a statutory term of art in the 1934 Communications Act”).

5. 47 U.S.C. §§ 201-276 (2018); *see also* Sylvain, *supra* note 4, at 142–43 (“Through the new statute, legislators consolidated in a new federal agency the authority to administer spectrum policy . . . and telephony and telegraphy . . . the new FCC obtained authority to minimize signal interference, ‘make a fair and equitable allocation’ of licenses, and give interested members of the public an opportunity to argue in a hearing against the award of a license to any given applicant.”).

6. *See* Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 3, 7–8 (Max D. Paglin ed., 1989); *see generally* BRETT M. FRISCHMANN, *INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES* 211–17 (2012); MILTON L. MUELLER, JR., *UNIVERSAL SERVICE: COMPETITION, INTERCONNECTION, AND MONOPOLY IN THE MAKING OF THE AMERICAN TELEPHONE SYSTEM* 1–3 (1997); TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 240–48 (2010).

7. Daniel F. Spulber & Christopher S. Yoo, *Toward a Unified Theory of Access to Local Telephone Networks*, 61 FED. COMM. L. J. 43, 48 (2009) (“The regulatory authorities condoned the Bell System’s monopolization of all aspects of the telephone network.”).

AT&T muscled local networks into agreeing to exclusive connection terms.⁸ And, for years, it was unsuccessful at implementing rules that would forbid AT&T from blocking unapproved new devices that consumers could develop or use freely at home.⁹ It was not until the late 1960s and 1970s that the FCC instituted restraints on the lines of business that AT&T could pursue, including, most notably, those in computing.¹⁰ By then, however, AT&T had consolidated such a dominant market position in telecommunications that the Department of Justice filed its landmark antitrust suit in the 1970s—a suit that ended in the breakup of the company in 1982.¹¹

Concerning broadcasting, Congress gave the FCC broad authority to license spectrum frequencies to applicants.¹² The law delegated to the agency the authority to define the nature of the then-emergent network system that partnered large broadcasting companies (generally based in New York) with “network affiliates” to locally transmit programming. The agency was to do this pursuant to “comparative” hearings in which local civic leaders, elected officials, advertisers, and residents would evaluate the applicant’s commitment to the local “public interest” in their programming and operations.¹³ As much as these comparative hearings invited obsequiousness, they also cultivated an obligation to tend to the nature and quality of their local programming for audiences.

8. *Id.* at 73 (“Federal regulation of interstate rates was similarly unsuccessful . . . [the FCC] provided very little control or restriction on AT&T’s interstate rates and activities but it did help prevent competition from arising.’ For the first three decades following the enactment of the 1934 Act, the FCC failed to undertake an formal investigations or to create any systematic basis for evaluating the reasonableness of AT&T’s rates.”).

9. JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE* 58 (2007).

10. Harvey Reiter, *The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 *FED. COMM. L.J.* 243, 264 (2005) (“[W]ith the increasing development of computing technology and its dependence on the telephone networks . . . there was a growing threat . . . This threat led the FCC to rule ‘that large telephone companies could only offer data processing services through a separate subsidiary.’”).

11. *See* *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (1982).

12. Sylvain, *supra* note 4, at 138 (“Reformers believed that anything less than a centralized government overhaul of spectrum administration would not resolve the cacophony of signals”); Olivier Sylvain, *Broadband Localism*, 73 *OHIO ST. L.J.* 795, 823–24 (2012) (“AT&T ruled phone service much like a feudal lord would govern fiefdoms.”).

13. Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 *RUTGERS L. REV.* 235, 269–70 (2004) (“The purpose of the comparative hearing was to determine which applicant was best qualified based on the FCC’s objective and subjective factors.”).

Comparative hearings were not the only ways in which the FCC drew on its authority under the Communications Act to attend to consumer needs. Under its “fairness doctrine,” the FCC required licensees “to provide coverage of vitally important controversial issues of interest in the community served by the licensees” and “to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.”¹⁴ In a similar vein, the agency also sought to ensure that children were never exposed to obscenity and indecency in daytime programming.¹⁵

But, as a result, the Communications Act, also entrenched the broadcast industry oligopoly of ABC, CBS, and NBC.¹⁶ Indeed, the comparative hearings resembled coronations more than public interest vetting processes.¹⁷ They were sometimes also rife with unseemly corruption, as in the award of licenses to powerful local network station affiliates whose managers had little to no broadcast programming experience.¹⁸ Regardless, through their relationship with local affiliates (the actual stations that applied for FCC licenses), the networks essentially controlled what most Americans watched and heard. It was not until the 1970s, as with the turn in telephony, that the FCC started imposing limits on the networks’ respective ownership and financial stake in local stations, production companies, and newspapers.

III. THE TELECOMMUNICATIONS ACT AND THE REGULATION OF MARKET STRUCTURES

The 1934 Act effectively assured that just a handful of companies would retain coveted gatekeeping positions in the telecommunications and broadcast markets. The Telecommunications Act sought to cure these failings. Through the Act, Congress sharpened the FCC’s authority to promote competition and free market principles. Its sponsors believed that these reforms, even if not

14. Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 146 (1985); *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

15. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

16. *See* ROBERT BRITT HORWITZ, THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS 20–21, 116–17 (1989); ROBERT W. MCCHESENEY, TELECOMMUNICATIONS, MASS MEDIA, & DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING 1928–35 (1993); HUGH R. SLOTTEN, RADIO AND TELEVISION REGULATION: BROADCAST TECHNOLOGY IN THE UNITED STATES 1920–1960 (2000).

17. Sylvain, *supra* note 4, at 123 (“The prior system of awarding licenses pursuant to public comparative hearings had grown notoriously inefficient and unresponsive to innovations in telecommunications.”).

18. 47 U.S.C. § 254 (2018).

directly addressed to consumers, would in the long run necessarily redound to their benefit.¹⁹

One of the most important reforms in the Act was to the obligations incumbent telephone providers (principally AT&T) owed to emergent competitors. Among other things, Congress imposed strict interconnection and unbundling requirements on incumbents to promote competition in the markets for long-distance and local service.²⁰ These reforms were imposing enough that incumbent and emergent providers litigated them for almost a decade.²¹

Congress also expanded universal service programs to ensure “advanced telecommunications services” at “just, reasonable, and affordable” rates for all Americans.²² These programs support low-income customers with their monthly service bills as well as telecommunications companies and healthcare providers in high-cost rural areas. The statute obliges telecommunications providers to contribute to a Universal Service Fund and meet other requirements in order to participate in the high-cost program.²³ It also supports discounted “E-Rates” for phone and internet connections for schools and libraries.²⁴ Today, pursuant to these terms, the FCC has sought to expand universal service programs to include broadband service in recognition of the need to make broadband as ubiquitous as telephone service.²⁵

As important as these universal service interventions in 1996 were, however, Congress did not promulgate self-executing obligations or enforceable duties to ensure universal service. Congress instead called on the FCC to create a “Federal-State Joint Board” which, in turn, is entrusted to make recommendations to the agency.²⁶ These recommendations would be based on the regulatory “principles” set out above.

The FCC has dutifully, if unevenly, relied on these terms to support income-eligible consumers, finance deployment in underserved rural areas, and

19. NUCHESTERLEIN & WEISER, *supra* note 9, at 69–74.

20. 47 U.S.C. §§ 251, 252 (2018).

21. *See, e.g., Iowa Utilities Board v. AT&T*, 525 U.S. 366 (1999).

22. 47 U.S.C. § 254(b) (2018).

23. 47 U.S.C. § 254(d) (2018) (“Every telecommunications carrier . . . shall contribute . . . to [preserve] and [advance] universal service.”).

24. *See E-Rate—Schools & Libraries USF Program*, FED. COMM’NS COMM’N, <https://www.fcc.gov/general/e-rate-schools-libraries-usf-program> (Dec. 29, 2021).

25. *Universal Service*, FED. COMM’NS COMM’N, <https://www.fcc.gov/general/universal-service#:~:text=Universal%20service%20is%20the%20principle,policies%20to%20implement%20this%20principle> (Nov. 24, 2021) (“Today, the FCC . . . is working to make broadband as ubiquitous as voice, while continuing to support voice service.”).

26. 47 U.S.C. § 254(a)(1) (2018); *see also* 47 U.S.C. § 226(e)(3) (2018).

support affordable broadband for schools and libraries.²⁷ But the agency has done so based on shifting electoral priorities, as in the occasional and sporadic appropriations Congress makes for infrastructure investment.²⁸ This is to say nothing of the ways in which these programs have arguably only expanded the dominance of a handful of incumbent providers.²⁹

The 1996 amendments were plainly deregulatory in the broadcast setting. Congress built on the liberalizing reforms of the preceding decade. In 1987, the FCC effectively repealed the fairness doctrine³⁰—a rule that the Supreme Court had approved because of the networks’ powerful “public trustee” gatekeeping position. That rule no longer made sense, however, in light of the ways in which cable television had expanded the nature of the content available to consumers such that consumers no longer depended on the Big Three networks for programming. Just a few years later, Congress promulgated “must-carry” obligations on cable operators to carry local broadcast signals in recognition of the former’s newfound gatekeeping power in the market for video distribution.³¹ By the early 1990s, moreover, the FCC also started loosening longstanding media ownership rules, including regulations that restricted broadcasters from having a financial interest in the programs they air.³² Congress expanded this deregulatory agenda in the 1996 Act by first requiring the FCC to review its ownership rules every four years and, second, by repealing or modifying those rules in the event they “are no longer in the public interest.”³³ And, pursuant to a new statutory authority from Congress, the agency started using competitive bidding to award licenses for certain

27. *Universal Service*, FED. COMM’NS COMM’N, <https://www.fcc.gov/general/universal-service#:~:text=Universal%20service%20is%20the%20principle,policies%20to%20impleme nt%20this%20principle> (Nov. 24, 2021).

28. American Recovery and Reinvestment Act, Pub. L. No. 111-5 (2009); *see also* Infrastructure Investment and Jobs Act, H.R. 3684 (2021).

29. Mark P. Trinchero & Holly Rachel Smith, *Federal Preemption of State Universal Service Regulations Under the Telecommunications Act of 1996*, 51 FED. COMM. L.J. 303, 305–06 (1999) (“[P]romoting competition in local service is at odds with the current method of funding universal service through cross-subsidies . . . new competitive entrants are unable to compete in residential markets and high-cost areas because, unlike the incumbent providers, they do not have a captive customer base.”).

30. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

31. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); *see also* *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 671 (1994); *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 188 (1997). This provision has given commercial television networks an option other than retransmission consent under 47 U.S.C. § 325; *see also* 17 U.S.C. § 111 (2018).

32. Starting in the early 1990s, these changes continued with great fanfare under the Bush administration and accelerated dramatically under Trump.

33. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021).

wireless services, including broadcasting uses.³⁴ Policymakers believed that competitive bidding would help to rectify inefficiencies and administrative problems in the comparative public hearing process.

In this way, in telephony, broadcasting, and cable, the Telecommunications Act continued a decade-long slide at the FCC away from the focus on substance of consumer content and services to *the structure of the market* for such services. By the time of its enactment, a consensus of policymakers across the political spectrum had committed to this structure-of-the-market framing,³⁵ forgoing regulations that presumed to protect consumers directly. Under this view, developers and entrepreneurs in a truly competitive environment are best situated to meet consumer demand; government oversight is limited to calibrating competition in ways that, in the long run, will redound to the benefit of consumers.³⁶ Since that time, the different presidential administrations and their respective appointments to the FCC have had different approaches, with Republicans generally less concerned about consolidations within and across media industries. But, for the most part, the basic form of regulation across administrations has been addressed to the competitiveness of markets rather than to the quality of consumer-facing content and service as such.³⁷

IV. THE TELECOMMUNICATIONS ACT: LITTLE TO NOTHING ABOUT BROADBAND OR THE INTERNET

For all that it changed, the Telecommunications Act rarely mentions anything about the internet. The term that Congress used to denote broadband service, “advanced telecommunications service,” appears infrequently.³⁸ The statute’s relative silence has animated a two-decade long battle over whether and to what extent the FCC should or could regulate in this area. Much of that debate has turned on the question of whether broadband is a common carrier

34. Omnibus Budget Reconciliation Act, Pub. L. No. 103–66 (1993).

35. This was not just particular to this legislative field. Recall Bill Clinton’s proclamation in his 1996 State of the Union Address that “the era of big government is over.”

36. Olivier Sylvain, *Network Equality*, 67 HASTINGS L.J. 443 (2016).

37. *Compare* Federal Communications Commission, Protecting and Promoting the Open Internet, GN Docket No. 14–28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5601 ¶1 (Feb. 26, 2015) *with* Federal Communications Commission, Restoring Internet Freedom, WC Docket No. 17-108, Declaratory ruling, Report, and Order, 33 FCC Rcd 311, 311 ¶1 (Jan. 4, 2018).

38. *See* 47 U.S.C. § 1302(d)(1) (2018) (“The term ‘advanced telecommunications capability’ is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high quality voice, data, graphics, and video telecommunications using any technology.”).

“telecommunications service” or an “information service” to which common carrier obligations do not apply. Policymakers in 1996 should probably be forgiven for their oversight because very few people knew or understood that broadband would be as important or popular as it has been. Very few people even anticipated that cable providers would be the ones to lead the way just half a decade later. Nor did most observers appreciate that online video and gaming would be as popular with consumers as they have been.

The lack of clarity on the substantive requirements under the Telecommunications Act for broadband service has fueled high-octane policy clashes between Republican- and Democratic-led FCCs, the most notable of which is over “network neutrality.”³⁹ The debate generally turns on whether or the extent to which broadband service providers may leverage their gatekeeping position to block or receive remuneration from websites, applications, and online services. As I have argued elsewhere, this structure-of-the-market focus has distracted policymakers from the quality of service that consumers receive.⁴⁰ Instead, pursuant to the prevailing approach, policymakers have been preoccupied with the question of whether the broadband providers or application developers in the internet supply and distribution chain should be freest to innovate. The courts have not been able to direct the agency on the point because of the statute’s ambiguity.⁴¹

This is not to say that the Telecommunications Act is silent or ambiguous about all aspects of the internet. As part of the 1996 Act, legislators set out what is today one of their most recognized enforceable terms on internet regulation. In 47 U.S.C. § 230, Congress established the “Good Samaritan” safe harbor for “interactive computer services.”⁴² The courts have read this provision broadly; they generally hold that the amendment immunizes online intermediaries from liability for unlawful user-generated content as well as for their good faith efforts to take objectionable user-generated content down.⁴³

39. Daniel T. Deacon, *Institutional Considerations for the Regulation of Internet Service Providers*, 74 FED. COMM. L.J. 111 (2021–2022) (advocating existing regulatory framework for commercial mobile radio services for open internet rules).

40. See Sylvain, *supra* note 36.

41. Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005); Verizon Commc’ns v. Fed. Commc’ns Comm’n, 740 F.3d 623 (D.C. Cir. 2014); Mozilla Corp. v. Fed. Commc’ns Comm’n, 940 F.3d 1 (D.C. Cir. 2019).

42. Legislators included this language only after the full bill had been marked up and reported out of committee, as if it was an afterthought.

43. See, e.g., Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1120–21 (9th Cir. 2003); Chi. Laws.’ Comm. for C.R. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008); Doe v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir. 2008); Jones v. Dirty World Ent. Recordings LCC, 755 F.3d 398, 402 (6th Cir. 2014); Doe v. Backpage.com, LLC, 817 F.3d 12, 15 (1st Cir. 2016); Herrick v. Grindr

Through § 230, legislators sought to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”⁴⁴ They believed that online intermediaries would be best situated to moderate the distribution of user-generated content and that such companies would do it best without the threat of legal sanction. This deferential approach to technologists presumed a lot about the competence and beneficence of intermediaries.⁴⁵

Relying principally on one of the two operative provisions of this amendment,⁴⁶ courts have since held that an “interactive computer service” may not be held liable for the unlawful content that their consumers post unless that service “materially contributes” to it.⁴⁷ The courts have been very generous in their reading of that protection, eschewing longstanding secondary liability theories applicable to other industries.⁴⁸ They have explained that intermediaries do not need to monitor their sites for unlawful content.⁴⁹ Nor do intermediaries even have to take unlawful content down when they have notice that it exists on the service.⁵⁰ Today, that provision and the way in which courts have interpreted it are widely seen as essential to the way in which social media and other popular internet applications have evolved, even as the incentives that drive content production and distribution are undeniably different from those when Congress passed § 230.

V. THE STATUTE’S WAKE: PROVIDER CONSOLIDATION, INEQUALITY, AND DISINFORMATION

If we are to assess the 1996 Act comprehensively, we should consider whether and to what extent Congress delivered on its stated aims. In this regard, Congress seemed to create new problems even while it credibly attempted to resolve others. At least, the regulatory shifts of the 1990s—

Holding Co., 765 F. App’x 586, 591 (2d Cir. 2019); *Dyoff v. Ultimate Software Grp.*, 934 F.3d 1093, 1094 (9th Cir. 2019).

44. 47 U.S.C. § 230(b)(2) (2018).

45. See Olivier Sylvain, *Internet Governance and Democratic Legitimacy*, 62 FED. COMM. L.J. 205 (2010).

46. 47 U.S.C. § 230(c)(1) (2018).

47. *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1168 (9th Cir. 2008).

48. Compare *AOL*, 129 F.3d 327, 330–31 (4th Cir. 1997) (tort action against online intermediary for defamatory post by third-party user), with *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 168, 171–73 (2d Cir. 1968) (tort action against Coast Guard for physical damage to ship port), and *Carr v. Wm. C. Crowell Co.*, 171 P.2d 5, 6, 8 (Cal. 1946) (tort action against employer for assault by employee).

49. See, e.g., *Jane Doe v. Internet Brands*, 824 F.3d 846, 853 (2014).

50. See *AOL*, 129 F.3d 327 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1988).

embodied most clearly in the 1996 Act—obscured Congress’s consumerist aims of prior decades on the theory that consumers would be the inevitable downstream beneficiaries of competition among providers.⁵¹

The result has been both ironic and alarming. First, in spite of its aims, the market for communications is concentrated in the hands of just a handful of companies across media technologies—from cable to broadcast to mobile to broadband. Second, the quality of broadband service is still highly uneven between poorer, rural, and minority communities, on the one hand, and wealthier and whiter communities, on the other.⁵² Third, the substantive content of programming across media technologies appears to have eroded a shared sense of purpose across our polity.⁵³

Thus, today we are experiencing an economic and social disorder that in the mid-1990s most of us could not have anticipated or really wanted. The early internet’s most outspoken evangelists tended to talk breathlessly about the structural transformation of markets, democratic politics, and social relations.⁵⁴ In their exuberance, however, they did not foresee the potential for consolidation, disparities in broadband access, algorithmic bias, consumer manipulation, and polarization.⁵⁵ Nor could they anticipate how rapidly networked computing would suddenly permeate all aspects life and economy. Today, even the former champions of “disruptive innovation” and “moving fast and breaking things” recognize that, as transformative as the new communication technologies have been, policy reform is inevitable.⁵⁶

51. Consider the long title of the 1996 Act: “An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid development of new telecommunications technologies.”

52. See Sylvain, *supra* note 36, at 448–49. Affordability remains a problem, but it is arguably better now than it was a couple years ago. Anyway, consumer service in the United States is expensive relative to that in other highly industrialized countries around the world. *Id.* at 451.

53. ELI PARISER, *THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU* (2011).

54. John Perry Barlow, *The Declaration of the Independence of Cyberspace* (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence>; see CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* (2008).

55. See Olivier Sylvain, *Contingency and the ‘Networked Information Economy’: A Critique of ‘The Wealth of Networks’*, 4 INT’L J. TECH., KNOWL. & SOC’Y (2008).

56. Mark Zuckerberg, *The Internet Needs New Rules. Let’s start in these Four Areas*, WASH. POST. (Mar. 30, 2019), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html (“I believe we need a more active role for governments and regulators. By updating the rules for the Internet, we can preserve what’s best about it—the freedom for people to express themselves and for entrepreneurs to build new things—while

A. MARKET CONSOLIDATION

The prevailing (if sometimes marginally contested) laissez-faire approach across presidential administrations from 1996 to today has only created new opportunities for incumbent providers and internet companies to enlarge and retain dominant market positions at the expense of competitors and consumers.⁵⁷ The market for fixed broadband internet service since the 1990s, for example, has gone from being vibrant to now being effectively dominated by a duopoly (Comcast and Charter) in most parts of the country. These companies, moreover, have moved quickly into commanding positions in the content production business, well beyond the mere provision of broadband service. Meanwhile, the market for mobile broadband providers has also become consolidated across three carriers (AT&T, T-Mobile, and Verizon). One could rest assured that, in spite of these trends, consumers still have access to the full bazaar of internet services, applications, and content. But research of the past couple of years suggests that, in the wake of the Trump Administration's FCC decision to repeal very hard-fought network neutrality rules, providers (in mobile wireless markets in particular) have been throttling popular online video streaming applications like YouTube and Netflix, presumably because of the threat that those popular online companies pose to their own new video offerings.⁵⁸ In fact, this pattern is neither new or nor unsurprising.⁵⁹

B. ACCESS DISPARITIES

During the COVID-19 pandemic, online applications and services have made many people's lives easier to manage. It is hard to understate, for example, how applications like Zoom, GrubHub, and Dropbox have helped many of us remain busy, nourished, and productive.

also protecting society from broader harms From what I've learned, I believe we need new regulation in four areas: harmful content, election integrity, privacy and data portability.”).

57. The exception substantiates this claim: peering arrangements and nongovernmental consensus-driven administration of the internet's underlying transmission engineering has, as far as I know, remained open and resilient. Even so, many companies up and down the layered stack have developed proprietary infrastructure and content delivery networks in furtherance of their own bottom-line interests.

58. Klint Finley, *Think Video on Your Phone Is Slow? It's Not Your Imagination*, WIRED (Aug. 20, 2019), <https://www.wired.com/story/video-phone-slow-not-your-imagination/>; Nick Statt, *Netflix and YouTube are Most Throttled Mobile Apps by US Carriers, New Study Says*, VERGE (Sept. 4, 2018), <https://www.theverge.com/2018/9/4/17820508/netflix-youtube-throttled-att-verizon-t-mobile-net-neutrality-violations>.

59. *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010); *In re Madison River Communications*, 20 FCC Rcd. 4295 (2005).

But, even in consideration of these affordances, the pandemic has exposed and, in some cases, exacerbated extant deficiencies and disparities in broadband infrastructure.⁶⁰ Consider that at the height of the pandemic last summer in New York, about a quarter of children (more than 725,000) did not have adequate internet access at home to complete schoolwork. The problem is particularly notable for racial minorities, low-income people, and rural residents. In the United States, Black and Latinx students are significantly more likely to lack adequate internet access to keep up with schoolwork.⁶¹ And children in rural areas are almost two times more likely than children in urban areas to have an unreliable connection.⁶² School districts across the country relied on Wi-Fi-equipped buses to make up for these deficiencies in service.⁶³ Other kids reportedly did homework outside of stores and libraries with Wi-Fi.⁶⁴

Schoolchildren were not the only ones who needed ad hoc stopgap support. A disproportionate number of elderly residents could not register for coronavirus vaccinations and related treatments since most states and localities administered those registrations through websites and apps.⁶⁵ Most jurisdictions offered options for registering by phone, but these services were overwhelmed with calls.⁶⁶ This was no surprise since older Americans have always been among the least likely to have service before the pandemic.⁶⁷

60. This failure is not particular to internet service. Infrastructure neglect is systemic. See generally Griff Witte, Abigail Hauslohner & Emily Wax-Thibodeaux, *In the shadow of Its Exceptionalism, America Fails to Invest in the Basics*, WASH. POST (Mar. 13, 2021), https://www.washingtonpost.com/nation/interactive/2021/america-growing-disparities/?utm_medium=email&utm_campaign=Newsletters&utm_source=sendgrid (describing how the market for networked applications “spins out endless entertainment to keep millions preoccupied during lockdown—and keep tech shares riding high on Wall Street—but leaves kids disconnected from the access they need to do their schoolwork?”).

61. COMMON SENSE MEDIA, *Teaching Through the Digital Divide* (Nov. 20, 2021), <https://www.commonsensemedia.org/digital-divide-stories#/state/NY>.

62. *Id.*

63. Sarah Al-Arshani, *School districts across the country are using school buses to deliver WiFi to students who lack access*, INSIDER (Mar. 31, 2020, 9:10 PM), <https://www.insider.com/wifi-buses-being-used-across-country-to-give-kids-internet-2020-3>.

64. Cecilia Kang, *Parking Lots Have Become a Digital Lifeline*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/technology/parking-lots-wifi-coronavirus.html>.

65. Rebecca Heilweil, *A big hurdle for older Americans trying to get vaccinated: Using the internet*, VOX (Jan. 27, 2021, 1:50 PM EST), <https://www.vox.com/recode/22250606/older-americans-seniors-computer-literacy-skills-internet-digital-divide>.

66. Sharon Otterman, *The Maddening Red Tape Facing Older People Who Want the Vaccine*, N.Y. TIMES (Sept. 2, 2021), <https://www.nytimes.com/2021/01/14/nyregion/covid-vaccine-older-people-senior-citizens.html>.

67. PEW RSCH. CENTER, *Internet/Broadband Fact Sheet* (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

The key here, however, is not raw unevenness in access to broadband service on which most U.S. residents have come to rely. After all, the “digital divide” is closing. Rather, what remains are glaring disparities in the kinds of services available to different populations by virtue of the devices they use to access the internet.⁶⁸

C. DISINFORMATION AND CONSUMER MANIPULATION

Add to these access disparities the distinctive two-sided market for online content (for consumers) and personal consumer data (for advertisers and data brokers) that Alphabet, Apple, and Meta (formerly Facebook) dominate. These Big Tech companies, as with all other interactive computer service providers under § 230, have been enjoying the windfall of the 1996 Act’s regulatory approach. As explained above, Congress has not directed through law or otherwise the ways in which internet companies may develop, market, and administer their services. That is, legislators have done very little to adapt law to prevailing business models, practices, or phenomena.⁶⁹ Congressional inaction allows Big Tech companies to indulge the opportunity to optimize consumer engagement without compunction or fear of liability because it pays handsomely in ad revenue.

Today, online intermediaries of all sizes design their services to attract and hold consumer attention, even if the content that keeps consumers engaged is illicit, dangerous, or unlawful.⁷⁰ This is to say that they are not content with knowing that their services just host engrossing content. Moreover, they accelerate, amplify, and target content to consumers who are likeliest to be interested. As much as intermediaries have reconnected college roommates or spread awareness about #BLM or #MeToo, they also recommend connections between violent extremists and accelerate the proliferation of disinformation about public health, elections, and other highly consequential social facts. And they provide services that help advertisers target and deliver advertisements in ways that discriminate against historically marginalized groups in areas otherwise protected under civil rights laws, including housing

68. See Sylvain, *supra* note 36.

69. *But see* 47 U.S.C. § 230(e)(5) (2018) (Allow States and Victims to Fight Online Sex Trafficking Act & Stop Enabling Sex Traffickers Act, Pub. L. No. 115-164 (2017) (creating new § 230 exception under for actions concerning sexual exploitation of children and sex trafficking).

70. Karen Hao, *How Facebook Got Addicted to Spreading Misinformation*, WIRED (Mar. 11, 2021), <https://www.technologyreview.com/2021/03/11/1020600/facebook-responsible-ai-misinformation/>.

and employment.⁷¹ Until recently, online intermediaries have done this with little apparent compunction, because, again, the courts have chosen to protect them on the theory that these “interactive computer services” are mere platforms for user-generated content, in spite of the active role they play in designing practically all of the online consumer experience.⁷²

Current law effectively incentivizes distribution, amplification, and delivery of polarizing, misleading, and discriminatory content because it presents no friction or barrier to engaging in them at all. But the main problem with the doctrine today is not simply that it effectively allows these practices. The principal problem is that, under current law, these phenomena may proliferate at the expense of equality and consumer protection. This has the effect of entrenching extant systematic patterns of subordination and exclusion. Consumers and historically marginalized groups are likeliest to be harmed where law (other than § 230’s sweeping immunity) has no effect.

VI. A NEW COMMUNICATIONS POLICY FOR EQUALITY AND CONSUMER PROTECTION

Reformers in the 1990s were right to redress the failings of twentieth-century regulation of broadcast content, cable, and long-distance telephony. But, in 2021, it is now plain that Congress’s structure-of-the-market focus twenty-five years ago in the Telecommunications Act has fallen short, at least because market concentration and inequality continue to prevail in the covered industries. Those amendments’ ambiguity about broadband internet service, moreover, has been kindling for a variety of intractable partisan tussles over network neutrality and other public policy concerns involving the internet. Additionally, legislators’ assertively libertarian treatment of “interactive computer services” under § 230 has nudged the courts to promulgate a laissez-faire doctrine that, as I have argued elsewhere, facilitates the spread of disinformation and entrenches inequality.⁷³

71. See Olivier Sylvain, *Discriminatory Designs on User Data*, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV. (2018), <https://knightcolumbia.org/content/discriminatory-designs-user-data>; Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 202 (2018) [hereinafter Sylvain, *Intermediary Duties*].

72. See, e.g., *Force v. Facebook*, 934 F.3d 53 (2d Cir. 2019); *Dyroff v. Ultimate Software Group*, 934 F.3d 1093 (9th Cir. 2019); *Jane Doe v. Backpage*, 817 F.3d 12 (1st Cir. 2016); *Daniel v. Armslist*, 386 Wis.2d 449 (Wisc. 2019).

73. See, e.g., Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 YALE L. J. FORUM 475 (Nov. 16, 2021), available at <https://www.yalelawjournal.org/forum/platform-realism-informational-inequality-and-section-230-reform>; ; see also Alexandra S. Levine, *Misinformation About the Vaccine Could be Worse Than Disinformation About the Elections*, POLITICO (Dec. 21, 2020), <https://www.politico.com/news/2020/12/21/social-media->

At this moment of reckoning twenty-five years after Congress enacted the Telecommunications Act, the United States' information environment is demonstrably dysfunctional. To wit, (1) just a couple of companies today have market-defining control in each respective media industry—cable, telephony, and broadband; (2) stark inequalities persist in the availability and quality of networked computing services for consumers; and (3) consumer-facing content developers have sliced and diced consumers and the electorate into highly stylized market segments and ostensibly irreconcilable political factions. These factions have, in turn, been exploited by self-regarding demagogues and manipulative advertisers.

The problem today lies in, first, underinvestment in equal deployment and availability of broadband service to individual consumers and, second, commercial development of services that entrench extant material distributional inequality among consumers. Communications policymakers can remedy these failures by committing to equality and consumer protection above all other policy priorities in at least the below-outlined ways.⁷⁴ These are foundational regulatory priorities to which federal policy should always attend no matter how innovative firms or technologies may be.⁷⁵

A. BASIC EQUALITY

In the United States, courts have held that the Constitution forbids state actors from restricting companies' right to publish lawful internet content⁷⁶ or individuals' right to receive it.⁷⁷ Communications policy in the United States, however, is nowhere near as assertive about internet availability, affordability, and accessibility. This is not to say that policymakers do not attend to these matters. Some do more than others. Regardless, there is nothing even close to

vaccine-misinformation-449770; *U.S. Senators Target Tech's Legal Immunity to Stop Vaccine Misinformation*, REUTERS (July 22, 2021), <https://www.reuters.com/world/us/us-senators-aim-stop-vaccine-misinformation-by-going-after-techs-legal-immunity-2021-07-22/>; Louise Matsakis, *Facebook's Ad System Might be Hard-Coded for Discrimination*, WIRED (Apr. 6, 2019), <https://www.wired.com/story/facebooks-ad-system-discrimination/>.

74. The agenda set out here is not addressed to the resiliency of the United States' communications infrastructure. The workings of internet transmission technology and the backbone infrastructure are not the problem. The internet's early developers long ago sought to design networked computing protocols and infrastructure that could withstand nuclear attack, after all. Nor should policymakers concern themselves with innovation, a concept I have elsewhere called a third order priority of the Communications Act. Olivier Sylvain, *Network Equality*, 67 HASTINGS L.J. 443, 453 (2016).

75. *Cf. id.* at 460; Sylvain, *Broadband Localism*, *supra* note 12, at 811–12.

76. *Prager Univ. v. Google*, 951 F.3d 991 (9th Cir. 2020); *Zhang v. Baidu*, 10 F.Supp.3d 433 (S.D.N.Y. 2014); *Search King v. Google*, 2003 WL 21464568 (W.D. Okla. 2003); *see also* *Wash. Post v. McManus*, 944 F.3d 506 (4th Cir. 2019).

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

resembling a sustained institutional obligation to make service available, affordable, or equally accessible. Instead, attention to these concerns has come and gone based on the vagaries of electoral politics and the shifting needs of fiscal policy. In recent years, legislators have shown their strongest support for investment in broadband infrastructure in response to emergencies and macroeconomic calamity.⁷⁸ In these instances, legislators have delegated the responsibility of administering such investments to federal agencies.⁷⁹

During 2020, the year COVID-19 struck, policymakers mobilized resources to ensure that underserved communities could remain connected.⁸⁰ Congress passed the CARES Act within weeks of the national lockdown. That statute committed \$100 million to the Agriculture Department's ReConnect program to support deployment in rural areas.⁸¹ Later in the year, after the presidential election, Congress appropriated a \$1 billion grant program to support deployment in tribal lands, \$300 million for rural areas as well as others that lacked broadband, as well as other programs to support funding of historically Black and tribal colleges and universities to expand broadband connectivity.⁸² Congress supplemented these substantial efforts with important but smaller appropriations for "connected care" telemedicine and support for distance education.⁸³

As vital as these interventions have been, they reflect the ad hoc approach to closing gaps in service at a time when network connection was obviously vital for everyone. Today, with regards to systemic policy, however, the best the United States has is the Communications Act's stated aspirations for universal service. For the most part, these programs have provided important

78. See, e.g., *Emergency Broadband Benefit Program*, FED. COMM'NS COMM'N, <https://www.fcc.gov/emergency-broadband-benefit-program> (last visited Oct. 5, 2022).

79. Sylvain, *Broadband Localism*, *supra* note 12, at 795.

80. See *Show Us the Money: Federal Broadband Support During the COVID-19 Pandemic*, BENTON INSTITUTE, https://www.benton.org/blog/show-us-money-federal-broadband-support-during-covid-19-pandemic?utm_medium=email&utm_campaign=Newsletters&utm_source=sendgrid.

81. Pub. L. No. 116–136, § 11004, 134 Stat. 510 (2020) (CARES Act); see also *ReConnect Loan and Grant Program*, U.S. DEP'T AGRICULTURE, <https://www.usda.gov/reconnect>.

82. Consolidated Appropriations Act, Pub. L. No. 116–260 (2020); see *Grants Overview*, NAT'L TELECOMMS. INFO. ADMIN., BROADBAND USA, <https://broadbandusa.ntia.doc.gov/ntia-common-content/overview-consolidated-appropriations-act-2021> (last visited Oct. 5, 2022).

83. *FCC Fights Covid-19 with \$200M; Adopts Long-Term Connected Care Study*, FED. COMM'NS COMM'N, <https://www.fcc.gov/document/fcc-fights-covid-19-200m-adopts-long-term-connected-care-study> (last visited Oct. 5, 2022); *Governor's Emergency Education Relief Fund*, OFFICE OF ELEMENTARY & SECONDARY EDUCATION, <https://oese.ed.gov/offices/education-stabilization-fund/governors-emergency-education-relief-fund/> (last visited Oct. 5, 2022).

subsidies to individuals and providers who “build out” service to schools, hospitals, and rural areas.⁸⁴ But, as explained *supra*, the statute does not establish self-executing or enforceable protections that ensure “reasonably comparable” service to all Americans. The 1996 Act only sets objectives out in precatory terms. Furthermore, as drafted, Congress really meant that language for telephony, not broadband as such. Over the past decade, the FCC took it upon itself to draw on this authority to apply it to broadband explicitly.⁸⁵ This stated policy in the statute bespeaks how unclear Congress in 1996 was about the “broadband convergence” that would soon come. Legislators were content in the faith that private providers would fill in any gaps in broadband deployment, assuming the incentives were right.

The only provisions through which Congress clearly affirmed its intention to promote broadband deployment are in § 253 and § 706.⁸⁶ The first proscribes local and state governments from prohibiting “any entity” from providing telecommunications service. The second, § 706, enumerates a soup-to-nuts menu of regulatory tools on which the FCC could rely to promote “infrastructure investment”—everything from price cap regulation to forbearance.⁸⁷ But that is really all. Ever since, Congress has enacted piecemeal appropriations and financial incentivizes for private providers. Legislators have generally delegated administration of these funds to the FCC, the National Telecommunications Information Administration in the Commerce Department, the Agriculture Department, and other federal executive agencies.

84. *Universal Service*, FED. COMM'NS COMM'N, <https://www.fcc.gov/general/universal-service#:~:text=Universal%20service%20is%20the%20principle,policies%20to%20implement%20this%20principle> (last visited Oct. 5, 2022).

85. *Urban Rate Survey Data & Resources*, FED. COMM'NS COMM'N, <https://www.fcc.gov/economics-analytics/industry-analysis-division/urban-rate-survey-data-resources> (last visited Oct. 5, 2022) (“Each year, the FCC conducts a survey of the fixed voice and broadband service rates offered to consumers in urban areas. The FCC uses the survey data to determine the reasonable comparability benchmarks for fixed voice and broadband rates for universal service purposes.”).

86. The latter is codified in the U.S. Code at 47 U.S.C. § 1302 (2018).

87. 47 U.S.C. § 1302 (2018) (“The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”). The FCC has relied on this language far more than legislators in 1996 probably expected, most notably in the context of broadband network management—in essence, network neutrality.

1. *Accountability for Data Collection and Content Delivery Disparity*

This is weak stuff. State and local governments as well as foundations and community-based nonprofit organizations have sought to fill the notable gaps left by the piecemeal federal approach.⁸⁸ New York's very recent announcement that it will provide affordable internet to low-income families across the state is among the most notable of these interventions.⁸⁹ It can be a blueprint for large states across the country. But, again, this hardly counts as enough.

A better national policy would at least explicitly identify concrete benchmarks for deployment. Policymakers could assert that failing to meet such standards would be inconsistent with the institutional commitment to equality. They could also propose as much without creating a positive right to broadband service. Instead, a benchmark would at least formalize the federal government's sustained commitment to "reasonably comparable" broadband deployment.

Congress could, for example, expand and regularize FCC capacity to collect broadband deployment data by census block.⁹⁰ This granular information is important to understanding the extent, quality, and cost of service. In consideration of the correlation between neighborhood and race or class,⁹¹ the data would advance the objective of delivering broadband service "to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex."⁹² The FCC could be charged with

88. See *The New York City Internet Master Plan*, NYC MAYOR'S OFF. OF THE CHIEF TECH. OFFICER (Jan. 2020), https://www1.nyc.gov/assets/cto/downloads/internet-master-plan/NYC_IMP_1.7.20_FINAL-2.pdf (regarding New York State 2021 broadband effort).

89. Stacie Sherman, *Cuomo Signs New York Bill Requiring Low-Cost Broadband Access*, BLOOMBERG (Apr. 16, 2021), <https://www.bloomberg.com/news/articles/2021-04-16/n-y-to-require-all-internet-providers-offer-low-cost-broadband>. Nate Benson, *Gov. Cuomo Signs Legislation Ensuring Affordable Internet to Low-Income Families*, WGRZ (Apr. 16, 2021), <https://www.wgrz.com/article/news/local/new-york/gov-cuomo-signs-legislation-ensuring-affordable-internet-to-low-income-families-broadband-new-york-state/71-4855037d-d587-4994-95f6-85c19dfb6049>.

90. One very recent creative idea from the agency is to invite consumers to test their service speed on an FCC-provided app which, in turn, collects data about service for the limited purposes of measuring broadband deployment. See *FCC Encourages Public to Use Its Speed Test App to Measure their Broadband Speeds*, FED. COMM'NS COMM'N (Apr. 12, 2021), <https://www.fcc.gov/document/fcc-encourages-public-use-its-speed-test-app>.

91. CONSUMER FIN. PROT. BUREAU, USING PUBLICLY AVAILABLE INFORMATION TO PROXY FOR UNIDENTIFIED RACE AND ETHNICITY: A METHODOLOGY AND ASSESSMENT 7–8 (2014), https://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf.

92. 47 U.S.C. § 151 (2018).

reporting its findings from time to time in the same way that other agencies, including the FCC, must report to Congress on other matters.⁹³

Data collection could help keep providers accountable. Congress, moreover, could impose legal or budgetary consequences if service distribution falls short of some concrete benchmark. It could, for example, condition universal service funding on the given provider's demonstrable good faith efforts to affirmatively further highspeed broadband service to all communities. Such companies could not participate in universal service funding if some concrete measure of disparity exists across race or class. It is possible that this condition would diminish providers' incentive to invest in underserved communities, but this would not be because Congress was imposing costs on infrastructure research or development. Rather, it would be because providers have for years been the beneficiaries of a regulatory regime that has yet to close gaps in the quality and nature of affordable service across communities in the United States.

2. *Broadband Localism*

Broadband access is both a local service and a geographically contingent service.⁹⁴ This is a stubborn fact about the internet today. That is why, when communications policymakers speak about connecting all Americans, they generally refer to the availability of service in the "last mile" between the local provider and its consumers. The U.S. regulatory framework accordingly delegates or otherwise assumes that municipal governments and related local authorities are the best situated to assign to providers the responsibility of providing service to local residents through franchise agreements with providers. These arrangements account for local rights of way, community anchor institutions, topography, demographic distribution of residents, and other distinctly contingencies that local officials generally have the greatest capacity and competence to understand.⁹⁵

In redoubling its commitment to equality and consumer protection, Congress should shift away from its presumptive institutional reliance on private providers and instead do more to enlist local governments. It could do this by asserting unambiguously that municipalities have the positive authority

93. See, e.g., Fed. Commc'ns Comm'n, Notice of Proposed Rulemaking In the Matter of 2018 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (Dec. 13, 2018), https://docs.fcc.gov/public/attachments/FCC-18-179A1_Rcd.pdf.

94. See generally Sylvain, *Broadband Localism*, *supra* note 12, at 795–96 (“All broadband is local.”).

95. *Id.*

to own and provide service or otherwise administer deployment.⁹⁶ Such a statutory command should also make plain that no private or state government entities may intrude on that authority.

This last point is important because in 2004, the Supreme Court held in *Nixon v. Missouri Municipal League* that Congress does not preempt states from preventing municipalities or public utilities from providing telecommunications service.⁹⁷ The plain text of the pertinent provision, 47 U.S.C. § 253, the Court explained, was not clear on the question; it provided that neither states nor local governments may bar “any entity” from providing telecommunications service.⁹⁸ This contrasted the explicit and direct restrictions on state regulation in other provisions under the statute.⁹⁹ For the Court, the constitutional interest in federalism required that Congress be clearer about its intention to bar states from imposing themselves on local governments because municipalities are instrumentalities of the states that create them. As written, however, the Court concluded that the Act did not bar states from regulating municipal service.

Missouri Municipal League concerned conventional telephone service. The Court’s holding, however, shaped and constrained FCC regulation of broadband policy on a variety of fronts, including state network neutrality regulation, 5G wireless deployment, and municipally owned or administered broadband service.¹⁰⁰ In these areas, the courts have held true to *Missouri Municipal League*’s 2004 holding: Absent a clear statement from Congress on

96. Cf. Letter of Samuelson Law, Technology & Public Policy Clinic to Marlene H. Dortch, Re: Notice of Ex Parte Presentation Regarding the Emergency Broadband Benefit Program, WC Docket No. 20-445, (Feb. 22, 2021), https://www.law.berkeley.edu/wp-content/uploads/2021/07/02.22.2021-Ex-Parte--NCC-Meeting-with-Trent-Harkrader.FINAL_.pdf (highlighting how innovative and effective municipal broadband initiatives, such as San Rafael’s community mesh network do not receive program funding).

97. *Mo. Mun. League v. Nixon*, 541 U.S. 125, 138 (2004).

98. The statute in its entirety provides that: “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a) (2018).

99. 47 U.S.C. § 332(c)(7)(b) (2018) (providing that state or local regulations governing the “placement, construction, and modification of personal wireless services facilities . . . (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services”).

100. See CONG. RSCH. SERV., STEPPING IN: THE FCC’S AUTHORITY TO PREEMPT STATE LAWS UNDER THE COMMUNICATIONS ACT (Mar. 26, 2021), <https://fas.org/sgp/crs/misc/R46736.pdf>.

the question, the Communications Act does not authorize the FCC to constrain states' regulation of their municipalities.¹⁰¹

Congress can and should prohibit states from blocking such efforts because municipal systems would compete with the one or two or maybe three incumbent providers in most local markets.¹⁰² Proponents of state bans on municipally owned or operated broadband have argued that government-funded systems would have an unfair advantage in tax treatment and, moreover, would not bear the same internal budget and market-related constraints like the price mechanism. These are concerns worth serious consideration, but they do not help to resolve whether flat bans on municipal service make sense. Indeed, if the objective of municipal broadband is to promote competition in ways that redound to the benefit of consumers (in much the same way that the structure-of-the-market approach does), policymakers would have to be alert to the competitiveness of incumbents as well, even as they free up local governments to participate in the market for service.

B. INFORMATION SERVICES: CONSUMER INTERFACES AND EXPERIENCES

The 1996 amendments to the Communications Act could have said more about consumer protection. But, as I explain *supra*, legislators and policymakers in the 1990s were eager above all to reform the regulation of the structure of the market for telecommunications service. The common view back then was that a properly regulated market would eventually inure to the benefit of consumers.

This is to say that legislators paid little to no attention to the consumer-facing services, applications, and content that would run “on top” of the telecommunications infrastructure. Congress, to be fair, was not completely silent about those services in 1996; through § 230 it established a safe harbor for intermediaries that are not “responsible, in whole or in part, for the creation or development” of unlawful content.¹⁰³ But this new provision bespoke legislators' relative indifference to the potential dangers of then-emergent consumer-facing intermediaries—in essence, not merely just the physical infrastructure that brought those services to consumers' displays and devices.

101. See *Mozilla Corp. v. FCC*, 940 F.3d 1, 75 (D.C. Cir. 2019); *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016).

102. See Sylvain, *Broadband Localism*, *supra* note 12, at 795.

103. 47 U.S.C. § 230(f)(3) (2018). Congress, moreover, included “information service” in its definition of “interactive computer service.” 47 U.S.C. § 230(f)(2) (2018) (“The term ‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”).

Congress even enshrined this framing in the distinction between “information services” in Title I of the Act and “telecommunications services” under Title II.¹⁰⁴ The latter encompasses telephony, which, as I discuss above, Congress subjected to strict “common carrier” obligations. “Information services,” on the other hand, connoted information processing capabilities that are made possible “via telecommunications”¹⁰⁵ and are subject to “light touch” regulatory oversight.¹⁰⁶ These statutory categories have been particularly relevant in litigation since 2005 about the appropriate regulatory classification for broadband—under the less demanding Title I or under the nondiscrimination and transparency requirements of Title II.¹⁰⁷

As important as telecommunications infrastructure is today, consumer-facing “information services,” applications, and content define consumers’ online experiences more than anything else. There is much to celebrate in the wide range of affordances now available to consumers. But there are many alarming developments. The amended Communications Act provides very little direction on how the FCC might protect consumers directly.¹⁰⁸

Policymakers will need newer and better honed regulatory tools that can redress, for example, rampant disinformation, consumer manipulation, and algorithmic bias. It is also not clear that the FCC could have a major role in this regard, at least because of the ways in which Congress has cabined its authority to focus on common carriers and related telecommunications services. Other federal agencies could ostensibly fill any such gaps, as when, for example, the Department of Housing and Urban Development commenced an investigation of Facebook’s Ad Manager for violating fair housing laws.¹⁰⁹

104. These statutory forms drew on vestigial regulatory distinctions between “basic” “transmission” and “enhanced” “data processing.”

105. 47 U.S.C. § 153(24) (2018) (“The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”).

106. Olivier Sylvain, *Network Equality*, 67 HASTINGS L.J. 443, 472 (2016) (“This really was a problem of the FCC’s own creation: until just this past February, the agency had classified the Internet under the Communications Act as an ‘information service’ deserving of the lightest of regulatory oversight.”).

107. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2016).

108. *See supra* Sec. III.

109. *See* Pema Levy, *Facebook Settles Civil Rights Lawsuits Over Ad Discrimination*, MOTHER JONES (Mar. 19, 2019), <https://www.motherjones.com/politics/2019/03/facebook-settles-civil-rights-lawsuits-over-ad-discrimination/>; *see also* *Facebook Settlement*, NATIONAL FAIR

The Federal Trade Commission (FTC), however, is the oldest and among the most impactful transsubstantive consumer protection agencies in the federal government. Over the past decade, it has emerged as an important regulator of consumer-facing services and applications, particularly in the area of consumer data security.¹¹⁰ Congress's decision over a century ago to exclude "common carriers" (as well as a dozen other regulated industries) from the FTC's jurisdiction changes nothing to the extent that consumer-facing intermediaries (i.e., not common carriers) are at issue.¹¹¹ In addition to broad investigatory powers, the FTC also has enforcement authority to protect against anticompetitive, unfair, and deceptive trade practices across industries.¹¹² Under its governing statute and judicial precedent, the FTC may issue cease and desist letters,¹¹³ pursue civil enforcement actions in service of its section 5 authority,¹¹⁴ and apply for court ordered injunctive relief.¹¹⁵

This authority would not mean much for information services if policymakers consider them to be nothing more than mere "platforms" for user-generated content. Apart from certain criminal and Intellectual Property exceptions, current § 230 doctrine immunizes them for their consumers' unlawful. Today, however, most online services and applications do far more than serve as dispassionate conduits for user-generated content. Even the biggest companies that purport to do little more than "bring the world together" and make new connections between users facilitate those

HOUSING ALLIANCE, <https://nationalfairhousing.org/facebook-settlement/> (last visited Nov. 29, 2021).

110. See generally Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014).

111. 15 U.S.C. § 43(a)(2) (2018) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.").

112. 15 U.S.C. § 45(a)(1) (2018).

113. 15 U.S.C. § 45(b) (2018).

114. Federal Trade Commission Act § 5(a), 15 U.S.C. § 45).

115. See 15 U.S.C. §§ 45(l) & (m) (2018). *But see* AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341 (2021) (holding that section 13(b) of the Federal Trade Commission Act does not authorize courts to grant equitable monetary relief, including restitution or disgorgement, in spite of the prevailing practice of the past decade).

connections through recommendations and secret sorting algorithms.¹¹⁶ In fact, there are a great assortment of ways in which online intermediaries curate and control the online consumer experience—from Reddit’s simple and elegant system of featuring the content that users “vote up” to immersive open world multiplayer gaming experiences like Red Dead Redemption 2. Many of these consumer-facing services vigilantly attend to the harms of cyberharassment and consumer manipulation.¹¹⁷ But others do not.¹¹⁸ Others still, meanwhile, surreptitiously employ what many observers have called “dark patterns” in user interfaces.¹¹⁹ They do so under the cloak of protection afforded by § 230 immunity¹²⁰ as well as pursuant to trade secret and other IP laws.¹²¹ These service designs imperceptibly lure consumers into purchasing products they do not want or giving personal data they would otherwise keep private.¹²² Deceptive and manipulative companies have always drawn scrutiny from the FTC, whether online or not. Current design features, however, have been especially worrisome because they are opaque to consumers and regulators or otherwise shielded from legal accountability, among other reasons. This is presumably why the FTC has intensified its attention to online consumer-facing services.¹²³ The agency has a variety of tools at its disposal to

116. Chaim Gartenberg, *What is Facebook? Just ask Mark Zuckerberg*, VERGE (Mar. 8, 2019), <https://www.theverge.com/2019/3/8/18255269/facebook-mark-zuckerberg-definition-social-media-network-sharing-privacy>.

117. See, e.g., Assoc. Press, *Reddit Announces Anti-Harassment Policy in Attempt to Curb Cyberbullying*, GUARDIAN (May 14, 2015), <https://www.theguardian.com/technology/2015/may/14/reddit-anti-harassment-policy-cyberbullying>.

118. See, e.g., Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398 (6th Cir. 2014).

119. See Sydney Fussell, *The Endless, Invisible Persuasion Tactics of the Internet*, ATLANTIC (Aug. 2, 2019), <https://www.theatlantic.com/technology/archive/2019/08/how-dark-patterns-online-manipulate-shoppers/595360/>; Arushi Jaiswal, *Dark Patterns in UX: How Designers Should Be Responsible For Their Actions*, UX COLLECTIVE (Apr. 15, 2018), <https://uxdesign.cc/dark-patterns-in-ux-design-7009a83b233c>; see also *Bringing Dark Patterns to Light: An FTC Workshop*, FED. COMM’NS COMM’N (Apr. 29, 2021), <https://www.ftc.gov/news-events/events-calendar/bringing-dark-patterns-light-ftc-workshop> (panelist Johanna T. Gunawan referring to “aesthetic manipulation”); see generally Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014).

120. See Sylvain, *Intermediary Duties*, *supra* note 71, at 203.

121. See FRANK PASQUALE, BLACK BOX SOCIETY 12, 193 (2017).

122. See, e.g., Fed. Trade Comm’n v. Accusearch, 570 F.3d 1187 (10th Cir. 2009); see generally Jamie Luguri & Lior Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43 (2021); Lauren E. Willis, *Deception by Design*, 34 HARV. J.L. & TECH. 115 (2020).

123. See, e.g., Alyson Klein, *Popular Interactive Math Game Prodigy Is Target of Complaint to Federal Trade Commission*, EDUC. WK. (Feb. 23, 2021), <https://www.edweek.org/technology/popular-interactive-math-game-prodigy-is-target-of-complaint-to-federal-trade-commission/2021/02>; Fed. Trade Comm’n, Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter In the Matter of Tapjoy, Inc., Commission File No. 1723092 (Jan. 7, 2021), https://www.ftc.gov/system/files/documents/public_statements/

redress these emergent problems. Last April, for example, it convened a day-long workshop on “dark patterns.”¹²⁴

But, over the past fifty or so years, Congress and the courts have narrowed FTC authority. In the 1970s, for example, legislators imposed procedural requirements on the agency’s authority to promulgate substantive rules in all but a couple areas.¹²⁵ Courts also have expressed skepticism about the FTC’s enforcement authority.¹²⁶ In a unanimous opinion by Justice Stephen Breyer, the Supreme Court in spring 2021 rejected the FTC’s decades-long practice of imposing restitution, disgorgement, and other monetary relief, even when the defendant company was demonstrably acting deceptively.¹²⁷ The Court reasoned that the specific statutory authority on which the agency has relied, section 13(b) of the FTC Act, limited the agency to equitable remedies. In other provisions in the statute, however, Congress has explicitly empowered the Commission to seek monetary remedies in addition to equitable ones. Section 5(a) of the FTC Act in particular is notable for its broad language and the careful but expansive adjudicatory and civil enforcement powers that flow from that authority.¹²⁸

Researchers and writers have for years been advocating for or generatively musing about a new agency that would attend more directly to emergent networked information technologies—including robotics, artificial intelligence, and automated decisionmaking generally.¹²⁹ Such interventions could make sense, but, in consideration of the FTC’s broad institutional

1585802/20210107_final_rchopra_tapjoy_statement.pdf; *Rent-To-Own Payment Plan Company Progressive Leasing Will Pay \$175 Million to Settle FTC Charges It Deceived Consumers About Pricing*, FED. TRADE COMM’N (Apr. 20, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/rent-own-payment-plan-company-progressive-leasing-will-pay-175>; Fed. Trade Comm’n, *FTC Workshop Looks Into Loot Boxes*, FTC NEWS (Apr. 8, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/04/ftc-workshop-looks-loot-boxes>.

124. See *Bringing Dark Patterns to Light: An FTC Workshop*, FED. TRADE COMM’N (Apr. 29, 2021), <https://www.ftc.gov/news-events/events-calendar/bringing-dark-patterns-light-ftc-workshop>.

125. 15 U.S.C. § 57a (2018).

126. *Compare* LabMD v. Fed. Trade Comm’n, 776 F.3d 1275 (11th Cir. 2015), *with* Fed. Trade Comm’n v. Wyndham, 799 F.3d 236 (3d Cir. 2015). This is to say nothing about the conflict among the courts on what plaintiffs must allege in order to have standing to sue for data protection violations. *Spokeo v. Robins*, 578 U.S. 330 (2016); *TransUnion v. Ramirez*, 41 S. Ct. 2190 (2021).

127. *AMG Cap. Mgmt., LLC v. Fed. Trade Comm’n*, 141 S. Ct. 1341 (2021).

128. See, e.g., 15 U.S.C. § 45(l) & (m)(1) (2018).

129. See, e.g., Ryan Calo, *The Case for a Federal Robotics Commission*, BROOKINGS (Sept. 15, 2014), <https://www.brookings.edu/research/the-case-for-a-federal-robotics-commission/>; Adomas Siudika, *Anti-Discriminatory Algorithmic Accountability: Transparency By Design in AI-Powered Decision Making*, IAPP (Nov. 20, 2020), <https://iapp.org/news/a/anti-discriminatory-algorithmic-accountability-transparency-by-design-in-ai-powered-decision-making/>.

capacity and extant expertise, it would not take as much nor be as risky to clearly elaborate the Commission's delegated authority to more aggressively regulate or redress harms caused by consumer-facing online services.

VII. CONCLUSION

Through the Telecommunications Act of 1996, Congress imposed long overdue duties and structural limits on the telephone, broadcasting, and cable industries. As important as it was, however, Congress's structure-of-the-market approach in 1996 did not protect against disparities in consumers' access and use of emergent communications services. Nor did it (or could it) anticipate the informational harms that the internet would facilitate or enable. These consumer-facing concerns ought to be the primary focus of reform today.

INSTITUTIONAL CONSIDERATIONS FOR THE REGULATION OF INTERNET SERVICE PROVIDERS

Daniel T. Deacon[†]

ABSTRACT

Written to commemorate the twenty-fifth anniversary of the Telecommunications Act of 1996, this Essay looks forward at possible settlements regarding the nagging question of whether and how best to regulate Internet service providers. Rather than start from the standpoint that this or that policy, such as net neutrality, is good or bad, I ask more broadly who should regulate ISPs and under what general framework. I assess and critique various frameworks, including reliance on markets and antitrust; state-level regulation under a federal Title I regime; various frameworks set forward in Republican-sponsored bills; and the Save the Internet Act. I argue that all of these frameworks suffer from numerous drawbacks, such as the lack of the ability to set clear rules (as with antitrust) or insufficient flexibility (as I argue besets both Republican and Democratic-sponsored bills, in differing ways). I suggest that the legislative proposal with the most promise would be roughly based on the legislation enacted to govern the regulation of CMRS in the early 1990s. This would bring ISPs within the general Title II framework while perhaps taking certain things—such as ex ante price regulation and many forms of state-level regulation—off the table. It would also preserve the FCC’s flexible role going forward, and re-channel the FCC’s inquiry toward the policy-focused forbearance factors and away from endless scholastic debate about whether ISPs really “are” telecommunications carriers.

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I. INTRODUCTION

Since the dawn of the commercial Internet, how to treat Internet service providers has bedeviled the Federal Communications Commission (FCC). The reasons are easily enough known. The Communications Act—last subject to major overhaul in 1996, when broadband Internet was still in its adolescence—does not speak clearly to how (or even whether) the FCC should regulate ISPs. The FCC has thus been left to grapple with how archaic sounding terms, concocted when the Bell operating companies still dominated the landscape, apply in modern times: adjunct-to-basic, “enhanced” services, ancillary authority, etcetera. At the same time, broadband Internet has become central to American life. More and more traditional communications services are being operated over IP-based platforms. And there is a growing unease with the power that large, agglomerative entities—ISPs, but also platforms like Google and Facebook—wield over the consumer.¹

The situation has recently reached a potential head. When the Obama-era FCC finally classified ISPs as Title II common carriers,² many immediately perceived that the classification might not outlast a changeover in party control of the White House. And indeed, with the pivot to a Republican-controlled Commission following the election of Donald Trump, the FCC swiftly moved to remove ISPs from Title II and place them back into the Title I “light touch” regulatory framework.³ Fast forward through another election cycle, and it looks likely that a Democratic-controlled FCC will again reverse course, with news outlets suggesting that the Commission will again move ISPs back into the Title II box.⁴ And although the FCC’s flip-flopping has been good for lawyers in the industry, few think it’s good for the industry itself or for society at large.

1. *See, e.g.*, STIGLER COMMITTEE ON DIGITAL PLATFORMS, FINAL REPORT 6 (2019) (detailing various “concerns about [the] unchecked power” of digital platforms).

2. Protecting & Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (2015) [hereinafter *Title II Order*].

3. Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd 311 (2018) [hereinafter *Restoring Internet Freedom Order*].

4. *See, e.g.*, Jon Reid, *Net Neutrality Tops To-Do List for FCC Democrats in Biden Era*, BLOOMBERG L. (Nov. 18, 2020, 6:01 AM), <https://news.bloomberglaw.com/tech-and-telecom-law/net-neutrality-tops-to-do-list-for-fcc-democrats-in-biden-era> [https://perma.cc/H4KT-G68W].

Against this backdrop, there are widespread calls to finally settle the issue. But there seems to be little consensus on how to do so.⁵ The main Democratic piece of legislation, the Save the Internet Act, passed the House in April 2019, but soon died in the Senate.⁶ Republican-sponsored bills have attracted little bipartisan support. And various options for working within the legislative status quo strike many as unappealing.

This short essay surveys the current landscape and discusses various potential ways out of the current morass. In doing so, I bring a primarily institutional focus. That is, rather than starting from the standpoint questioning whether this or that policy, such as net neutrality, is good or bad, I ask more broadly who should regulate ISPs and under what general framework. I assess and critique various frameworks, including reliance on markets and antitrust; state-level regulation under a federal Title I regime; various frameworks set forward in Republican-sponsored bills; and the Save the Internet Act. I argue that all of these frameworks suffer from numerous drawbacks, such as the lack of the ability to set clear rules (as with antitrust) or insufficient flexibility (as I argue besets both Republican- and Democratic-sponsored bills, in differing ways). I suggest that the legislative proposal with the most promise would be roughly based on the legislation enacted to govern the regulation of commercial cellular service in the early 1990s. This would bring ISPs within the general Title II framework while perhaps taking certain things—such as *ex ante* price regulation and certain forms of state-level regulation—off the table. It would also preserve the FCC’s flexible role going forward, and re-channel the FCC’s inquiry toward the policy-focused forbearance factors and away from endless scholastic debate about whether ISPs really “are” telecommunications carriers.

Part II briefly describes how we got here, cataloguing the history of the FCC’s efforts to regulate ISPs, most recently in the context of the controversy over net neutrality. Part III then turns to considering potential institutional settlements that could prove more enduring than that currently prevailing. After discussing two alternatives that could be implemented largely within the legal status quo—reliance on antitrust and state-level regulation—I turn to the main competing Republican and Democratic legislative proposals. Those proposals, I will argue, suffer from a similar defect—namely, failing to provide the FCC with sufficient flexibility to adapt to changing circumstances and treating today’s regulatory controversies as if they will continue to define the

5. See, e.g., Makena Kelly, *Democrats Are Gearing Up to Fight for Net Neutrality*, VERGE (Mar. 9, 2021, 4:24 PM), <https://www.theverge.com/2021/3/9/22321995/net-neutrality-ed-markey-save-the-internet-open-ajit-pai-rosenworcel>.

6. *Id.*

field going forward. Part III ends by discussing a legislative option, modeled on what Congress did in 1993 regarding cellular voice service, which has greater promise.

II. THE CURRENT MORASS

The history of how the FCC has come to its current posture regarding ISPs has been well told in the numerous court decisions and regulatory orders dealing with the issue. This part will provide a brief recap of that history. The Communications Act is divided into different Titles, which include: Title II (dealing with “common carriers”);⁷ Title III (“radio communications”);⁸ and Title VI (“cable communications”).⁹ Communications services that do not fit neatly within any Title but are still subject to the FCC’s general jurisdiction over “all interstate and foreign communication by wire or radio”¹⁰ fall under Title I. The FCC has some, but limited, authority over Title I services.

A large part of the controversy over ISPs has concerned whether ISPs should be subject to Title II of the Act—because they are properly considered common carriers—or whether they can be treated only under Title I. ISPs provide “last mile” connectivity to their customers. When a customer of an ISP wishes to visit a website, for example, the ISP takes the customer’s request and routes it to a separate backbone network. The backbone network then delivers the customer’s query to the website’s ISP, which transmits it to the website’s servers. The website processes the request and sends the requested information (a web page) back to the customer using the same chain of networks.¹¹ The whole process takes (hopefully) just a few seconds.

Whether in performing these functions the ISP acts as a “common carrier” subject to Title II of the Communications Act has enormous consequences. The Act defines common carriers, rather circularly, as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio.”¹² The Act imposes a range of duties on such carriers, including

7. Communications Act of 1934 tit. II, 47 U.S.C. §§ 201-21.

8. *Id.* tit. III, 47 U.S.C. §§ 301-29.

9. Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-73.

10. 47 U.S.C. § 152(a).

11. *See generally* United States Telecom Ass’n v. FCC, 825 F.3d 674, 690 (D.C. Cir. 2016) (providing similar example).

12. 47 U.S.C. § 153(11); *see also* Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 HOUS. L. REV. 545, 552 (2013) (noting that “[t]he circular nature of this definition inevitably leads those seeking to determine what a common carrier is to look to other sources”).

obligations to charge “just and reasonable” rates,¹³ to file detailed rate tariffs,¹⁴ and to refrain from “unjust or unreasonable discrimination.”¹⁵ Those requirements automatically attach to common carriers, except the Commission may “forbear” from applying them to particular providers, or category of providers, if certain conditions are met.¹⁶

The roots of the FCC’s current treatment of ISPs extend back to a series of decisions the FCC made in the 1970s and 1980s concerning services that used computers to provide “data processing” over telephone lines.¹⁷ In its *Computer II* order, the FCC decided that these data processing services would be treated as what it termed “enhanced services.”¹⁸ Such enhanced services, the FCC made clear, would not be subject to common-carrier regulation under Title II.¹⁹ The FCC contrasted enhanced services, which provided users the ability to manipulate information, with so-called “basic services,” including data transmission services with no data processing capability (such as traditional telephony), which continued to be regulated under principles of common carriage.²⁰

The Telecommunications Act of 1996 largely codified the distinction between enhanced and basic services, albeit using different nomenclature. Corresponding to the old “basic services” category was a new term, “telecommunications service,” which Congress defined as “the offering of telecommunications for a fee directly to the public.”²¹ “Telecommunications” was further defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”²² In contrast with telecommunications service, Congress introduced the term “information service,” which corresponded to the old regulatory category of enhanced

13. 47 U.S.C. § 201(b).

14. *Id.* § 203.

15. *Id.* § 202(a).

16. *Id.* § 160(a).

17. *See, e.g.,* James B. Speta, *Deregulating Telecommunications in Internet Time*, 61 WASH. & LEE L. REV. 1063, 1083-84 (2004).

18. Second Computer Inquiry, *Order*, 77 F.C.C. 2d 384, para. 92 (1980).

19. For a comprehensive history of the Computer Inquiries orders, see Robert Cannon, *The Legacy of the Federal Communications Commission’s Computer Inquiries*, 55 FED. COMM. L.J. 167 (2003); *see also* Speta, *supra* note 17, at 1083; JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE* 190 (2d ed. 2013).

20. *See* Cannon, *supra* note 19, at 183-88; Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 892-94 (2009); *see generally* Amend. of Section 64.702 of the Comm’n’s Rules and Regs. (Second Computer Inquiry), *Final Decision*, 77 F.C.C. 2d 384 (1980).

21. 47 U.S.C. § 153(53).

22. *Id.* § 153(50).

service and was defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”²³

Crucially, Congress also preserved the differing regulatory treatment of basic and advanced services, now recast as telecommunications and information services. Specifically, 47 U.S.C. § 153(51) defines “telecommunications carrier” as a “provider of telecommunications services.”²⁴ It goes on to state that “[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.”²⁵ The 1996 Act thus exempts non-telecommunications carriers—i.e., entities that do not provide “telecommunications service”—from regulation under Title II of the Communications Act. And because the FCC has long defined telecommunications service and information service as mutually exclusive categories such that a single service cannot simultaneously be both,²⁶ whether a given service is classified as one or the other has significant regulatory consequences.

The controversy regarding how to classify ISPs really kicked off when cable providers began to offer high-speed (broadband) Internet service using their own facilities.²⁷ These companies, like earlier non-facilities-based ISPs, offered their customers a suite of functionalities, including e-mail and other add-ons, that had traditionally been considered unregulated information services. But they also offered last-mile transmission of the type that had been the domain of highly regulated local telephone companies. Were these companies offering telecommunications services, information services, or a bundle that included both?

After first declining to answer that question,²⁸ the FCC ruled that broadband Internet offered over cable facilities was an integrated information

23. *Id.* § 153(24).

24. *Id.* § 153(51).

25. *Id.*

26. *See, e.g.*, Fed.-State Joint Bd. on Universal Serv., *Report to Congress*, 13 FCC Rcd 11501, 11507-08, para. 13 (1998) [hereinafter *Universal Service Report*] (“We conclude, as the Commission did in the Universal Service Order, that the categories of ‘telecommunications service’ and ‘information service’ in the 1996 Act are mutually exclusive.”).

27. On the regulatory treatment of ISPs prior to the rise of broadband Internet, see Daniel T. Deacon, *Common Carrier Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 134, 141 (2015).

28. *See id.* at 141-42.

service not subject to Title II.²⁹ It did so based on the FCC's determination that such ISPs offer customers certain functionalities—such as Domain Name System (DNS)³⁰—properly classified as “information services” and that are functionally inseparable from the pure “telecommunications” aspects of the ISPs' overall service offering.³¹ The Supreme Court upheld the FCC's classification decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, applying the *Chevron* framework to hold that the Communications Act was ambiguous regarding the proper classification of broadband Internet service and that the FCC had reasonably construed the Act to exclude ISPs from Title II.³² Following *Brand X*, the FCC extended the approach that it had taken regarding broadband over cable to broadband over DSL and to other types of broadband service.

The result of the FCC's decisions was to ensconce a largely anti-regulatory approach to broadband ISPs. As long as ISPs were treated as offering a Title I service, they could not be subject to core provisions of Title II, such as tariffing obligations. But whether ISPs should remain completely unregulated was subject to doubts. Many such doubts were expressed in the context of the controversy regarding so-called “net neutrality” rules.³³ Proponents of net neutrality seek to regulate the relationship between Internet service providers (such as Comcast or Verizon) and Internet content providers (such as Netflix, Facebook, or Google), often called “edge providers.”³⁴ More specifically, net neutrality proponents would generally place two requirements on Internet access providers: “(1) a ban on ‘blocking’ or ‘degrading’ lawful content over an Internet access platform and (2) a ban on, or at least close regulation of, contractual deals between broadband networks and Internet content providers for favored treatment over that platform.”³⁵ They fear that, absent these requirements, broadband Internet access providers will favor certain edge providers—most prominently, perhaps, those affiliated with the access

29. See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, 4819, para. 33 (2002) [hereinafter *Cable Broadband Order*].

30. As the Commission explained, “A DNS is an Internet service that enables the translation of domain names into IP addresses,” *Cable Broadband Order*, *supra* note 29 at para. 17 n.74, and it can also be used to perform a variety of other functions that, the Commission concluded, constituted information services. See *id.* para. 37.

31. *Id.* para. 39.

32. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002 (2005).

33. See generally Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECHNOLOGY L. 141 (2003) (coining the term “network neutrality”).

34. *Verizon v. FCC*, 740 F.3d 623, 629 (D.C. Cir. 2014).

35. See NUCHECHTERLEIN & WEISER, *supra* note 19, at 198.

provider itself—and disfavor others, to the long-term detriment of Internet innovation and consumer welfare.³⁶

Matters regarding net neutrality reached a head when the FCC, responding to complaints, condemned Comcast for allegedly interfering with its customers' use of certain peer-to-peer applications, including BitTorrent in particular.³⁷ As authority for doing so, the FCC pointed to its “ancillary authority” to regulate Title I providers, which allows the Commission to place rules on Title I providers that are “reasonably ancillary to the effective performance of the Commission’s various responsibilities” under the other, substantive Titles of the Act.³⁸ On appeal, the D.C. Circuit disagreed with the FCC’s conclusion that its ancillary authority allowed it to regulate ISPs’ network practices.³⁹ In the court’s view, the FCC had not pointed to a specific “statutory delegation of regulatory authority” to which the regulations in question were reasonably ancillary.⁴⁰ Perhaps most important was the D.C. Circuit’s seemingly parsimonious attitude toward the FCC’s ancillary authority as a general matter. Long gone, it appeared, were the days when the FCC could regulate entire new emerging technologies under Title I, as it had done when cable television networks first appeared.

After having been sent back to the drawing board, the FCC cast about for other options for regulating ISPs’ network practices. The Commission first considered reclassifying broadband Internet access as (at least in part) a Title II telecommunications service.⁴¹ But the FCC pulled back from that option and, in 2010, once again relied on grounds outside of Title II to impose net neutrality rules on ISPs—namely, section 706 of the Telecommunications Act of 1996.⁴² As most relevant here, section 706(a) directs the Commission to:

[E]ncourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest,

36. See, e.g., BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 270-73 (2010); Wu, *supra* note 33, at 145-46; Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. ON TELECOMM. & HIGH TECHNOLOGY L. 329, 378-80 (2007).

37. See Deacon, *supra* note 27, at 146.

38. United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968); see also, e.g., John Blevins, *Jurisdiction as Competition Promotion: A Unified Theory of the FCC’s Ancillary Jurisdiction*, 36 FLA. ST. U. L. REV. 585, 595-96 (2009).

39. Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010).

40. *Id.* at 658.

41. See Framework for Broadband Internet Access, *Notice of Inquiry*, 25 FCC Rcd 7866 (2010).

42. See Preserving the Open Internet, *Report and Order*, 25 FCC Rcd. 17905, 17906 (2010) [hereinafter *Open Internet Order*] (Section 706 is codified at 47 U.S.C. § 1302).

convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.⁴³

The FCC decided that net neutrality rules such as those described above were “other regulating methods that remove barriers to infrastructure investment.”⁴⁴ In support of that determination, the FCC pointed to the “virtuous cycle of innovation,” under which “new uses of the [broadband] network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses.”⁴⁵ Net neutrality rules, the FCC reasoned, were critical to fostering new innovations by upstart content providers without having to deal with potentially anticompetitive deals between ISPs and incumbent content providers. They therefore helped the Internet ecosystem as a whole, including by (down the line, at least) stimulating infrastructure investment by ISPs.

This time, the FCC won a partial victory at the D.C. Circuit, but the court went on to strike down the bulk of the Commission’s net neutrality regulations. First siding with the FCC against ISP challengers, the court determined that section 706 provided the FCC with substantive regulatory authority and deferred to the FCC’s “virtuous cycle” theory.⁴⁶ But the D.C. Circuit went on to vacate the no-blocking and nondiscrimination rules that made up the core of the *Open Internet Order*.⁴⁷ It did so based on the statutory prohibition, mentioned above, on treating “information services” providers—including broadband Internet service providers—as “common carrier[s].”⁴⁸ In essence, the court found that the *Open Internet Order*’s nondiscrimination rule—which prevented access providers from distinguishing among edge providers in providing service—constituted a classic “compelled carriage obligation” that the FCC is statutorily prohibited from placing on non-telecommunications carriers.⁴⁹ As for the no-blocking rule, the court held that it too ran afoul of

43. *Id.* § 1302(a). Section 706(b) similarly requires the FCC to conduct a yearly inquiry “concerning the availability of advanced telecommunications capability to all Americans,” and, if it finds such availability lacking, to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”

44. *Id.*

45. *Open Internet Order*, at 17,972 para. 123.

46. *Verizon v. FCC*, 740 F.3d 623, 634, 641-45 (D.C. Cir. 2014).

47. *Id.* at 659.

48. *Id.* at 650 (quoting 47 U.S.C. § 153(51)).

49. *Id.* at 650, 655-56.

the common-carrier prohibition by denying access providers' discretion over what traffic to carry and on what terms.⁵⁰

Having again been sent back to the drawing board, the FCC once more considered its options. At first, the FCC appeared reluctant to go the full Title II route by finally reclassifying ISPs as telecommunications carriers. Instead, the FCC proposed a system where, exercising authority under section 706, it would police potential abuses directed against consumers by ISPs on a case-by-case basis under a more flexible standard.⁵¹ This would, the FCC believed, remedy the legal defects in its prior approach while still allowing the FCC to root out the worst of abuses by ISPs. At the same time, the FCC was at first believed likely to treat traffic exchanged between ISPs and edge providers under Title II, creating a so-called "hybrid" approach to regulating Internet traffic.⁵²

The FCC's proposal met widespread opposition from net neutrality activists and consumer groups, who argued that bright-line rules against discrimination and blocking were necessary, and, in light of *Verizon*, that the only way to ensure such rules would survive judicial review was to reject the hybrid approach and go "full Title II."⁵³ Following President Obama's release of a YouTube video endorsing a full Title II approach, the Commission did just that, declaring that ISPs offered telecommunications services.⁵⁴ As to DNS (and caching), the FCC found that those services fell within the Act's "telecommunications management exception," which treats as a telecommunications service "any use [of an information service] for the management, control, or operation of a telecommunications system or the management of a telecommunications service."⁵⁵ Having found that ISPs offered telecommunications services, the Commission then went on to "forbear" from applying many of the obligations found in Title II, rendering them inapplicable to ISPs.⁵⁶ These obligations included, most importantly,

50. *Id.* at 657-59.

51. *See* Protecting & Promoting the Open Internet, *Notice of Proposed Rulemaking*, 29 FCC Rcd 5561, 5602-04 paras. 116-21 (2014).

52. *See* Amy Schatz, *FCC Eying Net Neutrality Plan That Will Make No One Happy*, VOX (Oct. 31, 2014), <https://www.vox.com/2014/10/31/11632498/fcc-eying-net-neutrality-plan-that-will-make-no-one-happy> [<https://perma.cc/8EY3-2RFU>].

53. *See id.*

54. *See Title II Order*, *supra* note 2, at 5610 para. 29.

55. *Id.* at 5765-71 paras. 365-372.

56. *Id.* at 5838-64 paras. 493-536. Section 10 of the Communications Act allows the Commission to "forbear" from applying provisions of the Communications Act "to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets,"

Title II's tariffing regime. The FCC did not forbear from Title II's ban on "unjust or unreasonable discrimination,"⁵⁷ which it used to root the 2010 *Open Internet Order's* no-discrimination and no-blocking rules.⁵⁸ On appeal, the D.C. Circuit handed the FCC a total victory, applying *Brand X's* finding that the Act was ambiguous and thus concluding that the FCC had discretion to move ISPs back and forth between Title I and Title II.⁵⁹

From the perspective of Title II supporters, victory was short lived. Following Donald Trump's election, the FCC (now with a Republican majority) signaled that it was going to reconsider the classification of ISPs as common carriers. And, in 2018, the FCC formally re-re-classified ISPs, sending them back to Title I.⁶⁰ DNS, the Commission declared, was not properly subject to the telecommunications management exception, with the FCC returning to the view of the *Broadband Internet Order* that ISPs offered a service with inseparable information-service components.⁶¹ Having returned ISPs to Title I, the FCC also disclaimed the Commission's prior view that section 706 granted it independent regulatory authority, leaving the FCC's power over ISPs limited to whatever (if anything) it might be able to do under its ancillary authority.⁶² The D.C. Circuit recently upheld the *Restoring Internet Freedom Order* in large part, again finding under *Brand X* that the FCC had wide discretion to make the call on classification and that section 706 was also ambiguous.⁶³ The court did send a few issues back to the FCC for further explanation—including the question of how the FCC intended to provide universal service support to ISPs now that they were no longer telecommunications carriers.⁶⁴ But the court refused to vacate the FCC's reclassification, and ISPs thus currently remain outside the Title II framework.⁶⁵

provided that the Commission makes certain public-interest determinations. 47 U.S.C. § 160(a).

57. 47 U.S.C. § 202 (2018).

58. *Title II Order*, *supra* note 2, at 5724-25 paras. 283-84. In the alternative, the Commission argued that those rules could be reapplied under section 706, now unfettered by the prohibition against treating ISPs as common carriers. Telecommunications Act of 1996 § 706, 47 U.S.C. § 1302 (2018). *Title II Order*, *supra* note 2, at 5721-24 paras. 275-82.

59. Provided, of course, that doing so was reasonable and not arbitrary and capricious. *See United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). The court also upheld the Commission's reclassification of mobile broadband ISPs as Title II common carriers, which raised separate legal questions which needn't detain us here.

60. *Restoring Internet Freedom Order*, *supra* note 3, at 227.

61. *Id.* at 415.

62. *Id.* at 378.

63. *Mozilla Corp. v. FCC*, 940 F.3d 1, 18, 46, 84 (D.C. Cir. 2019).

64. *Id.* at 68-70.

65. *Id.* at 86.

But, perhaps, not for long. With the Biden administration in town, the Commission is widely expected, once it reaches full strength, to put Title II back on the table.⁶⁶ And once the Commission does, finally, re-re-re-classify ISPs⁶⁷ as telecommunications carriers, you can expect litigation to follow—this time, maybe, all the way to the Supreme Court.

To recap, here is the status as of this writing:

- ISPs are Title I “information service providers.”
- Under the D.C. Circuit’s prevailing view, ISPs could be shunted back to Title II. The FCC would then be free to apply (or not apply, using forbearance) the various provisions of Title II to ISPs.
- Section 706 does not give the FCC independent regulatory authority over ISPs. Rather, it is merely hortatory, declaring that the FCC should use whatever authority it might otherwise have to stimulate broadband infrastructure investment.
- Again, under the D.C. Circuit’s view, section 706 is ambiguous regarding whether it grants the FCC independent regulatory authority. Thus, a future FCC could find that it does.
- If a future FCC did decide to reinvigorate section 706, it could regulate under that section to the extent that doing so was (a) consistent with the “virtuous cycle” theory, and (b) did not run afoul of the Act’s ban on treating information service providers as common carriers.
- If a future FCC reinvigorated section 706 *and* reclassified ISPs as Title II common carriers, it could regulate under section 706 provided doing so was consistent with the virtuous cycle theory. Having reclassified ISPs, it would not have to worry about whether its methods of regulation ran afoul of the Act’s ban on treating information service providers as common carriers.
- Even today, the FCC could regulate ISPs using whatever ancillary authority it might have over them. However, following *Comcast*, its ability to do so is likely limited.

66. See Reid, *supra* note 4.

67. Or “re-re-re-re-classifies” them, depending on how you parse the pre-*Cable Modem Order* state of affairs.

III. ESCAPE ROUTES

Few find the above situation tenable. At academic conferences around the country, participants cry out: “Congress must act! Bring an end to the madness!” And yet, there is little consensus on what Congress, or anyone else, might do. I have been an occasional skeptic of calls for Congress to fix things, believing that the most likely outcome of congressional action would be to replicate existing controversies just in different statutory garb. But following the latest FCC flip-flop—and the prospect of another coming soon—it seems best to survey the land to see if we might in fact do better. Recently, a bipartisan congressional working group has convened to explore if there is a reasonable path forward. This article seeks to contribute to those efforts.

A few words at the outset. I am more concerned, for present purposes, with coming to a sensible institutional framework than I am with defending particular approaches to specific regulatory controversies, net neutrality included.⁶⁸ That said, a sense of the policy stakes necessarily informs those higher-order institutional questions, and I will argue, for example, that placing sole reliance on background law such as antitrust is likely insufficient because it takes certain regulatory tools off the table that are at least plausibly necessary in certain contexts. I also proceed with some sense in mind of the politically possible. Of course, this involves some amount of guesswork. But certain political realities seem clear enough. For example, it is difficult to see a congressional majority coalesce around a regime requiring ISPs to file tariffed end-user rates for all services. Similarly, one might doubt whether “doing nothing” will be a stable political approach, especially given the dissatisfaction with the status quo as described in Part II. That said, given the realities of American politics, “doing nothing” has often shown a tendency to prevail over the seeming odds.

A. THE MARKET (AND ANTITRUST)

One option would be to essentially lock in the status quo as inherited from the Trump era, with the FCC more or less falling out of the picture. This option would treat ISPs similarly to most other sectors of the economy, including, importantly, other potential Internet “gatekeepers” such as Google. It would mean relying primarily on the market to discipline potential bad behavior by ISPs, with background antitrust and consumer protection laws serving as a backstop.

68. For an institutional take on the net neutrality dispute in particular, see Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. TELECOMM. & HIGH TECH. L. 19 (2009).

There are certainly things to be said for this option, and it has been ably defended in the literature.⁶⁹ Specialized regulation, in one view, has been reserved for sectors of the economy that are monopolistic and is particularly appropriate for those that exhibit natural monopoly tendencies.⁷⁰ Applied to non-monopoly markets, the tools of the specialized regulator—tariffs, especially, but also strict non-discrimination obligations, structural separation requirements, and the like—are seen as cumbersome to administer and potentially at odds with consumer welfare.⁷¹ And the market for broadband Internet access is not strictly monopolistic. Most consumers in the United States have access to at least two providers of broadband Internet access, and many have access to more.⁷² Perhaps as importantly, a number of new technologies—such as fixed or mobile wireless and fixed satellite service—may expand that number in coming years.⁷³

While stressing that competition will discipline ISP behavior in most cases, proponents of a market-based approach also stress that background antitrust law already has the tools to address potential abuses. Advocates for an antitrust approach see net neutrality in particular as a matter of regulating vertical contractual relationships.⁷⁴ And they point out that antitrust law views vertical contracts as likely to be pro-consumer or at least benign.⁷⁵ When challenged as anti-competitive, antitrust deploys a rule-of-reason approach that looks to the specifics of the particular contractual relationship in question and, deploying modern analytical tools, decides whether the specific contract in question harms competition. Antitrust advocates argue that this approach allows for a more fine-grained determination that recognizes that the effects on competition from vertical contracts are often nuanced.⁷⁶

69. See, e.g., Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767 (2012).

70. See Howard A. Shelanski, *Adjusting Regulation to Competition: Toward A New Model for U.S. Telecommunications Policy*, 24 YALE J. ON REGUL. 55, 58-59 (2007).

71. See *id.* at 64-66.

72. See 2020 Comm. Marketplace Rpt., *In the Matter of Comm. Marketplace Rep.*, 18 FCC Rcd. 188, para. 126 (2020) [hereinafter *2020 Communications Marketplace Report*].

73. See, e.g., Inquiry Concerning Deployment of Advanced Telecomms. Capability to All Ams. in A Reasonable & Timely Fashion, *Fourteenth Broadband Deployment Report*, No. FCC21-18, 2021 WL 268168, at para. 11 (OHMSV Jan. 19, 2021) (expressing “optimis[m] that increased deployment of 5G may allow mobile services to serve as an alternative to fixed services”); see generally Christopher S. Yoo, *Technological Determinism and Its Discontents*, 127 HARV. L. REV. 914 (2014) (reviewing SUSAN CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE (2013)).

74. See Hazlett & Wright, *supra* note 69 at 795-796.

75. *Id.* at 798.

76. See Hazlett & Wright, *supra* note 69, at 797; Nuechterlein, *supra* note 68.

That all said, in my view, there would be significant flaws with locking in a market-plus-antitrust framework under current conditions. As an initial matter, the current levels of competition in the market for Internet access should not be overstated. According to the FCC's own data and using its broadband benchmark of 25/3 Mbps service, most consumers in the United States still can only choose between two providers.⁷⁷ Nearly one-quarter of Americans have either zero options or only one.⁷⁸ And fewer than half have access to multiple providers of 50/5 Mbps service,⁷⁹ which may increasingly be necessary in today's online environment. Even where there is competition, high switching costs prevent consumers from defecting in response to (from their point of view) subtle changes in ISP behavior.⁸⁰ And due to consumer misperceptions, ignorance, or inability to uncover the facts, the idea that consumer choices will discipline ISP behavior may be more dream than reality.

I want to focus here, though, on two broader institutional features of the antitrust framework that may limit its effectiveness when it comes to communications markets: first, antitrust prefers standards over rules, and second, there are a limited set of values relevant to the antitrust enterprise. First, antitrust operates *ex post*, condemning past anticompetitive acts on their facts, and although antitrust could embrace a more rules-focused regime, the trend has been toward standards.⁸¹ This isn't a bad thing, necessarily. In many contexts, selecting a standard as opposed to an *ex ante* rule is the right choice.⁸² But there are, of course, benefits to rules that may be particularly salient when it comes to broadband markets. Barbara van Schewick has developed several critiques of the reliance on standards in the context of net neutrality in particular.⁸³ These include (1) lack of certainty for market players, (2) the costs imposed by regulation through individual adjudication, and, relatedly, (3) the potential for regulation through *ex post* adjudication to bias the system against less-well-financed players.⁸⁴

The point, however, is not to bury standards in favor of rules. The point is that turning over broadband markets to antitrust law involves the decision

77. See 2020 *Communications Marketplace Report*, *supra* note 72, at para. 126.

78. *Id.*

79. *Id.*

80. See *Title II Order*, *supra* note 2, at para. 81.

81. See Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 50-51 (2007).

82. For some classic explorations, see Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

83. See Barbara van Schewick, *Network Neutrality and Quality of Service: What A Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 70-74 (2015).

84. *Id.* at 70-74.

to (largely) impose a standards-reliant framework across the board. By contrast, under the modified Title II-plus-forgiveness approach (discussed below),⁸⁵ the FCC would always have the ability, under its forgiveness authority, to disclaim regulatory authority over particular issues, and, in effect, send them back to antitrust. That is, Title II does not involve *renouncing* the usefulness of antitrust, including its “rule-of-reason”-focused approach, but only creates the *option* to proceed by different means, where appropriate. As I have argued elsewhere, the FCC should more squarely refocus its forgiveness decisions to render more fine-grained determinations regarding the appropriateness of antitrust or specialized regulation regarding a particular issue as opposed to a more crude, across-the-board conclusion regarding the entire industry.⁸⁶

The second potential limitation of reliance on the market and antitrust is more deeply embedded. The “market-plus-antitrust” framework—at least in its current form—is concerned with consumer welfare, usually (though not always exclusively) measured through effects on price and output.⁸⁷ But as historically practiced, communications regulation has served a broader set of goals. Based on a recognition that communications networks play a role in orienting society itself, communications regulators have focused more squarely on ensuring, for example, that the market respects the principle of equality.⁸⁸ Related to, or as an aspect of, that commitment, communications law has striven to provide access to technologies necessary for persons to be able to participate in society as equals, regardless of race, sex, physical location, disability, or other characteristic. And the FCC has long served as the repository of such authority.

The “market-plus-antitrust” framework serves access in its own way, of course. By driving down prices to competitive levels and increasing output, that framework ensures that more people willing to pay the market price for a good or service will be able to do so. But the access-oriented applications of antitrust don’t extend to situations where it would simply be uneconomic for market participants to provide a certain good. Nor do they provide the ability to subsidize access by persons who are unable to pay the competitive price or to ensure that persons who are vision- or hearing-impaired can meaningfully engage on communications platforms. And antitrust could not plausibly be reformed to serve such goals. In the United States’ system, at least, courts

85. See *infra* Part III.E.

86. See Daniel T. Deacon, *Justice Scalia on Updating Old Statutes (with Particular Attention to the Communications Act)*, 16 COLO. TECHNOLOGY L.J. 103, 116-19 (2017).

87. See, e.g., Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 716 (2017).

88. See Olivier Sylvain, *Network Equality*, 67 HASTINGS L.J. 443, 445 (2016).

simply do not sit to dole out government subsidies but rather are limited to resolving concrete disputes among individuals.

The FCC's current approach, working from within the Title I framework, has been to interpret its statutory authority to provide it with the ability to subsidize broadband facilities under its universal service programs without deeming the underlying services as telecommunications.⁸⁹ Without dwelling on the legal arcana, suffice it to say that the FCC's approach was somewhat thrown into doubt when the D.C. Circuit in *Mozilla Corp. v. FCC* expressed skepticism that the FCC could subsidize broadband through its Lifeline program and remanded that issue to the FCC for further explanation.⁹⁰ Although the FCC has since responded, drawing attention more carefully to the Tenth Circuit's ratification of a similar legal theory in prior litigation,⁹¹ the legal theory itself may be time limited. That is because it depends, on reasons we need not discuss, upon the entity receiving funds offering both broadband services and Title II voice services. But in the future, many such companies may shift to offering *only* what the FCC currently deems unregulated Title I services, raising questions about the long-term viability of the FCC's legal strategy.⁹²

One response to the above would be to argue that, yes, funding broadband deployment and the like are worthwhile goals not easily pursued through court-centered systems like antitrust, and the FCC should be statutorily authorized to perform such goals and provided with additional funds to do so. Other matters, however, can and should be returned to the market. Such a response, however, misses the rationale for *why* there is near universal agreement on matters like the necessity of access to broadband. And that's because, I submit, the public has a special relationship to things like communications markets that, in the words of Sabeel Rahman, provide "infrastructural goods," which he defines as those that "form the vital foundation or backbone of our political economy."⁹³

In recognition of the special role of communications platforms, communications regulation has historically treated those platforms as subject to public superintendence and control, treating such superintendence as a worthwhile goal in itself. As then-Commerce Secretary Herbert Hoover put it

89. See generally *Restoring Internet Freedom Order*, *supra* note 3, at para. 193; Connect Am. Fund et al., *Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd. 17663 (2011).

90. *Mozilla Corp. v. FCC*, 940 F.3d 1, 68-70 (D.C. Cir. 2019).

91. See *In re FCC 11-161*, 753 F.3d 1015, 1044-49 (10th Cir. 2014).

92. See Deacon, *supra* note 86, at 118.

93. K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1625 (2018).

in defending what would become the Federal Radio Act of 1927, which extended administrative control over the spectrum, the bill “recognizes that the interest of the public as a whole supersedes the desire of any individual. This is a new and highly desirable feature in the radio law.”⁹⁴ And that public interest has been attendant to a range of values other than ensuring bare access to technology. Through a variety of tools ranging from market entry and exit requirements, merger review, licensing, and others, communications regulation has pursued a variety of social goals such as equality, diversity, “free speech” (as more broadly defined than in the First Amendment context), and privacy, none of which are easily captured by the “market-plus-antitrust” framework.

B. STATE-LEVEL REGULATION UNDER A TITLE I REGIME

Another institutional option, also rooted in the status quo, is to rely on the states. California, for example, passed a statute in 2018 containing a suite of net neutrality and related obligations.⁹⁵ Other states have also passed various laws concerning ISPs.⁹⁶

The balance of federal-state power in the area of communications regulation is too large of a topic to explore in this short essay. Suffice it to say that as a policy matter, I seriously doubt there are many who view *exclusive* state-level regulation of ISP practices as a first-best solution.⁹⁷ Indeed, the interest in state net neutrality laws came about largely because it was widely perceived that, following the election of Donald Trump, the FCC would swing back to Title I, as it did.

Under the legal status quo, I also believe there are also serious legal difficulties with relying on the states. To be sure, the *Mozilla* court, with Judge Williams dissenting on this point, held that the *Restoring Internet Freedom Order* could not expressly preempt state regulation in the area.⁹⁸ The court held,

94. *To Regulate Radio Communications: Hearings Before the H. Comm. on the Merchant Marine and Fisheries on H.R. 5589*, 69th Cong., 11 (1926) (statement of Herbert Hoover, Sec’y, U.S. Dep’t of Commerce).

95. California Internet Consumer Protection and Net Neutrality Act of 2018, CAL. CIV. CODE §§ 3100-3104 (West 2021).

96. *See, e.g.*, Or. Rev. Stat. Ann. § 276A.418(3) (West 2021) (effective January 1, 2019); Wash. Rev. Code Ann. § 19.385.020(1)-(3) (West 2021) (effective June 7, 2018).

97. Of course, there still may be a role for states in an overall regulatory system. For a thoughtful defense of state authority, *see* Tejas Narechania & Erik Stallman, *Internet Federalism*, 34 HARV. J.L. & TECHNOLOGY 547, 548-620 (2021). Others suggest that states should have *no* role in the regulation of broadband networks. *See, e.g.*, Daniel Lyons, *State Net Neutrality*, 80 U. PITT L. REV. 905, 951 (2019) (arguing that “[b]roadband networks are inherently interstate” and “beyond the traditional realm of state telecommunications regulation”).

98. *Mozilla Corp. v. FCC*, 940 F.3d 1, 74-86 (D.C. Cir. 2019); *see also id.* at 95-107 (Williams, J., dissenting).

essentially, that to expressly preempt the states, the FCC had to point to a statutory source of authority allowing it such power.⁹⁹ And having moved ISPs to Title I, the FCC could not rely on anything in Title II to do so.¹⁰⁰ Thus, somewhat counterintuitively, the act of deregulating ISPs meant that the FCC could no longer prevent the states from regulating them.

Although this aspect of *Mozilla* was taken as a victory for net neutrality proponents hoping to fashion laws at the state level, the victory was a shaky one. That is because *Mozilla* also explained that the Commission was free to argue, as it had not done in its order, that specific state laws were preempted by ordinary obstacle preemption principles, as opposed to expressly preempting state statutes as a blanket matter.¹⁰¹ And obstacle preemption can flow from agency decisions to deregulate just as they can flow from decisions to affirmatively regulate.¹⁰²

There is now a split concerning the preemptive effect of the *Restoring Internet Freedom Order*. In a challenge to California's net neutrality law, the state defeated a motion for a preliminary injunction, with the judge concluding that the Order likely did not preempt California's statute.¹⁰³ That decision is now on appeal. More recently, a federal district court in New York preliminarily enjoined that state's statute requiring broadband providers to offer low-income households basic broadband service at a capped rate.¹⁰⁴ The essence of that court's ruling was that the FCC's decision to move ISPs out of the Title II framework preempted states from imposing "common carrier" rules similar to those contained in Title II.¹⁰⁵ The New York district court's judgment is also on appeal as of this writing.

Although each state law will present unique considerations depending on its particulars, I believe that, at a minimum, state laws placing obligations on ISPs that the FCC has specifically foresworn conflict with federal policy objectives and thus call for obstacle preemption. That is because the driving

99. *Id.* at 74-76.

100. *Id.* at 76-86.

101. *Id.* at 85.

102. *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate.").

103. See Tony Romm, *Net Neutrality Law to Take Effect in California After Judge Deals Blow to Telecom Industry*, WASH. POST (Feb. 23, 2021), <https://www.washingtonpost.com/technology/2021/02/23/net-neutrality-law-take-effect-california-after-judge-deals-blow-telecom-industry/> [https://perma.cc/43YS-XM3J].

104. *N.Y. State Telecomms. Ass'n v. James*, No. 221CV2389DRHAKT, 2021 WL 2401338, at 1 (E.D.N.Y. June 11, 2021).

105. *Id.* at 13.

force behind the FCC's decision to move ISPs back to Title I was its judgment that such obligations were inappropriate as a policy matter. As the FCC explained, in its view, "[t]he record evidence, including [the Commission's] cost-benefit analysis, demonstrates that the costs of [common-carrier] rules to innovation and investment outweigh any benefits they may have."¹⁰⁶ Reimposing those obligations on ISPs at the state level thus presents a plain case of conflict between state and federal prerogatives.

Proponents of state-level net neutrality laws respond with a similar argument as carried the day in *Mozilla*.¹⁰⁷ They say that by moving ISPs out of Title II, the FCC took the position that the FCC had no jurisdiction over them and, thus, there can be no federal interest in maintaining federal policy in an area over which the FCC doesn't even have power.¹⁰⁸ This argument misconceives the nature of the FCC's authority. Under *Brand X*, the FCC does have jurisdiction over ISPs.¹⁰⁹ But it has the choice, using *Chevron*, to exercise that jurisdiction by treating ISPs as telecom carriers or not. That is fundamentally a policy choice. And placing ISPs within Title I does not strip the FCC of jurisdiction. ISPs remain engaged in the provision of interstate communications by wire. It is just that Title II of the Act does not apply to them. True, that means that, as a practical matter, the FCC can do very little to regulate ISPs. But that was the FCC's choice, based on its determination that regulation was largely inappropriate, and that choice embodies the relevant federal policy for obstacle preemption purposes.¹¹⁰

Mozilla does not change this bottom line. There, the court was searching for a particular provision that allowed the FCC to announce, as a general rule, that states were preempted from acting.¹¹¹ It found none.¹¹² But under *Brand X*, the FCC has authority to announce, as a rule, that ISPs are not telecom carriers.¹¹³ Obstacle preemption then asks what the consequences of *that* determination are.¹¹⁴ No further source of statutory authority is required. And

106. *Restoring Internet Freedom Order*, *supra* note 3, at para. 4.

107. *See, e.g.*, Karl Bode, *Why Feds Can't Block California's Net Neutrality Bill*, VERGE (Oct. 2, 2018), <https://www.theverge.com/2018/10/2/17927430/california-net-neutrality-law-preemption-state-lawsuit> [<https://perma.cc/2NDF-8D52>].

108. *See, e.g.*, *James*, 2021 WL 2401338, at *7 (describing state's argument).

109. *See* NCTA v. *Brand X Internet Servs.*, 545 U.S. 967, 1002-03 (2005).

110. *See James*, 2021 WL 2401338, at *7 (the federal district court in New York accepted a very similar argument).

111. *Mozilla Corp. v. FCC*, 940 F.3d 1, 75-76 (D.C. Cir. 2019)

112. *Id.* at 74.

113. *See Brand X*, 545 U.S. at 996-97.

114. *See Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978) (explaining that "where failure of ... federal officials affirmatively to exercise their full authority takes on the character of a

on that question, courts are likely to find that those consequences include the preemption of any state law that the FCC specifically chose not to apply under Title II, including net neutrality protections. Thus, as long as the Title I framework stands at the federal level, I believe many state net neutrality laws are on shaky legal ground.

C. REPUBLICAN-SPONSORED BILLS

At the federal level, some of the earliest attempts to legislate out of the morass described by Part II came from the Republican side of the aisle.¹¹⁵ Although the bills vary somewhat in their particulars, they follow the same basic outline: codify ISPs' classification as information service providers under Title I; subject ISPs to certain basic net neutrality obligations (no blocking, no paid prioritization); and restrict the FCC's ability to implement the new obligations, for example, by prohibiting the FCC from engaging in rulemaking.¹¹⁶

The various Republican bills suffer from some serious flaws. For one, certain issues that could be handled under a Title II framework—such as broadband funding and privacy—are not addressed at all. Of course, these could be handled by different legislation, but there's no guarantee they will be, and Title II already contains the panoply of options that have traditionally attached to communications markets.

More generally, the Republican bills give a false sense that they are putting to bed today's controversies through imposing "clear" obligations on ISPs while at the same time kneecapping the FCC's ability to adapt the regulatory regime to new circumstances. For example, in dealing with paid prioritization, one bill provides that ISPs "may not throttle lawful traffic by selectively slowing, speeding, degrading, or enhancing internet traffic based on source, destination, or content, subject to reasonable network management."¹¹⁷ The bill's sponsors see this provision as enshrining what net neutrality proponents have always wanted, but even from today's vantage point its application to emerging controversies is unclear. Take "zero rating," which describes the practice of allowing users to use certain apps free from otherwise applicable data caps or fees.¹¹⁸ Those who wish to regulate zero rating argue that it may

ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation?").

115. See H.R. 1101, 116th Cong. (2019); H.R. 1096, 116th Cong. (2019); H.R. 1006, 116th Cong. (2019).

116. *Id.*

117. H.R. 1101, 116th Cong. § 1 (2019).

118. Ellen P. Goodman, *Zero-Rating Broadband Data: Equality and Free Speech at the Network's Other Edge*, 15 COLO. TECHNOLOGY L.J. 63, 64 (2016).

have the same harmful effects on innovation that classic paid prioritization arrangements have.¹¹⁹ Those on the other side argue that zero rating may be beneficial to consumers, allowing ISPs to have lower prices and expand access.¹²⁰ What's important for present purposes is not who's right, it is that the bills in question don't resolve the issue. And that is to say nothing of controversies over network practices that haven't even emerged yet.

The same bill would require the FCC to “enforce the [bill’s] obligations . . . through adjudication of complaints alleging violations of such subsection,” and provides that it “may not expand the internet openness obligations for provision of broadband internet access service beyond the obligations established in such subsection, whether by rulemaking or otherwise.”¹²¹ This restriction to adjudication contains ambiguities of its own. Is the FCC barred from rulemaking entirely, or only rulemaking that “expands . . . obligations”? And what does it mean to “expand” an obligation? Does this strip the FCC of *Chevron* deference when it proceeds by rulemaking? When it proceeds by adjudication? Does it get *Chevron* deference when it “restricts” and not “expands” an obligation?

Those ambiguities aside, the seeming purpose of the provision would be to push the FCC toward adjudication and away from rulemaking. But why? Proponents of the bill would likely say that proceeding by individual adjudication provides a more flexible regulatory regime that can better adapt to changed circumstances, and there is something to that. But adjudication also has its drawbacks. It can be hard to definitively settle issues through adjudications, and a case-by-case approach provides less certainty to regulated entities and to the public.¹²² Rulemaking procedures also enhance political accountability and, by soliciting public input, can produce higher quality policy.¹²³ Those agencies that have pursued mostly adjudication have been subject to severe criticism.¹²⁴ The FTC, for example, has been pushed toward a system of regulation by adjudication by statutory provisions that made it more onerous for the FTC to engage in rulemaking.¹²⁵ The result has been that the FTC has formulated, through adjudication and (often) consent decrees, a

119. *See id.* at 73-77.

120. *See id.* at 77-80.

121. H.R. 1101, 116th Cong. § 14(b)(1) (2019).

122. *See* 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 520-24 (6th ed. 2019).

123. *See id.* at 518-20.

124. *See, e.g.*, Justin (Gus) Hurwitz, *Data Security and the FTC’s Uncommon Law*, 101 IOWA L. REV. 955, 1001 (2016).

125. *See id.*

body of common-law-like obligations in areas such as privacy.¹²⁶ Commentators, including academics, have criticized this system for violating fundamental norms such as the right to fair notice.¹²⁷ And yet, the Republican bills would seemingly require the FCC to proceed similarly, subject only to a hazy backstop prohibiting it from “expanding” on the obligations contained in the bills.

At the very least, it would seem appropriate to give the FCC the option of proceeding by rulemaking (if that is indeed what the bill prohibits). One does not need to do a full dress rehearsal of the administrative law class on *Chenery II* to understand that whether to proceed through rulemaking or adjudication is often a highly contextual question on which the agency likely has better information.¹²⁸ To artificially restrict the agency to one or the other—and especially to adjudication—should require special justification, which has not been supplied here. To the contrary, arguments have been made (canvassed in the antitrust section above) that clear ex ante rules may be particularly appropriate when it comes to ISP practices.

D. THE SAVE THE INTERNET ACT

The main Democratic legislative proposal in the area, passed by the House in April 2019, is the Save the Internet Act.¹²⁹ The Save the Internet Act is a very strange piece of legislation. Section 2(a)(1) of the Act provides that “[t]he Declaratory Ruling, Report and Order, and Order in the matter of restoring internet freedom that was adopted by the [FCC] on December 14, 2017 shall have no force or effect.”¹³⁰ That provision nullifies the Trump-era FCC’s Restoring Internet Freedom Order. So far, nothing totally out of the ordinary. Section 2(a)(2) then states that the Trump-era order “may not be reissued in substantially the same form” and further that the [FCC] may not issue a “new rule” that is “substantially the same” as the Trump-era rule.¹³¹ This language appears borrowed from the Congressional Review Act. Section 2(b)(1) “restore[s] as in effect on January 19, 2017” the Obama-era FCC order classifying ISPs as telecom carriers and the regulations promulgated along with that order.¹³²

126. See Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 676 (2014).

127. See generally Hurwitz, *supra* note 124, at 1001.

128. See HICKMAN & PIERCE, *supra* note 122, at 524-41.

129. Save the Internet Act of 2019, H.R. 1644, 116th Cong.

130. *Id.* § 2(a)(1).

131. *Id.* § 2(a)(2).

132. *Id.* § 2(b)(1).

Those provisions were, at the time the bill was originally introduced, basically it. What was left unclear was the extent to which the bill actually enshrined the Obama-era order in the U.S. Code, such that a future FCC could not depart from it, or whether it simply reinstated the order subject to future revision. My personal understanding was that it “restored” the Obama-era order, but would allow—consistent with normal principles of administrative law—a future FCC to depart from it, at least to the extent that the resulting legal regime was not “substantially the same” as the Trump-era one. But uncertainty remained.

The apparent response to that uncertainty, added by later amendment, is the current bill’s section 2(c)(2). That provision defines what it means to “restore” the Obama-era FCC’s order and states that “restore” means “to permanently reinstate the rules and legal interpretations set forth in [the Obama-era order], including any decision (as in effect on such date) to apply or forbear from applying a provision of the Communications Act of 1934 . . . or a regulation of the [FCC].”¹³³

That provision presumably sticks the FCC with the Obama-era rules, full stop. Once you drill down, though, the bill remains a minefield. For one, everyone who has read a few FCC orders—including, very much so, the Title II Order—knows that they contain sprawling discussions of various issues, often resembling a judicial opinion more than a code of law. The regulations that are to be codified in the Code of Federal Regulations (CFR) are appended to the order. The Save the Internet Act does not just return the CFR to its pre-Trump state of being, however. It protects, on a permanent basis, “the rules and legal interpretations set forth” in the order itself.¹³⁴ But which parts of the underlying order this effectively codifies and which it doesn’t is not self-evident.

In addition, section 2(c)(2) specifically states that it is permanently restoring the Obama-era order’s “decisions” regarding which statutory provisions and regulations to forbear from applying to ISPs. For example, the Obama-era FCC decided to forbear from section 203 of the Communications Act—dealing with tariffing requirements.¹³⁵ Presumably, then, the Save the Internet Act would bar the FCC from reapplying section 203 to ISPs. But the Obama-era order also reserved the FCC’s authority to act more aggressively going forward, including by imposing forms of rate regulation under its sections 201 and 202 authority, which the FCC did not forbear from.¹³⁶ If a

133. *Id.* § 2(c)(2).

134. *Id.*

135. *Id.*

136. *Id.*

future FCC did decide to get more aggressive, how far could it push such rate regulation before running afoul of the Save the Internet Act's apparent intent not to allow forms of rate regulation resembling section 203 tariffing? Again, it's not clear.

It's similarly unclear how the Act would apply to future deregulatory actions. The seeming intent of the bill is to set the Obama-era rules as a floor. But given the rigidity this reading would impose, it is possible that a future FCC could try to cheat, and a sympathetic court could potentially allow the FCC to do so. For example, say a future FCC promulgates a new rule, formally codified some other place in the CFR, exempting a subset of Internet service providers—fixed wireless ISPs,¹³⁷ for example—from the Obama-era net-neutrality rules “notwithstanding” those rules, which continue to appear in the CFR just as before. Would that violate the bill's command that the Obama-era rules be “permanent”? A good argument could be made that it would, but that conclusion wouldn't necessarily be a slam dunk, particularly if there was solid evidence that the rules were wreaking havoc on some category of providers.

As should be reasonably clear from this discussion, I believe there are serious issues with the Save the Internet Act. First, the above questions would invite a litigation bonanza, as future FCCs attempt to navigate the vagaries of the Act. That would be good, of course, for telecom lawyers and those of us writing at the intersection of administrative law and communications regulation, but probably not so much for society at large. That is especially true when what is especially needed now, in light of the current state of things, is some kind of stable framework within which to work. The Save the Internet Act does not provide such a framework—indeed, it may invite even more confusion and uncertainty than what it is designed to replace.

Second, the Save the Internet Act suffers from a similar infirmity as Republican legislative proposals—namely, treating today's regulatory issues as etched in stone and hampering the FCC from making flexible adjustments going forward. That is especially ironic given that the Obama-era FCC order—the one that the Save the Internet Act would enshrine as code—was itself ambivalent about some issues, deferring consideration of some and building in flexibility for future FCCs to depart from the specifics on others. And there are good reasons for that. Communications markets are constantly evolving, and the FCC has a long and sometimes troubled history with adapting regulation to new conditions. The Save the Internet Act would (to some unknown but likely substantial degree) freeze the FCC in its tracks, treating as

137. Fixed wireless ISPs offer customers, largely in rural areas, Internet access service over the air. Some of them have argued that strict anti-prioritization rules prevent them from effectively managing traffic over their networks, which raise unique engineering issues.

inviolable an FCC order when the authors of that order recognized its own fallibility.

E. THE CMRS MODEL (TWEAKED)

The final option I'll survey is the one I believe has the most promise. This I'll call this the CMRS option because it is based on, with some tweaks, the model that Congress enacted for commercial mobile radio services—most importantly, cellular voice service. The emergence of CMRS raised similar issues as the emergence of the commercial Internet. A new technology developed with exciting applications. The FCC tentatively waded into the waters, distributing licenses for CMRS services and regulating around the edges using a hodgepodge of authorities.¹³⁸ But the application of the Communications Act to CMRS was unclear. Broadcast radio, the closest historical kin to CMRS, had not traditionally been regulated as a common carrier service under Title II. And the CMRS market was far from perfect. Most early CMRS markets had a duopoly structure.¹³⁹ One player in each market was typically the legacy landline voice monopolist, with an incentive not to allow burgeoning competition in the CMRS market to affect their legacy profits.¹⁴⁰ This dynamic led to disputes regarding the terms on which CMRS providers were entitled to interconnect their networks with the local landline provider and other CMRS providers.¹⁴¹

Congress's solution, passed in 1993, was what became 47 U.S.C. § 332(c). Section 332(c) does a number of things. First, it expressly classifies CMRS as a Title II common carrier service. Second, it provides that the FCC may “specify by regulation” that certain provisions of Title II do not apply to CMRS.¹⁴² Third, it states that the FCC may not nullify, using this “specification” authority, certain provisions of the Communications Act, including those prohibiting unjust or unreasonable charges and discrimination.¹⁴³ Fourth, it provides that the FCC may nullify provisions as applied to CMRS only if three conditions are met.¹⁴⁴ Fifth, it expressly

138. See generally NUECHTERLEIN & WEISER, *supra* note 19, at 133-41.

139. *Id.* at 133-34.

140. *Id.*

141. *Id.* at 143.

142. 47 U.S.C. § 332(c)(1)(A). This became the model for the Act's general grant of forbearance authority to the Commission, enacted in 1996. Telecommunications Act of 1996, Pub. L. No. 104-104, § 401, 110 Stat. 56, 128-30.

143. 47 U.S.C. § 332(c)(1)(A).

144. 47 U.S.C. § 332(c)(1)(A)(i)-(iii) (“(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

preempts the states from regulating CMRS providers in certain ways, particularly with regard to charges.¹⁴⁵

The section 332(c) framework has worked tolerably well in the cellular service marketplace. The FCC has used it, as Congress intended, to adapt provisions of the Communications Act, like those provisions governing interconnection, to the CMRS market, while forbearing from the application of many other provisions, such as entry and exit licensing requirements and ex ante rate regulation, that make less sense.¹⁴⁶ Perhaps more controversially, the FCC has allowed CMRS providers to engage in individualized pricing practices that would typically have been anathema to a common carrier regime.¹⁴⁷

The CMRS model could be straightforwardly applied to ISPs. At a minimum, Congress would declare that ISPs are common carriers, re-affirm that the FCC has broad authority not to apply provisions of the Act to them using its forbearance power, and specify any requirements (perhaps a basic “no blocking” obligation) that the FCC must apply to ISPs.

So far, this looks a lot like a statutory codification of the Obama-era FCC’s order and, for that reason, it is likely to be a political nonstarter. Indeed, the Obama-era FCC pointed to the CMRS experience when crafting its Title II-plus forbearance framework.¹⁴⁸ Partly due to that political reality, the CMRS model would likely need to be tweaked somewhat in order to garner support. In particular, Congress could specify that certain provisions of the Communications Act *could not* be applied to ISPs. That is, the legislation would set both a regulatory floor and a ceiling. What the FCC should be prohibited from doing could be left to political negotiation, but one obvious candidate is ex ante (and perhaps ex post) price regulation of consumer rates. When the Obama-era FCC re-classified ISPs as Title II carriers, it simultaneously forbore from those provisions of the Act, like tariffing requirements, that are designed to facilitate ex ante price controls. ISPs and the dissenting Commissioners complained, however, that a future FCC could always “unforbear” and apply such requirements, and they pointed out that the FCC retained the power, under its general authority to investigate “unjust rates,” to engage in ex post price regulation.¹⁴⁹ These latent powers have been seen as an existential threat

(ii) enforcement of such provision is not necessary for the protection of consumers; and (iii) specifying such provision is consistent with the public interest.”)

145. *Id.* § 332(c)(3).

146. *See generally* Implementation of Sections 3(n) & 332 of the Commc’ns Act, *Second Report and Order*, 9 FCC Rcd 1411 (1994).

147. *See* Orloff v. FCC, 352 F.3d 415, 420-21 (D.C. Cir. 2003) (blessing the FCC’s policy).

148. *See Title II Order*, *supra* note 2, at 5791, paras. 409-10.

149. *See id.* at 5922 (statement of Commissioner Ajit Pai) (citing arguments by ISPs).

to ISPs and provided a basis for ISP arguments that, although they did not object to net neutrality regulation per se, they do object to Title II.¹⁵⁰

Statutorily prohibiting the FCC from regulating consumer rates—perhaps with carve outs for services designed to serve lower-income individuals and others who have historically benefited from universal service—would undercut these arguments and could be paired with other reforms that would address ISP pricing practices. For one, the FCC could eliminate, or, at least narrow, the FTC Act’s “common carrier exemption,” which places “common carriers subject to the Acts to regulate commerce” outside of the FTC’s jurisdiction.¹⁵¹ Doing so would be especially necessary if the FCC was completely disabled from investigating ISP pricing practices, in order to make sure that those practices did not fall into a regulatory void. Second, the FCC could be directed to ensure that existing funding mechanisms, such as the FCC’s Lifeline program, be used to support subsidizing broadband access for lower-income individuals. Third, Congress and the FCC could continue to work toward facilitating broadband “public options” in the form of municipally provided services, though this is not without its own political controversies.

To quell ISP concerns about state regulation, the imagined legislation could also contain a broad express preemption provision. Title II already expressly prohibits states from imposing requirements that are the same as those the FCC has forborne from, and that could be expanded to preempt states from regulating other issues that are thought best left to uniform federal regulation. At the same time, state authority could be preserved for matters, such as deceptive or fraudulent advertising or local franchising, that the states have traditionally had an active role in.

What are the benefits of this framework? First, by finally putting the Title II issue to bed, this approach would allow the FCC to focus on the right issues. Whether broadband ISPs should be regulated in this or that way does not depend, in my view, on whether they “offer” a telecommunications service as the Act defines it, or on such technical sub-issues as whether DNS or caching fall within the telecommunications management exception. Accepting the applicability of Title II while modulating regulation through the exercise of

150. See AT&T Blog Team, *Net Neutrality and Modern Memory*, AT&T PUB. POL’Y (June 6, 2014), <https://www.attpublicpolicy.com/fcc/net-neutrality-and-modern-memory/> (reiterating AT&T’s stance that it is not opposed to some forms of net neutrality regulation) [<https://perma.cc/4ARV-AGEP>]; Paul Mancini, *The FCC: Having its Forbearance Cake and Eating it Too*, AT&T PUB. POL’Y (June 16, 2010), <https://www.attpublicpolicy.com/broadband/the-fcc-having-its-forbearance-cake-and-eating-it-too/> (linking the FCC’s power to “unforbear” to AT&T’s opposition to Title II) [<https://perma.cc/LR6D-P9ED>].

151. 15 U.S.C. § 45(a)(2).

forbearance, by contrast, allows the FCC to focus on the right questions. The forbearance factors themselves are quite broad and allow the FCC a fair amount of discretion. But they point toward what should be the central inquiry: Does FCC regulation provide a valuable addition to background forms of regulation, such as antitrust? And answering this question properly focuses the FCC on whether regulatory interventions are justified, or whether other institutions, such as the courts or FTC, are better able to police the issue.

Second, by setting a regulatory floor and ceiling, the approach would inject some amount of regulatory certainty into the area while still allowing the FCC broad discretion to operate within the bounds opened to it. For example, the FCC would be free to adapt the Act's prohibition on "unjust and unreasonable discrimination" to new practices and in light of evolving market conditions. Other provisions of the Act governing things like privacy and subsidies, less salient in the fight over net neutrality, could be similarly adapted to the realities of the broadband market. The approach thus largely avoids the lock-in problems that are invited by several of the other alternatives discussed above.

Third, the framework installs a permanent public regulator as steward in the area. Of course, whether this is viewed as good or bad depends on one's perspective. But because of the importance of broadband Internet to society and democracy, there is a good case for embracing the public stewardship model that has been a traditional hallmark of communications regulation and public utility regulation more broadly. Doing so allows us to maintain a certain degree of democratic or quasi-democratic control over infrastructure that undergirds the modern world.

The primary drawbacks of the CMRS model follow from its strengths. ISPs will argue that any model that involves investing the FCC with authority as vague as the prohibition against "unjust" or "unreasonable" discrimination will lead to regulatory uncertainty and depress investment in broadband networks, thus undermining the FCC's goals regarding broadband deployment. That concern can be partially militated against, as discussed above, through legislation that provides a regulatory ceiling as well as a floor, taking at least certain things off the table, such as ex ante price regulation of consumer rates, that have been viewed as especially threatening to ISP profits. Moreover, the prohibition against unjust and unreasonable discrimination has a long history and much precedent attached to it. And although the FCC has the ability, under *Chevron*, to depart from that precedent to some degree, its presence should operate to reduce the uncertainty associated with a Title II framework. Indeed, in the years that ISPs were classified under Title II, the evidence of grave uncertainty, at least as reflected in investment numbers, was difficult to detect.

IV. CONCLUSION

This essay has explored various institutional settlements concerning the regulation of Internet service providers, finding the current options to be mostly unsatisfactory. In their place, I have advocated for a surely-not-perfect-but-maybe-better alternative modeled on, with some changes, Congress's solution to CMRS.

CONVERGENCE AND A CASE FOR BROADBAND RATE REGULATION

Tejas N. Narechania[†]

ABSTRACT

There is an important but underappreciated tension between transmission-layer services and application-layer services in the design of prior telecommunications statutes. These statutes were designed for a different technological era, one where discrete networks served distinct purposes—for example, coaxial cable for television or copper wires for telephony. But these distinct physical networks have since converged into a single multipurpose internet, making nonsense out of some statutory provisions. These rules, conflating applications with transmission services, yield illogical outcomes—including both deregulated monopoly markets and overregulated competitive ones.

One consequence of such persistent, deregulated monopolies is a stubborn digital divide, driven by higher costs for critical transmissions services like broadband carriage. Indeed, this Article's novel study suggests that consumers served by monopoly providers—about 20% of the American population—face substantially higher prices for comparatively worse internet access services. But this data also suggests that broadband rate regulation, where it exists, helps move rates and quality closer to competitive levels.

The next telecommunications statutes must thus better account for the convergence across physical networks, the distinctions between the applications layer and the broadband transmission layer, and the concomitant consequences for competition and regulation. Competition, where it exists (as in many applications markets), should thrive, and regulators should properly refrain from meddling in competitive markets for broadband carriage. Yet Congress and the Commission should protect consumers from monopoly carriers—including, most importantly, broadband carriers. Broadband rate regulation offers one promising path for doing so.

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I. INTRODUCTION

Our modern media landscape consists of a wide range of video content providers: broadcasters, cable services, and internet-only streaming content providers, among others. Important policymakers and commentators have explained that this competitive marketplace requires a new regulatory infrastructure.¹ Each of these sorts of services currently faces a distinct regulatory regime, giving rise to a distinct set of obligations and privileges.² Yet

1. See, e.g., Ajit V. Pai, Chairman, Fed. Comm’ns Comm’n, Remarks to the Media Institute (Dec. 15, 2020).

2. See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Service, 29 FCC Rcd. 15995 (2014) (Notice of Proposed Rulemaking) [hereinafter 2014 MVPD NPRM].

these services all seem to compete with each other within one market for viewership and revenue, and so, according to some such commentators, we should replace these rules and regulations with unrestrained market competition.

Such conversations about the competitive market for content services and applications have often overlooked conditions in the market for transmission. To access video content (no matter whether local news, live sports, or old sitcoms), that content must be transmitted to viewers—by spectrum or by wire, by a cable system operator or by a broadband carrier.³ And competition among providers of transmission services has long been an important goal of communications statutes, including the Telecommunications Act of 1996.⁴

The Communications Act of 1934 (the Act) (as amended by the 1996 Act, the Cable Television Consumer Protection and Competition Act of 1992, and the Cable Communications Policy Act of 1984, among other intervening bills), however, has often conflated transmission-related rules with those regarding the services and applications sent over the infrastructure. Title VI of that Act, for example, includes provisions that pertain to both the transmission of cable service as well as the content offered by multichannel video programming distributors. Some provisions, for example, regard the technical standards for transmission over cable wires; other provisions govern the channels and content that cable providers must offer to consumers.⁵ Title II similarly includes provisions pertaining to both telephone transmission and service.⁶ Viewed in historical context, this structure makes sense, as different physical facilities were once used to transmit different sorts of services—copper wires for telephony, for example, or coaxial cable for television.⁷ Hence, such provisions were enacted to address concerns related to monopoly power, on

3. I use the phrase “broadband carrier” (and “broadband carriage”) as I have used it elsewhere, to refer to a company providing broadband internet access services (or such services themselves). *See, e.g.*, Tejas N. Narechania & Erik Stallman, *Internet Federalism*, 34 HARV. J.L. & TECH 547 (2021). I use this terminology because the phrases “broadband carriage” and “broadband carrier” help to clarify and emphasize the core service offered, namely, the transmission—the *carriage*—of data from one internet location to another, regardless of the specific facility used to execute that service. *Cf.* 47 U.S.C. §§ 153(11), (50), (51), (53) (defining carriage).

4. *See, e.g.*, H.R. CONF. REP. 104–458, at 1 (1996) (explaining that the goal of the 1996 Act is to “ope[n] all telecommunications markets to competition”).

5. *Compare, e.g.*, 47 U.S.C. § 544(e) (setting out authority to issue technical standards for cable transmission) with 47 U.S.C. §§ 534–535 (prescribing scope of cable programming).

6. *Compare, e.g.*, 47 U.S.C. § 224 (setting rules for deploying network infrastructure) with 47 U.S.C. § 201 (confering general power to ensure that carrier practices are “just and reasonable”).

7. *See, e.g.*, JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS 17 (“For most of the twentieth century, people closely identified . . . these categories of service with a particular medium of transmission.”).

the assumption that (natural) monopoly power in a particular facilities-based transmission market would necessarily imply monopoly power in a related applications market.⁸ Title VI, for example, allows for the limited rate regulation of cable service, on the assumption that a monopoly in the market for transmission over cable facilities (i.e., the wired infrastructure) will also give rise to a monopoly over the video programming service (i.e., cable television).⁹ In short, these rules provided for monopoly regulation in both transmission and applications markets.

But now various applications—video, voice, music, and teleconferencing, among others—have all converged onto the internet, a single platform mediating varied physical transmission facilities, thereby opening local networks to third-party applications providers.¹⁰ Hence, it is no longer true that monopoly power in a certain transmission market will necessarily yield a monopoly in an associated applications market: Monopoly control over cable facilities still leaves cable television service susceptible, to an important but limited extent, to competition from providers like Hulu and YouTube TV.¹¹ Cable service providers must compete with streaming video providers along such dimensions as the breadth and quality of available programming.¹² It is this convergence onto the internet, and the concomitant competition, that has precipitated interest, noted *supra*, in reexamining the application-specific rules that apply to, say, cable channels and other video programming services.¹³ It often no longer makes sense to subject such services, including their internet-delivered counterparts, to monopoly regulation.¹⁴

8. I take no view here on whether local exchange carriers or cable systems are indeed natural monopolies. Rather, I simply mean to point out that such regulation was motivated by a legislative view, sometimes later upended, that such infrastructural platforms were indeed natural monopolies. *See* Narechania & Stallman, *supra* note 3.

For a brief word on transmissions providers that are not facilities-based, see *infra* note 19.

9. *See* 47 U.S.C. § 543(a)(2); *see also infra* notes 30–33, 131–136 (describing this regulatory scheme and its successes).

10. *See, e.g.,* Narechania & Stallman, *supra* note 3 (describing the internet’s interconnectedness across facilities).

11. *See infra* Part II.B.

12. *See, e.g.,* SNL KAGAN, CABLE TV INVESTOR: DEALS & FINANCE, Feb. 21, 2014, at 6–7; *see also* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 30 FCC Rcd. 3253 ¶¶ 3, 96–100 (2015).

13. *See* Pai, *supra* note 1; *see also* 2014 MVPD NPRM, *supra* note 2, ¶¶ 1–8.

14. I do not, of course, mean to imply that such services should be wholly deregulated. Some regulation of both applications and transmission services is likely warranted no matter the competitive conditions, including, for example, to promote accessibility and to prohibit discrimination, to name only a few obvious examples. *See, e.g.,* 47 U.S.C. § 541(a)(3) (prohibiting income-based redlining); Closed Captioning for Video Programming, 29 FCC

Competition among application-layer providers, however, does not imply competition among transmission-layer providers.¹⁵ The markets, though complementary, are distinct. Hulu and YouTube TV, for example, require but do not provide broadband internet access.¹⁶ Rather, such access hinges on broadband infrastructure. Often, this is the very same infrastructure—the same physical transmission facilities, i.e., the cables, wires, and network components—that delivers cable television.

Moreover, companies that own broadband facilities and offer broadband carriage are frequently local monopolists.¹⁷ Hence, claims that convergence undermines the case for the regulation are true only to a limited extent. They are true for the “intelligence” in the network, the now-competitively offered applications and content services.¹⁸ But they are not true for the many facilities-based transmission services providers that retain their local monopoly, including, most importantly, broadband carriers.¹⁹ Hence, while policymakers have long deregulated application-layer services in view of competition,²⁰ the vitality of this competition depends on internet access. Broadband internet access is, in many ways, the defining utility of today. Transmission-specific broadband regulation is thus more important than ever, especially where local markets for broadband carriage are controlled by monopoly providers.

Rcd. 2221 (2014) (promulgating accessibility regulations for various video programming services).

15. *Cf.* Vance v. Rumsfeld, 701 F.3d 193, 207 (7th Cir. 2012) (en banc) (Wood., J. concurring) (describing converse fallacy).

16. *See, e.g., Getting Started with Hulu*, HULU, (Jan. 11, 2021), https://help.hulu.com/s/article/getting-started?language=en_US (explaining that subscribers need “a supported device and a solid connection”). *See supra* note 3.

17. *See infra* Part III.A; *see also infra* note 19 (describing and setting aside one relatively rare complication to this finding).

18. *See, e.g.,* David P. Reed, Jerome H. Saltzer & David D. Clark, *Commentaries on “Active Networking and End-to-End Arguments,”* 12 IEEE NETWORK 66, 70, (May-June 1998); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925, 930–31 (2001).

19. For the purposes of this paper, I assume that most transmission services providers are also facilities owners, as is typically the case in U.S. broadband markets. *See, e.g.,* NÜECHTERLEIN & WEISER, *supra* note 7, at 196–97 (explaining that “a broadband subscriber today essentially equates her last-mile transmission provider . . . with her ISP”). Comparatively few markets enable competition among internet service providers over shared facilities. Of course, where there are competing non-facilities-based transmission services providers offering services over monopoly facilities, the economic story becomes more complicated, especially where one of the competing retail options is (or is affiliated with) the facilities owner, thus requiring a close look at the monopoly provider’s wholesale and retail prices and practices. *Cf.* Pacific Bell Tel. Co. v. LinkLine Commc’ns, 555 U.S. 438, 442–46, (2009). I set such (comparatively rare) complications to one side for the purposes of this Article.

20. *See, e.g.,* Tejas N. Narechania & Tim Wu, *Sender-Side Transmission Rules for the Internet*, 66 FED. COMM’NS L.J. 467, 470–76 (2014)

In this Article, I make a case for greater transmission-specific regulation, including, especially, rate regulation. I do so even knowing that broadband rate regulation remains something of a taboo in communications policy.²¹ I do so because, these atmospherics notwithstanding, the persistence of local monopolies in the provision of broadband internet access, together with concomitant, enduring affordability concerns, suggests a need for some regulatory intervention.²² Moreover, despite ratesetting's apparent status as a regulatory pariah, the Commission already engages in some—often overlooked and mischaracterized—forms of rate regulation (and service specification) for monopoly broadband carriers. In particular, where the Commission subsidizes broadband facilities and broadband carriage services with federal funds, it imposes rate and service conditions on retail broadband carriage.²³ By highlighting these pre-existing and well-accepted modes of broadband rate regulation, I hope to help reestablish and normalize retail ratesetting as one appropriate regulatory measure among several possibilities.²⁴

21. See, e.g., James B. Speta, *Supervising Discrimination*, 95 MARQUETTE L. REV. 1195, 1197 (2011) (explaining that “virtually no one” calls for broadband rate regulation); see also Jonathan E. Nuechterlein & Howard Shelanski, *Building on What Works*, 73 FED. COMM’NS L.J. 219, 239 (2021) (noting that “the FCC has always expressed opposition to broadband rate regulation”); cf. STEPHEN G. BREYER, REGULATION AND ITS REFORM 59, 70 (1982) (summarizing various objections to different forms of ratesetting). *But see infra* note 24 (noting other calls for broadband rate regulation).

22. See *infra* Parts III.A–III.B; see also, e.g., President Joseph R. Biden, Remarks on the American Jobs Plan (Mar. 31, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/31/remarks-by-president-biden-on-the-american-jobs-plan/> (“Americans pay too much for Internet service. We’re going to drive down the price for families who have service now, and make it easier for families who don’t have affordable service to be able to get it now.”).

23. See Connect Am. Fund, 26 FCC Rcd. 17663 ¶ 86 (2011) (requiring that subsidized monopoly providers of broadband service meet standards of “reasonable comparability” with competitively-offered service).

24. See 47 U.S.C. § 1302(a) (directing the “[FCC] and each State commission with regulatory jurisdiction over telecommunications services” to use “price cap regulation” to encourage broadband deployment and adoption). While rate regulation has been something of a taboo among telecommunications authorities, see *supra* note 21 and accompanying text, I am far from the first or only scholar to breach this soft custom. See, e.g., Susan P. Crawford, *The Looming Cable Monopoly*, 29 YALE L. & POL’Y REV. 34, 39 (2010) [hereinafter Crawford, *Looming Monopoly*] (advocating in favor of “policies requiring line-sharing at regulated rates”); Susan P. Crawford, *The Communications Crisis in America*, 5 HARV. L. & POL’Y REV. 245, 261–62 (2011) [hereinafter Crawford, *Crisis*]; Gigi B. Sohn, *Keynote Address, Social Justice or Inequality: The Heart of the Net Neutrality Debate*, 80 U. PITT. L. REV. 779, 785 (2019) (contending that the Commission should “ensure affordable Internet access” and arguing that the Commission’s decision to define internet access as an information service, see 47 U.S.C. § 153(24), thus renouncing its powers over providers’ prices, is an abdication of that responsibility); see also Nuechterlein & Shelanski, *supra* note 21 (summarizing some calls for broadband rate regulation by states, policymakers, and commentators). I address some of these proposals in greater depth *infra* notes 139–145 and accompanying text.

Specifically, where Congress and the Commission have countenanced rate regulation for cable television service, they should consider relaxing those rules (which mistake a competitive applications market for a facilities-based monopoly), and they should issue rules targeting broadband carriers (who are often local transmission monopolists). In short, regulators should focus on broadband carriage monopolies.²⁵

This Article proceeds in three parts. First, I elaborate on the perils of a statutory scheme that conflates transmission facilities with applications, drawing on the regulatory trail leading to *Massachusetts Department of Telecommunications and Cable v. Federal Communications Commission (MDTC)* as an exemplar.²⁶ A close look at *MDTC* and the Commission's underlying order reveals how the prevailing statutory regime can both permit application-layer rate regulation in the presence of competition and prevent transmission-layer rate regulation, even under monopoly conditions. Second, I elaborate on the need for greater regulation of the transmission services of facilities-based providers.²⁷ Specifically, I present the results of a novel study demonstrating that monopoly broadband carriers offer consumers significantly less value, and that existing modes of broadband rate regulation help to move prices and services closer to competitive levels. Finally, I propose a regulatory scheme, including, in Appendix A, a model statute to improve broadband quality and affordability, one that draws from the Commission's prior experience regulating broadband and cable service rates.

II. EFFECTIVE COMPETITION?

As noted above, policymakers and commentators have sought to pare back the regulatory regime applying to the newly competitive markets for various applications (including, for example, "video programming" services).²⁸ But the Commission's ability to accomplish such deregulation is constrained by the bounds of the Act's vision, outlining (in this example of video) the limited

25. *But see supra* note 14 (noting that some regulation of competitive markets may be justified to address, e.g., accessibility- and discrimination-related concerns).

26. *Mass. Dep't of Telecomms. & Cable v. FCC*, 983 F.3d 28 (1st Cir. 2020).

27. I focus intentionally on the effect of these statutory and regulatory errors on transmission markets. Other policymakers and scholars have already well-elaborated the problems of (and possible policy responses to) such errors' effects on applications markets. *See, e.g.,* Pai, *supra* note 1. I agree that some deregulation of these markets is probably warranted, though some of these proposals advocate for more deregulation than is likely desirable or warranted. *See, e.g., supra* note 14 (explaining that, at minimum, rules promoting accessibility and prohibiting discrimination seem appropriate, no matter the competitive conditions). I leave a more complete examination of such issues to future work.

28. *See* 47 U.S.C. § 522 (defining "video programming").

scope of “effective competition.”²⁹ These calls for deregulation, moreover, have often overlooked effects in complementary transmission markets. The results, in short, are a mess: The Act’s too-limited understanding of “effective competition” can both leave some competitive markets regulated and deregulate monopoly providers of broadband carriage, to significant adverse consumer effects. Stated similarly, the statutory design, which conflates the application and transmission layers, forces the Commission to either regulate a competitive applications market or deregulate a monopoly transmission market.

A. COMPETITION AMONG APPLICATIONS

The Act notes an important “preference for competition” among cable service providers, and so permits local authorities to regulate cable service rates only where such services are not subject to “effective competition.”³⁰ Specifically, the Act sets out four tests, which, if any is satisfied, allow cable service providers to escape local rate regulation—a “low penetration test,” a “competing provider test,” a “municipal provider test,” and, most important for present purposes, a “local exchange carrier test.”³¹

“Local exchange carrier” is telecommunications jargon for a local phone company. Accordingly, the local exchange carrier test asks whether the local phone company competes with the local cable service provider: Does that

29. See 47 U.S.C. § 543(a)(1)-(2), (l)(1) (prohibiting rate regulation for the provision of cable services if the cable service is subject to effective competition).

30. See 47 U.S.C. §§ 543(a)(2), 522(6).

31. The effective competition test finds its roots in the Cable Communications Policy Act of 1984, which authorized the Commission to “prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition.” See MDTC, 983 F.3d at 31 (quoting the original provision). But this provision proved too broad to address cable rates as prices soared. *Id.* And so, in 1992, Congress clarified the definition of “effective competition,” by setting out three tests to determine if a market was sufficiently competitive. Under the low penetration test, a market is deemed sufficiently competitive if fewer than thirty percent of households in the area subscribe to cable television (no matter the number of competitors in the market). 47 U.S.C. § 543(l)(1)(A). Under the competing provider test, a market is deemed sufficiently competitive if there are two providers in an area, each of which offers service to at least fifty percent of households in that area, and each has a share of at least fifteen percent of the market. Under the municipal provider test, a market is deemed sufficiently competitive if the local government offers cable television service directly to its residents. In 1996, hopeful that competing telephone companies would increasingly invest in high-capacity networks, Congress added a fourth test—the local exchange carrier test. Under that test, a market is deemed sufficiently competitive where “a local exchange carrier or its affiliate” “offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area” “if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.” 47 U.S.C. § 543(l)(1)(D).

telephone company “offer[] video programming services directly to subscribers by any means”?³² If so, then such competition obviates the need—and hence preempts the local authority—for cable service rate regulation.³³

Some phone companies offer competing video programming services. AT&T, for example, launched U-verse in 2006 (since supplanted by AT&T TV).³⁴ But because such services typically demand significant network investments—for example, replacing low-capacity copper wires with high-capacity fiber optic cable—they have grown somewhat slowly and sporadically. By 2016, telephone-based providers had accrued only about 13 million subscribers (to the roughly 54 million subscribers to cable-system-based providers).³⁵ But these telephone-company-provided video programming services grew, however slowly, thereby offering competition to the video programming services of the incumbent cable service providers—leading to cable service deregulation in some regions.³⁶

Such telephone-based video programming services are not the only competition to cable service. For example, Netflix earned 49 million domestic subscribers to its online streaming service (which launched in 2007) through 2016.³⁷ Countless other online streaming services have launched, too—Hulu, Sling TV, and YouTube TV, to name only a few.³⁸ These online streaming services offer a competitive challenge to cable service, as they have led some consumers to “cut the cord” and decline cable service in favor of these internet-delivered alternates, and they have induced some cable service providers to offer a wider range of more compelling programming.³⁹ But these online streaming services are essentially meaningless to the statute’s “effective competition” test: They neither are offered by a telephone company, nor

32. 47 U.S.C. § 543(l)(1)(D).

33. See, e.g., Tejas N. Narechania, *Machine Learning as Natural Monopoly*, 107 IOWA L. REV. 1543, 1560–63 (2022) (explaining how rate regulation substitutes for competition’s effects in monopoly markets).

34. See *U-verse Timeline*, AT&T, (2008), <https://www.att.com/Common/merger/files/pdf/U-verse%20Timeline41907.pdf>.

35. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 30 FCC Rcd. 3253 ¶ 2 (2015); see also NÜECHTERLEIN & WEISER, *supra* note 7, at 27.

36. E.g., Coxcom, Inc., 25 FCC Rcd. 2106 (2010); see also Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, 33 FCC Rcd. 1268, at Attachment 1 (2018) (noting that the Commission “considers AT&T U-verse as a competing service for the purpose of findings of effective competition”) [hereinafter 2018 Cable Prices Report].

37. See NETFLIX INC., ANNUAL REPORT (FORM 10-K) FOR 2017 at 19.

38. See, e.g., 2014 MVPD NPRM, *supra* note 2, ¶ 13.

39. E.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 30 FCC Rcd. 3253 ¶¶ 3, 96–100 (2015).

satisfy any other test for effective competition, and so none have led to the deregulation of local cable service rates.

B. *MDTC v. FCC*, OR THE COMMISSION'S TWO BAD OPTIONS

Cable service providers thus face growing competition from varied sources. In some locales, telephone companies invested in facilities improvements to offer video programming services over their upgraded networks. Nationwide, new online streaming services began to offer access to video content over existing internet connections.

In 2016, AT&T launched DirecTV Now, a novel service sitting at the intersection of these two classes of competitors.⁴⁰ Like U-verse, it is offered by a telephone company (namely, AT&T). But, like Hulu and YouTube TV, DirecTV Now is delivered over an existing internet connection, rather than provisioned over an improved telephone network.

Hence, when Charter filed a novel petition asking the Federal Communications Commission to deregulate cable service rates in view of DirecTV Now—contending that it now faced “effective competition” from a streaming competitor supplied by a local exchange carrier—it forced the Commission to confront deeper questions regarding the sorts of competition that count as “effective” and the nature of Charter’s core service.⁴¹ Is Charter primarily in the business of offering the transmission of programming or the programming itself?⁴² And which matters more—competition among video programming services and applications, or competition among transmission services?

Charter (now marketed to consumers under the brand Spectrum) was the sole provider of cable service across a range of communities in Massachusetts. In view of that monopoly, the state regulated Charter’s cable service rates in those locales.⁴³ In 2018, however, Charter sought to escape the state’s regime, filing a petition with the Commission contending that DirecTV Now effectively competed with its existing cable service, given DirecTV Now’s

40. See Thomas Gryta, *As AT&T's DirecTV Now Streaming Service Is Unveiled, Watch the Details*, WALL ST. J. (Nov. 28, 2016).

41. See Petition for Determination of Effective Competition In 32 Massachusetts Communities and Kauai, HI (HI0011), 2019 WL 5558896, FCC No. 19-110, (Oct. 25, 2019) [hereinafter Charter Effective Competition Order].

42. This question echoes, of course, in a question that sits at the core of the legal network neutrality debates, namely, whether broadband carriage is primarily an internet transmission service or a transmission service bundled with associated information services. See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); see also Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019); U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016).

43. Charter Effective Competition Order, *supra* note 41, ¶ 3.

comparable service quality and the widespread availability of broadband internet access.⁴⁴ Other broadband-dependent services (like Hulu and YouTube TV) might also be thought to offer comparable service quality.⁴⁵ But DirecTV Now was different in one important—though perhaps accidental—respect: It was owned by a telephone company (AT&T). Hence, now that one of these online competitors, DirecTV Now, finally qualified under the Act’s relatively narrow conception of effective competition (as telephone-company-owned), Charter asked the Commission to at last acknowledge the fact of competition in the modern market for video programming services among cable services (like Charter’s) and online video applications (like Hulu and YouTube TV—and now DirecTV Now).

Massachusetts’s reply, however, drew a starkly different conclusion from the difference between Hulu and YouTube TV on the one hand, and DirecTV Now on the other: If Hulu and YouTube TV don’t count as effective competition, then neither should DirecTV Now.⁴⁶ This was because competition among transmission providers—not programming providers—is paramount, and AT&T had not deployed upgraded transmission facilities in these local Massachusetts communities to offer DirecTV Now.⁴⁷ Hence, the accident of DirecTV Now’s corporate structure could not, in the state’s view, adequately differentiate this service from the other streaming services that had so far mattered not at all.

Rather, Massachusetts explained that access to these competing video programming services hinged on Charter’s monopoly over local cable facilities. Residents had to buy internet access from Charter before subscribing to

44. In particular, the statute requires that an exchange carrier “offer” video programming services to subscribers “directly” “by any means.” Charter argued—and the Commission found—that AT&T indeed “offered” this service to its subscribers, that services offered over broadband facilities count as among those offered “by any means,” and that AT&T’s close advertising and billing relationship with subscribers meant that it was offered “directly.” Charter Effective Competition Order, *supra* note 41, ¶¶ 11–12, 16–21; *see also* Mass. Dep’t of Telecomms. & Cable v. FCC, 983 F.3d 28, 33 (1st Cir. 2020).

45. The Commission explains that a competitor offers comparable service if it offers “at least 12 channels of video programming, including at least one channel of non-broadcast service programming.” Charter Effective Competition Order, *supra* note 41, ¶ 13. Hulu’s Live TV service and YouTube TV meet that standard. *See Hulu + Live TV*, HULU, <https://www.hulu.com/live-tv> (last visited Sept. 26, 2022); *YouTubeTV*, YOUTUBE, <https://tv.youtube.com/welcome/> (last visited Sept. 26, 2022).

46. Specifically, Massachusetts contended that “directly” modifies the statutory phrase “by any means,” requiring that the telephone company offer its video programming by some direct means—e.g., telephone facilities—rather than indirectly, over a third-party connection. *See* Brief for MDTC at 24–25, MDTC v. FCC, 983 F.3d 28 (1st Cir. 2020) (No. 19-2282).

47. *See, e.g.*, Charter Effective Competition Order, *supra* note 41, ¶ 18.

DirecTV Now (or Hulu, or YouTube TV).⁴⁸ Massachusetts thus suggested that, in view of the 1996 Act's broader purpose in inducing facilities investment and spurring competition among transmissions services providers, the local exchange carrier test for effective competition is best understood as requiring facilities-based competition: Charter's cable service offered over Charter's cable facilities versus AT&T's video programming service offered over AT&T's upgraded telephone network.⁴⁹ But Charter's petition, said Massachusetts, asks the Commission to find effective competition in a monopoly market—Charter's cable service offered over Charter's facilities versus Charter's internet service (and a separate subscription to DirecTV Now) offered over Charter's facilities. Market competition is hardly effective if only

48. See *infra* Part III.A (noting that Charter retains its monopoly status as to broadband carriage, just as with cable service).

49. See, e.g., MDTC's Petition for Rehearing *En Banc* at 8–9, 19–20, MDTC v. FCC, 983 F.3d 28 (1st Cir. 2020) (No. 19-2282).

For evidence that Massachusetts's view better reflects Congress's intent, see, e.g., H.R. Rep. 102-628 (1992) at 43–44 (emphasizing competition among “delivery systems” for video programming); *id.*, at 44 (explaining that “the public interest is served by ... competition” among different facilities operators, and thus aiming to “encourage ... robust competition” from “wireless and private cable systems, cable overbuilds, and [satellite-based providers].”); see also 141 Cong. Rec. S8225-01, S8243, 1995 WL 353211 (June 13, 1995) (statement of Sen. Pressler) (emphasizing the capacity of telephone networks to deliver video programming); H.R. Rep. No. 102-862 (1992) (Conf. Rep.) (stating that the “conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable”); Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, 8 FCC Rcd. 3359, 3384, n.79 (1993) (finding that “[f]acilities-based competition” is a term used in the legislative history of the Act to emphasize that program competition can only become possible if alternative facilities to deliver programming to subscribers are first created. The focus in the 1992 Cable Act is on assuring that facilities-based competition develops”).

against oneself.⁵⁰ Indeed, freeing Charter of Massachusetts’s regulations threatened to double prices for some consumers.⁵¹

In all, both Charter and Massachusetts asked the Commission to reach an unsatisfying and incomplete conclusion. Charter asked the Commission to finally recognize competition among video programming services, cable and online alike—but, in so doing, asked the Commission to ignore its monopoly over the communications facilities necessary to access those services. Massachusetts asked the Commission to recognize Charter’s persistent facilities-based monopoly over certain transmissions services (including broadband carriage)—but, in so doing, asked the Commission to ignore the ever-increasing variety of video programming services beyond cable. In short, the Commission had to choose between subjecting one service in a competitive market to continued regulation and deregulating a monopoly provider of transmission services, all because the statutory design conflates these distinct services.

C. CONSOLIDATION IN TRANSMISSION

The Commission chose to grant Charter’s petition, deregulating the monopoly provider,⁵² and the Commission subsequently granted similar petitions from Comcast and Cox, finding it “irrelevant” that each of “th[os]e incumbent cable operator[s] [was] the only entity providing broadband internet

50. *But see* FCC, COMMUNICATIONS MARKETPLACE REPORT, GN Docket No. 20-60, 2020 WL 8025117, *40 ¶ 45 (Dec. 31, 2020) (contending, rather implausibly, that “competitive pressures often have spillover effects across a given provider” such that providers “will tend to treat customers that do not have a competitive choice as if they do”); Restoring Internet Freedom, 33 FCC Rcd. 311, 383–85, ¶¶ 126–27 (2017); *but see also* Mozilla v. FCC, 940 F.3d 1, 58 (D.C. Cir. 2019) (similarly suggesting that consumers in markets “with fewer than two providers,” i.e., markets with only one provider, “may also reap the benefits of competition” because of intrafirm spillover effects). Of course, policymakers have not seen it that way in other contexts. *See, e.g.*, Impact of Consolidation on the Aviation Industry, with a Focus on the Proposed Merger Between Delta Air Lines and Northwest Airlines, Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. & Infrastructure, 110th Cong. (2008) (statement of James J. O’Connell) (explaining that the Justice Department’s Antitrust Division evaluates the competition effects of airline mergers on the basis of city-pairs (nonstop routes), rather than on a nationwide basis); *see also* Amended Complaint ¶ 31, United States v. Nw. Airlines Corp., No. 98-CV-74611 (E.D. Mich. Dec. 18, 1998). Indeed, the data presented in this Article, *infra* Tables 2–3, suggests that, even within a single locality, broadband carriers offer different prices based on competitive conditions, undermining the Commission’s thesis (which *Mozilla* adopts) of intrafirm spillover effects.

51. *See* Charter Effective Competition Order, *supra* note 41, at *16 (Rosenworcel, Comm’r, concurring) (“According to the record in this proceeding, some consumers in the states affected by this proceeding can expect that rates for the basic cable service tier will double.”).

52. Charter Effective Competition Order, *supra* note 41, ¶ 29.

access enabling the [competing] streaming service” in its respective footprint.⁵³ In short, the Commission found that competition among applications, rather than among facilities, mattered more.

Even if the Commission’s choice is a plausibly defensible interpretation of the Act’s bare terms, that choice may seem inconsistent with the Act’s legislative purpose, particularly in view of its adverse social consequences (namely, reducing access to communications facilities by way of higher prices).⁵⁴ The U.S. Court of Appeals for the First Circuit affirmed the Commission’s decision, finding, under *Chevron*’s deferential approach, that the Commission reasonably concluded that DirecTV Now is “offer[ed] ... directly to subscribers by any means” by interpreting this text to require only a direct commercial relationship (rather than a direct physical link through, say, an upgraded telephone network).⁵⁵ But, as noted *supra*, Massachusetts’s approach to assessing the effectiveness of competition better embodies the purposes of the Communications Act’s 1992 and 1996 amendments, which emphasized facilities-based competition.⁵⁶ And so the Commission’s approach may seem unreasonable when viewed through the lens of those amendments’ legislative purposes.⁵⁷

But my present project is not to relitigate Massachusetts’s dispute with Charter. Rather, I aim to more squarely address the conceptual difficulty at the core of the Commission’s conclusion that DirecTV Now competes effectively

53. See, e.g., Charter Effective Competition Order, *supra* note 41, ¶ 23; Petition of Comcast Cable Commc’ns, LLC for a Determination of Effective Competition in Mass. Communities Listed in Appendix A; Petition of Coxcom, LLC d/b/a Cox Commc’ns for a Determination of Effective Competition in Holland, Mass. (MA0321), 2020 WL 7258817, ¶¶ 11–12 (MB Docket Nos. 19-385, 20-10) (Dec. 7, 2020).

54. See Charter Effective Competition Order, *supra* note 41, at *15 (Rosenworcel, Comm’r, concurring) (“To the extent that the relief requested in the petition before us fits within the law, then the law, frankly, is showing its age.”); *id.* at *16 (Starks, Comm’r, concurring).

55. MDTC v. FCC, 983 F.3d 28 (1st Cir. 2020); 47 U.S.C. § 543.

56. See *supra* notes 49, 54 and accompanying text.

57. See *supra* note 49 (suggesting that Massachusetts’s view better models Congress’s intent) and, collectively, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 & n.12 (1987) (using legislative intent to determine whether a provision is ambiguous for purposes of *Chevron*’s Step One inquiry); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (using legislative intent to determine whether an agency regulation is reasonable for purposes of *Chevron*’s Step Two inquiry). In short, when accounting for legislative intent, the Commission’s interpretation of the Act may seem unreasonable, even under *Chevron*. But see MDTC, 983 F.3d at 34–36 (agreeing with the Commission’s view that a direct commercial (for example, advertising and billing) relationship was sufficient to satisfy the “offer[ed] ... directly” prong of the statute, notwithstanding Massachusetts’s contention that only video programming services offered by “direc[t] ... means” should count); compare *supra* note 44 (describing Charter’s statutory arguments) with *supra* note 46 (describing Massachusetts’s).

with Charter: DirecTV Now may indeed compete with Charter's video programming service, but it also relies on Charter's transmission service, namely, its broadband carriage service. In short, there is some competition in the application layer, but none in the transmission layer. Charter thus controls the price of both competitive options in the applications market, since no matter whether a subscriber in Massachusetts chooses to watch cable or DirecTV Now (or, for that matter, Hulu or YouTube TV), she must pay Charter, either for cable service or for internet service. Hence, in terms of price, Charter's cable service need only compete with its own internet service (combined with the costs of a subscription to an online streaming service).⁵⁸ Notwithstanding competition among application-layer video programming services, Charter thus retains significant monopoly power over the relevant transmission facilities. Such monopoly power gives Charter power over both consumers and competitors.⁵⁹

III. A CASE FOR BROADBAND FACILITIES REGULATION

Charter remains a local monopolist, notwithstanding the Commission's conclusion that it faces effective competition from services like DirecTV Now. I do not mean to suggest that online streaming services do not compete with cable service—they can, as I note above, present a threat to cable television service and induce improvements in cable programming.⁶⁰ But where Charter, for example, retains monopoly control over local cable facilities—facilities used to deliver cable television content as well as a wide range of internet-based content (from video to voice and beyond)—it holds significant power to charge supracompetitive rates for internet access service, and thereby also avoid competition to its cable service. In short, Charter can charge high prices for broadband carriage, and this power over these transmission rates also gives

58. I do not mean to suggest that price competition is entirely apart from quality competition. *Cf. infra* text accompanying note 169 (noting that, consumer welfare may decrease, even when prices fall, if quality falls too). Rather, I simply mean to point out that Charter exerts control over the price-dimension of competition for both sets of competitive options in the market, traditional cable television and internet-enabled video programming applications.

59. I focus in this Article on broadband monopolists' power over consumers. Their power over competitors in adjacent (e.g., applications) markets (through, say, exclusionary behavior) is at issue in other policy debates, including network neutrality debates. *See generally*, Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 142 (2003) (proposing network neutrality protections); *see also* Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral? Tim Wu and Christopher Yoo Debate*, 59 FED. COMM'NS L.J. 575, (2007) (debating the need for network neutrality protections).

60. *See supra* note 38 and accompanying text (citing Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 30 FCC Rcd. 3253 ¶¶ 3, 96–100 (2015)).

it significant power to escape price competition with online video applications (because these high broadband carriage rates make online video services even more expensive), thereby distorting competition in the applications market.

One longstanding policy response to such monopoly power over communications facilities has been rate regulation.⁶¹ Indeed, broadband rate regulation helps to address the difficulty at the heart of *MDTC* by addressing monopoly power in the transmission market, while leaving alone the competitive market for applications. Ratesetting is a highly-contested policy, raising concerns about capture, depressed investment, information asymmetries, and regulatory failure, among others.⁶² But these concerns notwithstanding, rate regulation has proved effective at advancing communications policy's most basic aim—facilitating communication—by increasing connectivity through affordability.⁶³ By controlling monopoly prices, rate regulation makes communication cheaper across a wide range of contexts.⁶⁴ Expanding the reach of these communications systems, moreover, increases the social value of our communications networks through, say, positive network effects. And, as I elaborate below, forms of rate regulation have already proved effective in some broadband contexts. We should thus consider similar solutions to the problems of monopoly control over broadband facilities and the persistent affordability concerns for broadband carriage—concerns that have been thrown into stark relief in the wake of the COVID-19 pandemic.⁶⁵

61. NUECHTERLEIN & WEISER, *supra* note 7, at 32–33.

62. *See, e.g.*, NUECHTERLEIN & WEISER, *supra* note 7, at 32–35; Nuechterlein & Shelanski, *supra* note 21. I address such concerns *infra* Part IV.B.4.

63. *See, e.g.*, *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 663–64 (1994) (describing as “a basic tenet of national communications policy” “the widest possible dissemination of information from diverse and antagonistic sources”); *see also* Susan P. Crawford, *The Internet and the Project of Communications Law*, 55 UCLA L. REV. 359, 364 (2007) (“[T]he highest priority of communications policy should be to facilitate human online communications....”).

64. Recently, for example, the Commission has sought to regulate the rates charged by providers of inmate calling services, both to address the market failures in that market and to improve the affordability of this vitally important communications service. *See, e.g.*, *Global Tel*Link v. FCC*, 866 F.3d 397 (D.C. Cir. 2017) (reviewing some such regulations). Much commentary—including my own—has focused on the Commission's failure to address rates for intrastate service. *See, e.g.*, Jon Brodtkin, *Ajit Pai Urges States to Cap Prison Phone Rates After He Helped Kill FCC Caps*, ARSTECHNICA (July 21, 2020, 10:49 AM). And so, I should also give credit where it is due: The Commission's efforts to address rates for interstate service have been successful. *See, e.g.*, Jon Brodtkin, *FCC Lowers Some Prison Phone Rates After Blaming States for High Prices*, ARSTECHNICA (Aug. 6, 2020, 12:58 PM) (describing the successes, if partial, of the FCC's regulation of interstate rates charged by providers of inmate calling services providers).

65. *See, e.g.*, Eileen Guo, *The High Price of Broadband Is Keeping People Offline During the Pandemic*, MIT TECH. REV. (Feb. 3, 2021).

A. BROADBAND MONOPOLISTS

Before I consider questions of monopoly effects and concomitant policy responses, it is worth interrogating the premise of monopoly status: Is, say, Charter a broadband carriage monopolist in those locales where its cable service would be rate regulated (as a cable monopolist) but for the Commission's DirecTV Now decision? It is.

Charter was subject to rate regulation as a cable monopolist in thirty-two Massachusetts communities, home to over a half-million residents.⁶⁶ Where a provider is a local cable service monopolist, it is likely also a broadband carriage monopolist. This is due to cable's growing dominance in the market for broadband carriage: "The cable companies' wires [are] capable of transmitting high volumes of video data (such as multiple television channels), and so are comparatively well-suited to transmit high volumes of internet data, too."⁶⁷

Other communications facilities providers are, by contrast, generally less adapted to provide reliable broadband carriage. As noted *supra*, telephone providers have only sporadically upgraded their networks to incorporate high-capacity facilities (for example, those capable of delivering a competing video programming service, or a broadband internet connection), and thus offer reliable broadband carriage in only some locales.⁶⁸ Indeed, in some communities, telephone companies such as AT&T have stopped selling broadband carriage altogether.⁶⁹ And the Federal Communications Commission has repeatedly explained that satellite- and wireless-based broadband services are not (or, at least, not yet) functional substitutes for fixed wireline services (for example, cable-based internet access).⁷⁰

66. Charter Effective Competition Order, *supra* note 41, ¶ 1.

67. Narechania & Stallman, *supra* note 3 (citing Richard R. Green, *Cable Television Technology Deployment*, in THE UNPREDICTABLE CERTAINTY: INFORMATION INFRASTRUCTURE THROUGH 2000, NAT'L RSCH. COUNCIL COMPUT. SCI. AND TELECOMMS. BD. 263 (1997), <https://www.nap.edu/read/6062/chapter/34#263> [<https://perma.cc/5LA3-5HJV>]).

68. See *supra* note 34–35 and accompanying text.

69. Rob Pegoraro, *AT&T Shelving DSL May Leave Hundreds of Thousands Hanging by a Phone Line*, USA TODAY (Oct. 3, 2020 11:53 AM). Often, a phone company's decision to invest in upgraded facilities is shaped by the existence of other competition. See, e.g., NUECHTERLEIN & WEISER, *supra* note 7, at 26. Such investments may tend to aggravate the digital divide. Locations already served by high-capacity providers are overbuilt, directing available funds for capital investments away from unserved and underserved communities and leading companies such as AT&T to retire service in such communities instead. See Jon Brodtkin, *AT&T Kills DSL, Leaves Tens of Millions of Homes Without Fiber Internet*, ARSTECHNICA (Oct. 5, 2020).

70. In respect to satellite services, the Commission has explained that "[w]hile satellite signal coverage may enable operators to offer services to wide swaths of the country, overall satellite capacity may limit the number of consumers that can actually subscribe to satellite service at any one time." Indeed, the true adoption rate of satellite internet access service, as

A detailed examination of the Commission’s broadband competition data regarding Charter’s formerly rate-regulated footprint helps to confirm the view that cable service monopolists are typically also broadband monopolists. As Table 1 demonstrates,⁷¹ about 502,000 out of the approximately 512,000 residents in the thirty-two formerly rate-regulated communities have only one

compared against all comparable internet access subscriptions, is about 1% (notwithstanding coverage that spans over 99% of the nation). *See, e.g.*, FCC, FOURTEENTH BROADBAND DEPLOYMENT REPORT (2021) ¶ 27 n. 121 (noting that the FCC’s data shows the “adoption rate for satellite services (residential subscriptions divided by deployed households) for 10/1 Mbps [to be] 1%” (citation omitted)); *see also* Nilay Patel, *Starlink Review: Broadband Dreams Fall To Earth*, THE VERGE (May 14, 2021 10:00 AM EDT) (describing “Starlink, a new satellite internet service from SpaceX,” as a “beta product that is unreliable, inconsistent, and foiled by even the merest suggestion of trees”). Moreover, this figure may be close to the ceiling for a satellite-based broadband service. Leading industry analysts have found that, given Starlink’s “available capacity and anticipated usage,” the service can likely accommodate between “300,000 to 800,000 households, or less than 1% of the US market.” Even accounting for “aggressive assumptions” on future expansion, the service could expand to only “6 million customers” or about 5.7% of the total existing market for fixed broadband subscriptions. *See* Jeff Baumgartner, *Starlink’s Threat To Wired Broadband ‘Minimal’—Analyst*, LIGHT READING (Apr. 5, 2021), <https://www.lightreading.com/satellite/starlinks-threat-to-wired-broadband-minimal—analyst-/d/d-id/768528> (citing Craig Moffett’s analysis); *see also* FCC, COMMC’NS MARKETPLACE REPORT, GN Docket No. 20-60, 2020 WL 8025117, *37 Fig. II.B.8 (2020) (estimating 104.68 million fixed residential broadband subscriptions).

In respect to wireless broadband, the Commission has suggested that the availability of fixed wireless broadband service, when accounting for capacity, is—like satellite service—overstated. *See, e.g.*, FCC, FOURTEENTH BROADBAND DEPLOYMENT REPORT (2021) ¶ 28 & n. 123 (finding that, though fixed wireless services appear to be “widely available,” “the adoption rate for fixed wireless services of at least 10/1 Mbps was 2%,” and so concluding that the deployment data may overstate the availability of fixed wireless broadband carriage); *see also* NAT’L TELECOMMS. INFO. ADMIN, NOTICE OF FUNDING OPPORTUNITY—BROADBAND EQUITY, ACCESS, AND DEPLOYMENT PROGRAM, <https://www.internetforall.gov/program/broadband-equity-access-and-deployment-bead-program> (last visited Sept. 26, 2022) (classifying only some fixed wireless providers as a “reliable broadband service,” namely, drawing a distinction between services that use licensed spectrum and those that use only unlicensed spectrum); *Charter, Like Comcast, See Sputtering Broadband Growth* COMMC’NS DAILY (Aug. 1, 2022) (explaining that fixed wireline providers consider competition from fixed wireless services to be “relatively small” and unlikely to “have a big impact”). And the Commission has repeatedly determined that “fixed and mobile services are not full substitutes” but rather that “users generally treat fixed and mobile services as complements rather than substitutes,” particularly in light of the vast differences in capacity allowances (i.e., data caps) between the services. *See, e.g.*, FCC, FOURTEENTH BROADBAND DEPLOYMENT REPORT (2021) ¶ 10–11.

I concur with the Commission’s assessment that these services are not yet functional substitutes for fixed wireline broadband carriage, though I consider the possibility that they may eventually evolve to become competitive substitutes *infra* Part IV.B.3 and Appendix A.

71. I describe the data collection methods underlying Table 1 (as well as the Table’s asterisk notations) in Appendix B.

option for broadband internet access—Charter.⁷² About 1,000 are unserved entirely. Fewer than 9,000—less than two percent—can choose from multiple providers (and this likely overstates competition, as the Commission’s data is widely understood to be systematically overinclusive).⁷³

72. Here and throughout, I focus on fixed wireline providers. *See supra* note 70 and accompanying text. The Commission has taken an inconsistent approach to its treatment of satellite-based broadband services in its presentations of broadband-related data. In its congressionally mandated broadband deployment reports, the Commission has excluded satellite services from its analysis, reasoning that capacity constraints sharply limit the number of subscribers that such services may actually support. *See, e.g.*, FCC, FOURTEENTH BROADBAND DEPLOYMENT REPORT (2021) ¶ 50–51 & n. 148. But in other reports, the Commission has—largely without explanation—included satellite-based services. *See, e.g.*, FCC, WIRELINE COMPETITION BUREAU, INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION, INTERNET ACCESS SERVICES: STATUS AS OF DECEMBER 31, 2018 (Sept. 2020) at 6 fig. 4. It seems that this is a relatively recent change in the Commission’s practice: In an analogous report issued in November 2018, the Wireline Competition Bureau seems to have excluded such data from its calculations. FCC, WIRELINE COMPETITION BUREAU, INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION, INTERNET ACCESS SERVICES: STATUS AS OF JUNE 30, 2017 (2018) at 6 fig. 4. I follow the Commission’s reasoned practice of excluding satellite data from such tabulations, declining to adopt its more recent and unreasoned shift in selected reports.

73. *See generally* David Major, Ross Teixeira & Jonathan Mayer, No WAN’s Land: Mapping U.S. Broadband Coverage with Millions of Address Queries to ISPs, IMC 2020 - PROCEEDINGS OF THE 2020 ACM INTERNET MEASUREMENT CONFERENCE 393. If any one household in a census block is served by a provider, then the Commission counts the entire block as served by that provider, causing the Commission to overstate coverage. *See* FCC, FOURTEENTH BROADBAND DEPLOYMENT REPORT (2021) ¶ 22. Moreover, if two providers serve a single census block, that block is marked as competitive, even if the two providers do not compete to serve any given address within the census block (for example, if Provider 1 serves only the northern half of the block while Provider 2 serves only the southern half). *See* Michelle Andrews, Katie Kienbaum, Christopher Mitchell, Ny Ony Razafindrabe, H. Trostle, PROFILES OF MONOPOLY: BIG CABLE AND TELECOM (Aug. 2020) 3, https://ilsr.org/wp-content/uploads/2020/08/2020_08_Profiles-of-Monopoly.pdf.

Table 1: Available Broadband Service for Residents in Charter's Formerly Regulated Footprint

<u>Community</u>	<u>No Service</u> (Population)	<u>Monopoly Service</u> (Population)	<u>Competitive Service</u> (Population)
Auburn	5	15,659	375
Belchertown	18	15,478	470
Brimfield	2	3,529	78
Brookfield	4	3,366	15
Charlton	-	12,719	105
Chicopee	12	53,282	849
Dalton	-	6,276	378
Dudley	-	10,520	33
East Brookfield	-	2,183	-
East Longmeadow	7	14,707	563
Easthampton	-	4,496	309
Hadley	3	4,697	385
Hampden	11	5,035	-
Harvard*	2	4,996	230
Holden	10	16,476	721
Lee	-	5,739	43
Lenox	-	4,588	180
Ludlow	2	19,457	412
Paxton	2	4,289	-
Pepperell	2	11,297	189
Pittsfield	-	43,185	368
Richmond**	638	1,778	-
Southampton	-	5,792	-
Spencer	10	11,606	-
Stockbridge	-	1,808	-
Sturbridge	-	9,246	10
Upton	44	6,249	1,241
Uxbridge	-	13,356	49
West Boylston	-	6,361	-
West Brookfield	2	3,356	185
Wilbraham	4	13,944	11
Worcester	40	167,128	1,725
TOTAL	818	502,598	8,924

Such results are not limited to Charter. As noted above, shortly after the Commission agreed to deregulate Charter in view of DirecTV Now, it granted similar petitions from Comcast and Cox.⁷⁴ Here, too, we see that most residents must obtain broadband carriage through a local monopoly provider.⁷⁵ Comcast's formerly regulated footprint encompasses nearly two million residents, of which less than five percent enjoy the benefits of competition (concentrated primarily in Concord and Westfield, Massachusetts). Salem, meanwhile, is haunted by monopoly service: Only 53 (out of over 39,000) residents can choose from more than one broadband provider. Likewise, 94 percent of Cambridge residents have only one choice for broadband carriage. And in Cox's formerly regulated territory of Holland, Massachusetts, 93 percent of residents have only one available provider.

Broadband monopolies, moreover, are widespread, ranging far beyond the subset of communities across Massachusetts examined in detail above. Charter, for example, was (before its DirecTV Now petition) deemed a cable monopolist not only in Massachusetts, but in parts of Hawai'i as well—and so it is quite likely a broadband monopolist there, too.⁷⁶

Generally, the Commission's broadband deployment estimates, which, as noted, tend to overstate competition, suggest that about 20 percent of the nation's population is served by a broadband monopolist.⁷⁷ Other estimates

74. See, e.g., Charter Effective Competition Order, *supra* note 43, ¶ 23; *Petition of Comcast Cable Communications, LLC for a Determination of Effective Competition in Massachusetts Communities Listed in Appendix A*; *Petition of Coxcom, LLC d/b/a Cox Communications for a Determination of Effective Competition in Holland, Massachusetts (MA0321)*, 2020 WL 7258817, ¶¶ 11–12 (MB Docket Nos. 19-385, 20-10) (Dec. 7, 2020) (Memorandum Opinion & Order) (finding it “irrelevant” that each of “th[os]e incumbent cable operator[s] [are] the only entity providing broadband internet access enabling the [competing] streaming service” in their respective footprints).

75. See *infra* Tables 4–5. But see *supra* note 73 (explaining how the Commission's broadband deployment estimates tend to systematically overstate coverage).

76. See Charter Effective Competition Order, *supra* note 41.

77. See, e.g., FCC, COMMUNICATIONS MARKETPLACE REPORT, GN Docket No. 20-60, 2020 WL 8025117, *45 Fig. II.B.23 (2020) (estimating that 21.9% of the population is monopoly served (using the Commission's metric for broadband service)); see also FCC, WIRELINE COMPETITION BUREAU, INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION, INTERNET ACCESS SERVICES: STATUS AS OF JUNE 30, 2017 (2018) at 6 fig. 4 (noting that 18 percent of inhabited census blocks are served by only one provider at broadband levels (excluding satellite providers)). I cite the Commission's 2018 release of this report in favor of the 2020 release of this report because of the unreasoned methodological changes to the Commission's analysis presented in its more recent version. See *supra* note 73.

Notably, the Commission's 2018 finding that the percentage of the monopoly-served population is greater than the percentage of the monopoly-served census blocks may suggest that monopoly service is a problem that extends beyond rural or other comparatively sparsely populated areas. See, e.g., Eduardo Porter, *A Rural-Urban Broadband Divide, but Not the One You Think Of*, N.Y. TIMES (June 1, 2021) (describing and challenging the longstanding

are more pessimistic, some suggesting that over 80 million Americans must turn to a monopolist for broadband carriage. Others, defining broadband somewhat more narrowly, find that over two-thirds of Americans “don’t have the option to switch to a second high-speed provider.”⁷⁸ Indeed, out of the approximately 30,000 communities served by cable television providers (and recall that cable television monopolists are likely broadband monopolists, too), as many as two-thirds, encompassing over half of all cable subscribers, were never found have an effective facilities-based competitor.⁷⁹ And this after two decades of policies aimed at boosting facilities-based competition in local cable markets. In short, notwithstanding the ever-increasing competition among application-layer services, there is a persistent and widespread problem of local

assumption that rural communities are underserved, and highlighting access and affordability gaps in more densely-populated urban areas); John Hendel, Not-So-Remote Areas with Internet ‘Black Holes’ Renew Fight for Broadband, POLITICO (June 3, 2021) (explaining that though “[m]any people assume that America’s broadband problem is focused on far-flung areas,” in fact “the problem is also acute in . . . medium-sized cities” and in the “suburbs of cities like Philadelphia and Baltimore”).

78. See, respectively, Katie Kienbaum & Christopher Mitchell, *Report: Most Americans Have No Real Choice in Internet Providers*, (Aug. 12, 2020), <https://ilsr.org/report-most-americans-have-no-real-choice-in-internet-providers/> and Inti Pacheco & Shalini Ramachandran, *Do You Pay Too Much for Internet Service? See How Your Bill Compares*, WALL ST. J. (Dec. 24, 2019 10:00am ET), <https://www.wsj.com/articles/do-you-pay-too-much-for-internet-service-see-how-your-bill-compares-11577199600> (finding “that 68% of households in [its sample] don’t have the option to switch to a second high-speed provider,” where high speed providers are defined to encompass cable- and fiber-based providers while excluding DSL providers); see also JOHN BUSBY, JULIA TANBERK & TYLER COOPER, BROADBANDNOW RESEARCH, BROADBANDNOW ESTIMATES AVAILABILITY FOR ALL 50 STATES; CONFIRMS THAT MORE THAN 42 MILLION AMERICANS DO NOT HAVE ACCESS TO BROADBAND (May 5, 2021) (suggesting that the Commission overstates broadband availability by at least 6.5%); John Kahan, Chief Data Analytics Officer, Microsoft Corp., *It’s Time For a New Approach for Mapping Broadband Data to Better Serve Americans*, MICROSOFT BLOG (Apr. 8, 2019); Russell Brandom and William Joel, *This Is a Map of America’s Broadband Problem*, THE VERGE (May 21, 2021).

79. See 2018 Cable Prices Report, *supra* note 36, at Attachment 1. *But see* NATOA v. FCC, 862 F.3d 18 (D.C. Cir. 2017) (affirming the Commission’s decision to employ a rebuttable presumption that cable providers in all communities are subject to effective competition); Concerning Effective Competition, 80 Fed. Reg. 38001 (July 2, 2015) (explaining the decision to create such a rebuttable presumption by reasoning that the Commission had granted nearly all the petitions for effective competition it received, and speculating that no petitions were filed in many communities where competition existed because “the cable operator ha[d] not found it worthwhile to undertake the expense of filing an Effective Competition petition, perhaps because the vast majority of franchising authorities have chosen not to regulate rates”). That new rebuttable presumption, however, is based on the availability of satellite-based video programming services. See, e.g., NATOA, 862 F.3d 18 at 22–23. As I explain above, satellite-based broadband carriage—even if it were coterminous with satellite-based video programming services—is not a competitive substitute for fixed wireline broadband carriage. See *supra* note 70.

monopoly power in the most important modern transmission-layer service—broadband carriage.

B. BROADBAND MONOPOLY EFFECTS

So what? What exactly does it mean that at least 60 million Americans (and perhaps many more) face a broadband Hobson’s choice: the local monopolist, or nothing at all?

1. *Broadband Monopoly Pricing*

The theoretical price effects of monopoly service provision are well-trod. A monopolist faces no price or quality competition, and so is likely to charge a profit-maximizing price—a price that not only has significant welfare-depressing effects (through deadweight loss), but that may also yield distributive harms (as a regressive wealth transfer, especially for price-inelastic services such as broadband carriage).⁸⁰ In short, monopolists charge too much.

Evidence confirms the existence of this price effect in various local broadband carriage markets.⁸¹ For example, the Wall Street Journal found, in a notable study, that Comcast charges twelve percent less in regions where it is subject to broadband competition.⁸² And while the Wall Street Journal’s study is impressive in its breadth (encompassing a sample of nearly 2,700 retail

80. For the welfare effects of deadweight loss, see, for example, W. Kip Viscusi, Joseph E. Harrington, Jr. & John M. Vernon, *ECONOMICS OF REGULATION AND ANTITRUST* 82–84 (4th ed. 2005). For distributive effects of monopoly pricing, see, for example, Clark C. Havighurst & Barak D. Richman, *Who Pays? Who Benefits? Distributive Injustice(s) in American Health Care*, 69 *LAW & CONTEMP. PROBS.* 7, 38 (2006) (explaining that a consequence of “monopoly pricing” is the “regressive redistribution of income from consumers to producers”) And for the price-inelasticity of broadband, see, for example, NTCA, *EXPERT REPORT OF MICHAEL A. WILLIAMS & WEI ZHAO*, ¶¶ 71, 74 (May 7, 2020) <https://www.ntca.org/sites/default/files/documents/2020-05/2020-05-07%20-%20Williams-Zhao%20report%20Final.pdf>.

81. Broadband carriage markets are local. See Narechania & Stallman, *supra* note 3, at 603–04 (citing Applications of Comcast Corp. and Time Warner Cable, Inc. for Consent Pursuant to Section 214 of the Communications Act, as Amended, to Transfer Control of Subsidiaries of Time Warner Cable Inc., MB Docket No. 14-57, Joint Application of Time Warner Cable Inc. and Comcast Corporation, MB Docket No. 14-57, Apr. 8, 2014, ¶ 158; In the Matter of Applications of Comcast Corp. and Time Warner Cable, Inc. for Consent to Transfer Control of Subsidiaries of Time Warner Cable Inc., MB Docket No. 14-57, Opposition to Petitions to Deny and Response to Comments, Sep. 23, 2014, at 116 (explaining “[b]roadband service is sold on a local basis” and “the correct geographic market for broadband services is local, not national or even regional[.]”); In the Matter of Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 15-149, Opposition to Petitions to Deny and Response to Comments, Nov. 2, 2015, ¶ 32 (explaining that “[t]his consumer market is, of course, local because each consumer selects from options available at his or her location.”)).

82. Pacheco & Ramachandran, *supra* note 78.

bills), these analyses combine a wide range of locales—from Michigan to Massachusetts—before comparing prices across competitive conditions. The Commission has suggested that it can be difficult to systematically compare broadband carriage prices in this way, given the range in deployment costs across geographies.⁸³ But we can nevertheless get a sense of the effects of competition by comparing the rates charged and service quality offered by a single provider across geographically concentrated sets of locales.⁸⁴ My such study, elaborated below, reports similar findings: Monopolists charge more.⁸⁵

Using the Commission's data on broadband deployment, we can identify sets of reasonably proximate locales that are similar in salient respects except one—competitive conditions. Across such locales in neighboring California towns, for example, AT&T offers only one package, priced at \$45 per month for the first twelve months (and \$55 per month thereafter). But the service quality offered at this rate varies widely: Where AT&T is the only provider, that package offers, on average, download speeds of about 15 mbps—a service standard that falls below the Commission's 25 mbps benchmark for broadband. Nearby, where AT&T faces competition, that package yields average download speeds that are more than three times faster—50 mbps. Frontier's California offerings follow a similar pattern. Where Frontier is the sole provider, consumers pay about \$3.75 per mbps in download speeds. Faced with competition, Frontier charges consumers significantly less—approximately \$1.00—for similar service.⁸⁶

We see similar results for these providers even within a single community in Georgia. AT&T both operates as a monopolist and faces competition across

83. *See, e.g.*, International Broadband Data Report, 33 FCC Rcd. 978, Appendix C ¶¶ 7–8 (2018) ; *cf.* Narechania & Stallman, *supra* note 3 (describing how access network deployment varies across geographies).

84. Appendix B describes the data collection methods underlying these results in more detail.

85. Another study has uncovered results similar to those presented below, but for a provider not included in my data sample—Charter. That study, which examines prices in Rochester, NY, found that though Charter purported to offer standard prices nationwide, it offered discounts on those standard prices that varied substantially by competitive conditions. *See* Jon Brodtkin, *Charter Charges More Money for Slower Internet on Streets with No Competition*, ARSTECHNICA (May 27, 2021 1:32 PM), https://arstechnica.com/tech-policy/2021/05/charter-charges-more-money-for-slower-internet-on-streets-with-no-competition/?utm_brand=arstechnica.

86. Moreover, Frontier explains that the advertised monthly prices are subject to change after a 12-month promotional period—but declines to provide additional detail on pricing. I asked a research assistant to investigate further, but Frontier's customer service representative told the research assistant that she'd have to perform a credit check before offering additional information about rates and services. I told the research assistant to avoid that process, and I also avoided a seemingly needless credit check in order to obtain post-promotional rate information

varying census blocks in Watkinsville, a town of about 3,000. Where AT&T is a monopolist, it offers 5 mbps download speeds for \$55 per month. But four minutes away, where AT&T competes with Charter, it sells a 100 mbps service at the same price. Likewise, in Fairmount (Population: 900), monopoly-served customers pay Frontier \$3.75 per mbps in download speeds; less than two miles to the south, where Frontier competes with AT&T and Comcast, residents pay only \$0.48 per mbps.

These patterns remain consistent within communities in other states, too. Consider two residential addresses located less than a mile apart in Flagstaff, Arizona: where CenturyLink is a monopolist, consumers pay \$49 per month for 1.5 mbps download speeds; where CenturyLink faces competition, consumers pay the same price for download speeds of 40 mbps—more than 26 times as fast. Likewise, in Port Angeles, a coastal town northwest of the Seattle-Tacoma metropolitan area, CenturyLink offers a single package, sold at \$49 per month (a rate that includes discounts, perhaps ironic, for online orders). Where CenturyLink is the only provider, the \$49 package offers, on average, download speeds of up to 12 mbps; where CenturyLink faces competition, the \$49 package offers average download speeds more than twice as fast—30 mbps.

There is, to be sure, some variability in these findings. In Minnesota, for example, competition seems to have a somewhat muted effect on the quality of local broadband carriage. Where Frontier is a local transmission monopolist, consumers receive, on average, speeds of 12 mbps for a monthly price of \$44.99; where Frontier faces competition, consumers fare only slightly better with speeds of 20 mbps for the same price.⁸⁷

I could go on. Table 2, and Figures 1 and 2, summarize all these findings.⁸⁸ And for consistency's sake, Table 2 compares service by monopoly providers with service by providers facing competition using a “broadband carriage

87. It is possible that Frontier *advertises* higher speeds in competitive markets, without respect to whether it can actually deliver on those advertised promises. Mike Hughlett, *Frontier Communications Settles with Minnesota, Agrees to \$10M Upgrade To Broadband Network*, Minn. Star Tribune (July 14, 2020) (reporting Frontier agreed to settle claims that it failed to deliver on advertised broadband speeds for \$10 million); *see also* Complaint ¶ 61, *FTC v. Frontier Commc'ns*, No. 21-CV-04155 (C.D. Cal. May 19, 2021) (No. 1) (alleging that “Frontier has in numerous instances advertised, marketed, offered, or sold DSL Internet service at tiers corresponding to speeds that Frontier did not, and often could not, provide to consumers”).

88. I describe the data collection methods underlying Table 2 in Appendix B. Note that the horizontal axis in Figure 1 is truncated for readability. Truncated axes are sometimes used to misleadingly present data; for example, to exaggerate an otherwise minor change. Here, however, the truncated axis is used simply for readability purposes. My analysis does not depend on highlighting any one difference among the geographies studied and, in any event, highlights the significant difference between AT&T's service in competitive region in Georgia from the other studied locales.

value” metric, measured as average download speed per dollar.⁸⁹ Specifically, Table 2 reports the average broadband carriage value for packages offered within the specified communities at monopoly-served locales and at distinct competitively served locales. As I elaborate in Appendix B, which describes the data and methods underlying the findings presented throughout this Article, these prices generally exclude short-term (usually twelve-month) promotional discounts, and hence are based on monthly post-promotion prices, where such prices were available.⁹⁰

89. This measure is similar to a metric used by one of the broadband industry’s leading trade associations. See NCTA - The Internet & Television Association, *Setting the Record Straight About Broadband Pricing* (May 11, 2021), <https://perma.cc/M6ZJ-AUCQ> (comparing broadband service across locales by normalizing to a “quality-adjusted Price per Megabit per second” basis, whereas my results are reported as the inverse of that measure (i.e., mbps per dollar)).

90. See *supra* note 86 (explaining how one provider obfuscated post-promotion prices).

Table 2: Broadband Carriage Value (Download Speed Per Dollar)

<u>State</u> (Provider)	<u>Unregulated</u> <u>Monopoly</u> (Communities Surveyed)	<u>Competition</u> (<u>Communities</u> <u>Surveyed</u>)
Arizona (CenturyLink)	0.05 mbps / \$ (Flagstaff)	0.61 mbps / \$ (Flagstaff)
Arizona (Frontier)	0.20 mbps / \$ (Snowflake)	0.56 mbps / \$ (Snowflake)
California (AT&T)	0.28 mbps / \$ (Julian, Ramona)	0.91 mbps / \$ (Ramona)
California (Frontier)	0.27 mbps / \$ (Inyokern, Ridgecrest)	1.16 mbps / \$ (Inyokern)
Georgia (AT&T)	0.33 mbps / \$ (Bishop, Watkinsville)	6.31 mbps / \$ (Watkinsville)
Georgia (Frontier)	0.31 mbps / \$ (Fairmount, Ranger)	1.38 mbps / \$ (Fairmount, Ranger)
Minnesota (CenturyLink)	0.22 mbps / \$ (Cannon City, Faribault)	1.22 mbps / \$ (Faribault)
Minnesota (Frontier)	0.27 mbps / \$ (Green Isle, Henderson)	0.45 mbps / \$ (Henderson)
Montana (CenturyLink)	0.24 mbps / \$ (Bozeman)	1.43 mbps / \$ (Bozeman)
Montana (Ziply [formerly Frontier])	0.38 mbps / \$ (Troy)	0.61 mbps / \$ (Troy)
New York (Frontier)	0.30 mbps / \$ (Hemlock)	0.56 mbps / \$ (Hemlock)
New York (Windstream)	0.05 mbps / \$ (Kennedy)	1.12 mbps / \$ (Kennedy)
Washington (CenturyLink)	0.24 mbps / \$ (Port Angeles)	0.61 mbps / \$ (Port Angeles)
Washington (Ziply [formerly Frontier])	0.50 mbps / \$ (Kennewick)	1.37 mbps / \$ (Kennewick)
<u>Average</u> (across Geographies and Providers)	0.26 mbps / \$	1.31 mbps / \$

Figure 1: Broadband Carriage Value (Download Speed Per Dollar)

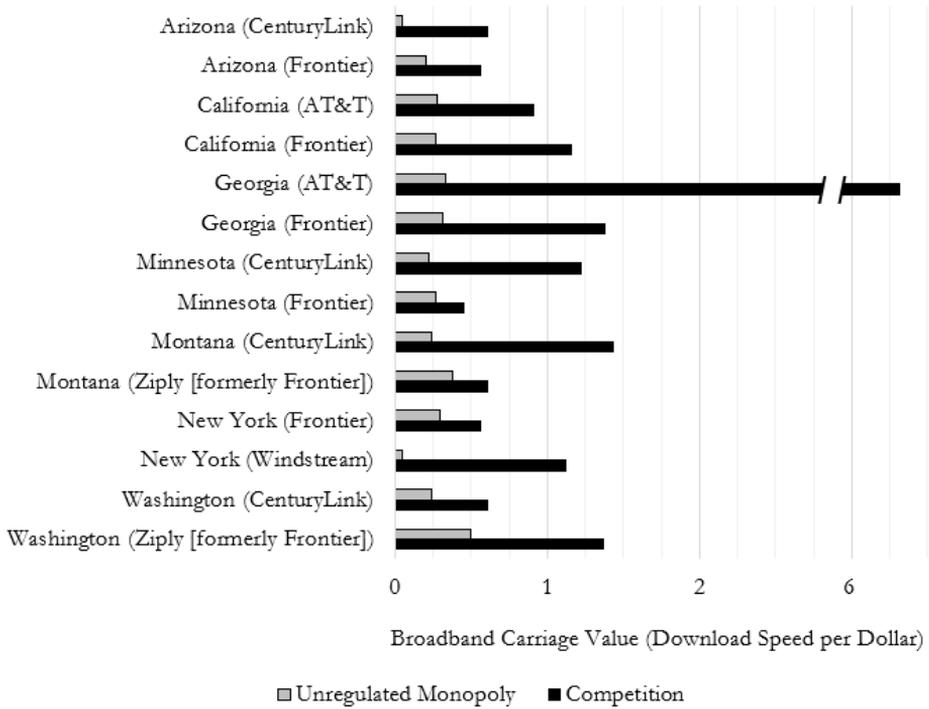
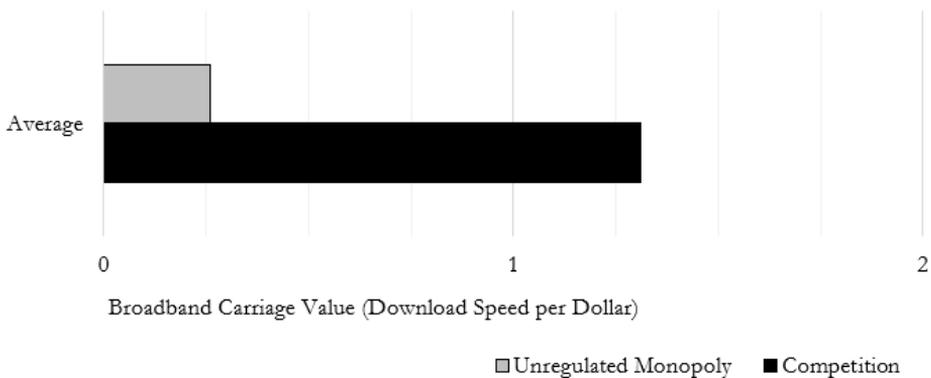


Figure 2: Broadband Carriage Value (Download Speed Per Dollar)



2. *On the Downstream Effects of Broadband Monopoly Pricing*

Such monopoly-informed price and service quality effects give rise to concrete implications for the millions of Americans who lack access to a competitive market for broadband carriage. One effect of this monopoly pricing is the loss of billions of dollars in consumer value.⁹¹ But the consequences of these persistent carriage monopolies extend far beyond regressive and welfare-reducing prices in the broadband carriage market. If we understand competition to meaningfully increase broadband carriage value not only by reducing prices, but also by improving service quality and increasing connectivity, then competition-driven gains can advance a wide range of further social benefits through increased access to application-layer services.

Broadband access plays an exceptionally important role in our nation's economic, educational, health, and civic infrastructure.⁹² Nearly twenty years ago, Peter Yu elaborated on the “unprecedented opportunities” made possible through internet access, including to both elevate the status of the indigent and

91. We can estimate this value by calculating a consumer's costs of a broadband carriage subscription at the Commission's current definition of broadband, 25 mbps downstream (understanding that such service may not be available, given technical limitations, in all areas). Assuming such a package, the average subscription rate in monopoly markets is \$96.15 per month, while it is \$19.08 per month in competitive markets, see Table 2, for a difference in \$77.07 per month (or \$924.84 per year). Moreover, the Commission estimates that there are 104.68 million fixed residential broadband subscriptions, and that 21.9% of the population is served by a monopolist. *See* FCC, COMMUNICATIONS MARKETPLACE REPORT, GN Docket No. 20-60, 2020 WL 8025117, *45 Figs. II.B.8, II.B.23 (2020) (estimating 104.68 million fixed residential broadband subscriptions and that 21.9% of the population is monopoly served (using the Commission's metric for broadband service)). Hence, about 22.9 million subscriptions cost \$924.84 higher (annually), totaling \$21,201,883,012.

I admit that this \$21 billion figure is a very rough estimate. It may be further refined by better estimating the actual connection speeds per subscription, and by estimating all these figures on a per state basis to better account for regional and geographic variation. Unfortunately, neither the Commission nor the industry appears to have made such data available, and so I rely on the Commission's most recent national data, together with my own average findings, for this estimate. In view of this uncertainty, I have tried to estimate conservatively, using low-end estimates for the total number of broadband subscriptions. *Compare*, for example, FCC, COMMUNICATIONS MARKETPLACE REPORT, GN Docket No. 20-60, 2020 WL 8025117, *45 Figs. II.B.8 (2020) (estimating 104.68 million fixed residential broadband subscriptions) *with*, for example, FCC, WIRELINE COMPETITION BUREAU, INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION INTERNET ACCESS SERVICES: STATUS AS OF DECEMBER 31, 2018 (2020) at 2 fig. 1 (reporting a total of approximately 111 million fixed broadband subscriptions in the United States); WORLD BANK, FIXED BROADBAND SUBSCRIPTIONS—UNITED STATES, <https://data.worldbank.org/indicator/IT.NET.BBND?locations=US> (reporting a total of approximately 121 million fixed broadband subscriptions in the U.S.) (last visited Sept. 26, 2022).

92. *See* BRETT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES 318 (2012).

to “widen the range of opportunities for business.”⁹³ Likewise, Olivier Sylvain has since explained that where broadband access and use grows, “significant increases in the number of jobs and aggregate household income” result.⁹⁴ Broadband internet access, moreover, has measurable effects on children’s performance in school.⁹⁵ Similarly, the availability of telemedicine services and associated increases in access to healthcare in rural locales have improved healthcare for Americans nationwide, estimated to yield “millions, if not billions” in annual savings.⁹⁶ And residents with reliable internet access are “much more likely to be politically engaged or to access government services.”⁹⁷

While it is beyond my present scope to fully describe all the ways in which broadband access contributes to general welfare, it suffices to note that “when more people are well connected, society as a whole benefits,” in large part because broadband carriage—the transmission service—is necessary to enable a wide range of economic, educational, government, and health applications.⁹⁸

Such effects have only sharpened since COVID-19 transformed the importance of internet access. Before, students without reliable internet access

93. Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1, 17 (2002).

94. Olivier Sylvain, *Network Equality*, 67 HASTINGS L.J. 443, 472 (2016).

95. *Id.* at 471.

96. Charles M. Davidson, Thomas Kamber & Michael J. Santorelli, *Broadband Deployment: Why It Matters And How It Works*, 19 MEDIA L. & POL’Y 15, 28–33 (2009).

97. Sylvain, *supra* note 94, at 472; *see also* Filipe Campante, Ruben Durante & Francesco Sobbrío, *Politics 2.0: The Multifaceted Effect of Broadband Internet on Political Participation*, 16 J. EUROPEAN ECON. ASS’N 1094, 1131 n.44 (2018).

98. Sylvain, *supra* note 94, at 471–72 (2016). Further sources elaborating on the benefits of broadband connectivity include BRETT M. FRISCHMANN, *INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES* 318–57 (2012) (explaining that broadband access has “radically increased entrepreneurship, political discourse, the production and consumption of media . . . community building, among many other things” and has thus transformed “our economic, cultural, political, and other social systems”); Catherine J.K. Sandoval & Patrick Lanthier, *Connect the Whole Community: Leadership Gaps Drive the Digital Divide and Fuel Disaster and Social Vulnerabilities*, in *TECHNOLOGY VS GOVERNMENT: THE IRRESISTIBLE FORCE MEETS THE IMMOVABLE OBJECT* (Lloyd Levine ed., forthcoming 2022); *see also* Sara Agate, *Unlocking the Power of Telehealth: Increasing Access and Services in Underserved, Urban Areas*, 29 HARV. J. OF HISPANIC POL’Y 85, 91 (2017) (noting the importance of broadband access for telehealth applications); Peter Sternberg et al., *Broadband Internet’s Value for Rural America*, UNITED STATES DEPT. OF AGRICULTURE, ECONOMIC RESEARCH REPORT NO. 78 (Aug. 2009) (finding that “[r]ural communities that had greater broadband Internet access had greater economic growth”); Linda A. Jackson, Alexander von Eye, Frank A. Biocca, Gretchen Barbatsis, Yong Zhao & Hiram E. Fitzgerald, *Does Home Internet Use Influence the Academic Performance of Low-Income Children?*, 42 DEVELOPMENT PSYCH. 426 (2006) (“Children who used the Internet more had higher GPAs after 1 year and higher scores on standardized tests of reading achievement after 6 months than did children who used it less.”).

risked scholastic success because “they [could not] complete internet-related homework as easily as their peers.”⁹⁹ But during the pandemic, students without reliable internet access may have been unable to attend school at all. And other studies find, predictably, that the quality of internet access helps to drive the quality of a student’s online learning experience, giving rise to worse learning outcomes and lower grades for students with worse broadband carriage service.¹⁰⁰

In all, the COVID-19 pandemic has “widened many inequities,” beginning with the homework gap, but also encompassing “health care, unemployment benefits, court appearances, and [even] the COVID-19 vaccine, all of which require (or are facilitated by) internet connections.”¹⁰¹ Olivier Sylvain details these shortcomings (among others) in his contribution to this symposium.¹⁰² In short, concerns regarding the transmission-layer service—i.e., broadband carriage—can give rise to concomitant concerns regarding access to a wide range of application-layer services (competition among those applications notwithstanding). And these concerns have intensified since COVID-19 moved so much of our daily life—commerce, education, and more—to these transmission-dependent applications.

In many respects, broadband internet access is the defining utility of our modern era. Like the postal, telephone, and television networks before it, internet access is *the* means by which the American populace communicates with each other, by which it receives news and information about the country and the world, and by which it interacts with and demands accountability from its elected leaders. And so those citizens that lack a reliable connection to the internet are likely to find themselves increasingly isolated from family and

99. Sylvain, *supra* note 94, at 472 (2016).

100. See Laura Stelitano, Sy Doan, Ashley Woo, Melissa Kay Diliberti, Julia H. Kaufman & Daniella Henry, *THE DIGITAL DIVIDE AND COVID19: TEACHERS’ PERCEPTIONS OF INEQUITIES IN STUDENTS’ INTERNET ACCESS AND PARTICIPATION IN REMOTE LEARNING*, RAND CORP. (2020) (“Teachers perceived that challenges with students’ access to internet and technology were deeply intertwined with concerns about communication with families, student participation, and delivering quality instruction in a remote context.”)

101. Guo, *supra* note 65; see also Cecilia Kang, *F.C.C. Broadband Plan Includes \$50 Monthly Subsidy for Millions*, N.Y. Times (Feb. 22, 2021) (explaining that “the digital divide . . . has punished low-income families during the pandemic”); NEXT CENTURY CITIES & SAMUELSON LAW, TECHNOLOGY & PUBLIC POLICY CLINIC, *CUT OFF FROM THE COURTHOUSE: HOW THE DIGITAL DIVIDE IMPACTS ACCESS TO JUSTICE AND CIVIC ENGAGEMENT* (2022) (describing how the “lack of access to affordable broadband” can “lead[] to missed court appearances, inability to confer with counsel before life-altering legal proceedings and decisions, isolation from democratic processes, and inability to receive critical government services and safety information”).

102. See Olivier Sylvain, *A New Telecommunications Act: Prioritizing Consumer Protection and Equality*, 37 BERKELEY TECH. L.J. 277 (2022).

friends, sequestered from economic opportunities, and sometimes without access to critical health, education, and government services.

IV. AFFORDABILITY AND BROADBAND RATE REGULATION

Concerns regarding broadband internet access turn on at least two dimensions—access and affordability. That is, students may fall behind (or patients may lack access to remote medical assistance, or workers may have difficulty seeking unemployment benefits, and so on) either because broadband internet access is not available at all, or because, even where available, it is unaffordable.¹⁰³

Here, I train my focus on questions of affordability, as cost is the most cited reason for the lack of connectivity.¹⁰⁴ To be sure, carriers and regulators have much to do to improve availability nationwide.¹⁰⁵ But I focus here on consumer price concerns in part because, as described above, even where consumers can purchase a broadband carriage subscription, there remain persistent problems of quality and affordability, due in part to monopoly conditions. Moreover, as I elaborate below, some solutions to these affordability issues may be found in the Commission’s existing efforts to address access-related questions.

A. SOME (MODEST) SUCCESSES

I begin with the Emergency Broadband Benefit, authorized by Congress as part of a comprehensive COVID-19 relief bill.¹⁰⁶ Here, Congress allocated

103. See Andrew Perrin, *Mobile Technology and Home Broadband 2021*, Pew Research Center (June 3, 2021) (noting the range of reasons “cited . . . for not having home broadband”); see also Blair Levin & Larry Downes, *Cities, Not Rural Areas, Are the Real Internet Deserts*, WASH. POST (Sept. 13, 2019, 3:00 AM) (attributing the digital divide to access, affordability, and literacy concerns).

104. See, e.g., Andrew Perrin, *Mobile Technology and Home Broadband 2021*, Pew Research Center (June 3, 2021) (explaining that “cost . . . remain[s] the most important reason[] non-broadband users do not subscribe”); see also Eduardo Porter, *A Rural-Urban Broadband Divide, but Not the One You Think Of*, N.Y. TIMES (June 1, 2021) (“A survey by the Pew Research Center in 2019 found that half of the people who did not have a broadband connection said they could not afford it. Only 7 percent blamed lack of access to high-speed networks as the main reason.” (citing Monica Anderson, *Mobile Technology and Home Broadband 2019*, Pew Research Center (June 13, 2019))).

105. See, e.g., BroadbandNow Research, *BroadbandNow Estimates Availability for all 50 States; Confirms that More than 42 Million Americans Do Not Have Access to Broadband* (May 12, 2021) (estimating that “42 million Americans do not have the ability to purchase broadband internet”).

106. See Consolidated Appropriations Act of 2021, Pub. L. No. 116–260, 134 Stat. 1182, 2129–36; see also Kang, *supra* note 101.

funds to offer qualifying households a \$50 discount on broadband carriage (\$75 for carriage services on Tribal lands).¹⁰⁷ But without price controls, such a federal subsidy risks further inflating the price—i.e., the “standard rate”—of broadband carriage.¹⁰⁸ Consider an extreme hypothetical: A monopoly-served locale where all households qualify for the benefit. There, the monopoly provider might be free to raise prices by \$50 per month (the amount of the subsidy) without any repercussion, leaving consumers no worse (but also, contra Congress’s intent, no better) than before the program’s enactment. And in less extreme, more realistic scenarios, monopoly providers serving locales with high concentrations of qualifying households might raise prices in order to capture a significant portion of the subsidy intended to benefit consumers.¹⁰⁹

To address such concerns, Congress required that participating carriers (i.e., providers willing to discount consumer rates and seek reimbursement for those discounts through Commission-administered funds) freeze rates for eligible service offerings to those charged on December 1, 2020, before the program’s enactment.¹¹⁰ In sum, the Commission’s program to provide consumers with short-term affordability relief includes a soft form of price-cap regulation.

Though the Commission’s Order implementing the Emergency Broadband Benefit offers both a temporary discount (through the \$50 subsidy) and some short-term relief from forward-looking price increases (through the price cap rule), it is incomplete along both quality and price dimensions. For one, the benefit program does little to improve the quality of broadband carriage where a lack of competition has stagnated speeds and capacity.¹¹¹ Moreover, the benefit program doesn’t address pricing and affordability concerns already present in the prices charged as of December 1, 2020. And

107. Emergency Broadband Benefit Program, 36 FCC Rcd. 4612, ¶ 4 (2021).

108. See Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 1182, 2129–36.

109. Cf. Geoffrey A. Fowler, *The Government Has a Program to Cut Your Internet Bill. Verizon Is Using it to Force You onto a New Data Plan*, WASH. POST. (May 17, 2021) (explaining that providers have enrolled only some plans into the program, requiring that some consumers subscribe to more expensive plans in order to qualify for the discount, and thus stunting the effect of the discount).

110. Emergency Broadband Benefit Program, 36 FCC Rcd. 4612, ¶¶ 70–72 (2021) (explaining that “the December 1, 2020 restriction is best understood as a method of avoiding arbitrage opportunities,” namely, preventing “unscrupulous providers” from “tak[ing] advantage of the increased subsidy available” by ensuring that providers do not “increas[e] prices above the usual market rate for their services for the purpose of claiming the maximum reimbursement amount.”).

111. *Id.*, ¶¶ 73–75 (“We decline to apply minimum service standards to covered services for the [Emergency Broadband Benefit] Program”).

providers have gamed the price-cap regulation by selectively defining the regulated service: Certain carriers, such as Verizon, have enrolled only more expensive plans into the program.¹¹² Hence, customers must select a more costly plan to qualify for the federal benefit, analogous to raising consumer prices to capture a subsidy intended for consumers, thereby giving rise to a partial short-term discount, but higher long-term consumer costs.¹¹³ In short, the subsidy and price-capped approach taken in the Broadband Emergency Benefit program may be promising, but it suffers from some significant limitations.

We might turn to a different Commission subsidy program to seek out a more complete approach. In 2011, the Commission reworked its Universal Service Fund—in truth, a regime of several discrete funds aimed at improving access and subsidizing affordability in underserved regions and among underserved communities—to focus on broadband carriage (instead of legacy services, such as voice telephony).

Among the many reforms to these various subsidy programs were rate and service regulations. The Commission now requires some funding recipients to agree to rate and service controls that help ensure basic service standards at capped rates. Specifically, the Commission required that carriers “receiving federal high-cost universal service support . . . offer broadband service in their supported area that meet certain basic performance requirements . . . at rates that are reasonably comparable to offerings of comparable broadband services in urban areas.”¹¹⁴ Stated simply, these subsidized services must be “reasonably comparable” to services available in (typically competitive) urban areas along dimensions of both price and quality. The Commission’s rules are tantamount to price-cap rate regulation, where rates are derived from competitive benchmarks.¹¹⁵

Carriers subject to these rules, moreover, are monopolists. This is by design: The Commission deploys support to only one provider, and only in locales where there is no existing unsubsidized competitor—i.e., where there is no apparent private business case to offer broadband carriage.¹¹⁶ In short,

112. See Fowler, *supra* note 109; Karl Bode, *Some ISPs Exploited Covid Broadband Relief Program to Make an Extra Buck*, VICE NEWS (June 2, 2021).

113. See Fowler, *supra* note 109; Bode, *supra* note 112. In reply, Acting Chairwoman Rosenworcel told providers to “knock it off,” and stop engaging in practices that are inconsistent the legislative aims of the programs. See *Rosenworcel to EBB ISPs Doing Upselling: ‘Knock It Off,’* COMM’NS DAILY (May 21, 2021); see also *supra* text accompanying note 109.

114. Connect Am. Fund, 26 FCC Rcd. 17663, ¶ 86 (2011).

115. NUCHECHTERLEIN & WEISER, *supra* note 7, at 34 (describing price cap regulation).

116. Connect Am. Fund, 26 FCC Rcd. 17663, ¶¶ 103, 105, 164–79 (2011).

the Commission helps to fund broadband carriage solely where it is reasonably confident that only a subsidized monopolist would offer service.

It is this feature of the Commission’s fiscal prudence—its desire to subsidize only one provider in high-cost areas—that gives rise to the “reasonably comparable” regulations.¹¹⁷ Cognizant of the risks of monopoly pricing and service, the Commission imposes “public interest obligations” on funding recipients to ensure that subsidized carriers do not charge monopoly prices for services offered over publicly-funded facilities.¹¹⁸ As I noted *supra*, these rules require that carriers offer service reasonably comparable (along dimensions of upload bandwidth, download bandwidth, and capacity allowances (i.e., data caps)) to that which is available in urban locales, and that they charge prices that are likewise reasonably comparable to those charged in urban locales.¹¹⁹ In short, reasonable service at reasonable rates—or, at least, reasonably comparable service at reasonably comparable rates.

I can safely elide most specifics of the Commission’s ever-evolving standards of reasonable comparability¹²⁰ and move straight to the question of efficacy: Are the Commission’s rules any good at addressing the affordability (and related quality) concerns of monopoly pricing? Yes—but incompletely.

As above, we can turn to sets of geographic proximate locales (the same sets, in fact) to compare the rates and services offered by unregulated monopolists, regulated monopolists (regulated by the conditions attached to

117. Before implementing these reforms, the Commission would wastefully grant funds to multiple providers in a single region (and used a formula that spiked its level of support per provider). See NUECHTERLEIN & WEISER, *supra* note 7, at 304–06 (describing the pitfalls of the identical support rule).

118. Connect Am. Fund, 26 FCC Rcd. 17663, *22 (2011).

119. *Id.* ¶¶ 86, 91.

120. For those interested in these specifics, they can be found at Wireline Competition Bureau and Office of Economics and Analytics Announce Results of 2022 Urban Rate Survey for Fixed Voice and Broadband Services, Posting of Survey Data and Explanatory Notes, and Required Minimum Usage Allowance for Eligible Telecommunications Carriers, 2021 WL 6010819, DA No. 21-1588 (FCC Dec. 16, 2021). The Commission revises these standards annually. *See, e.g.*, Wireline Competition Bureau and Office of Economics and Analytics Announce Results of 2021 Urban Rate Survey for Fixed Voice and Broadband Services, Posting of Survey Data and Explanatory Notes, and Required Minimum Usage Allowance for Eligible Telecommunications Carriers, 35 FCC Rcd. 13667 (2020); Wireline Competition Bureau and Office of Economics and Analytics Announce Results of 2020 Urban Rate Survey for Fixed Voice and Broadband Services, Posting of Survey Data and Explanatory Notes, and Required Minimum Usage Allowance for Eligible Telecommunications Carriers, 34 FCC Rcd. 11189, 11190 (2019); Wireline Competition Bureau and Office of Economics and Analytics Announce Results of 2019 Urban Rate Survey for Fixed Voice and Broadband Services, Posting of Survey Data and Explanatory Notes, and Required Minimum Usage Allowance for Eligible Telecommunications Carriers, 33 FCC Rcd. 12316 (2018); *see also* FCC, Urban Rate Survey Orders and Public Notices, <https://www.fcc.gov/general/urban-rate-survey-orders-and-public-notice> (last visited Sept. 26, 2022).

the receipt of federal funds), and competitively disciplined providers. While, as before, there is some variation across the geographic regions, one consistent theme emerges: The Commission's standards help to improve costs and service quality, though not as effectively as competition. This may be because competition is a more efficacious means of improving broadband value, or it may be because the Commission's standards are too lax (given that the Commission deems a rate to be "reasonably comparable" if it is within two standard deviations of the average rate (i.e., at about the 95th percentile of rates) charged in urban locales for similar service¹²¹), or both.

Consider Kennedy, New York: Across three addresses in this one town of 465, Windstream sells a \$67 broadband carriage service that promises download speeds of 50 mbps where it faces competition from Charter, 10 mbps where it is a monopolist subject to the Commission's public interest obligations, and only 4 mbps where it acts as an unregulated monopolist. Indeed, only a six-minute walk separates the locations where Windstream acts as an unregulated monopolist and where it acts as a regulated one—but that quarter-mile is the difference between, to return to the example of video, being able to reliably stream live video and not.¹²²

So too in Faribault, Minnesota. A five-minute drive separates three locations in the southwest part of the town: where CenturyLink faces competition from Charter and Consolidated Communications, where CenturyLink acts as a monopolist subject to the Commission's standards, and where CenturyLink acts as an unregulated monopolist. For \$49 a month, CenturyLink promises consumers download speeds of 60 mbps, 40 mbps, and 3 mbps respectively. To increase speed more than tenfold in Faribault, all one needs to do is move across the street.

As with the findings reported above, there is some variability across states—but that variability points in favor of regulation over competition. Troy, Montana, for example, is served by Ziplly (formerly Frontier).¹²³ In some

121. *Compare* Connect Am. Fund, 29 FCC Rcd. 13485, ¶¶ 7–8 (2014) (“adopt[ing] its proposal to use a weighted linear regression to estimate the mean rate for a specific set of service characteristics and then to add two standard deviations to this mean to determine the benchmark for services meeting those defined service characteristics”) and Connect Am. Fund, 29 FCC Rcd. 15644, ¶ 121 (2014) *with*, for example, Comments of the California Emerging Technology Fund at 9, Connect Am. Fund, 34 FCC Rcd. 6778 (2019) (suggesting that the Commission's benchmarks “allow providers to provide much higher speeds in urban areas, but then allow providers to provide rural, remote and Tribal areas with significantly slower speeds”).

122. *See, e.g.*, Internet Speed Recommendations, HULU (Jul. 10, 2021), https://help.hulu.com/s/article/speed-recommendations?language=en_US.

123. Ziplly's corporate history matters here because it defines how the Commission's public interest obligations apply. Frontier received federal funding to serve these locations and was therefore subject to these rules. But Frontier later sold those operations to Ziplly. *See*, Malia

parts of town, it is subject to the Commission's regulations; in others, it is unregulated; and, in still others, it is subject to competition. Those locations served by a regulated monopoly get better service than both other sets of locations—those served by an unregulated monopolist and even competitively-served locations. (Competition, though, still yields more consumer value than an unregulated monopoly.)

Table 3 (and Figure 3),¹²⁴ which adds regulated monopolies—regulated under the “public interest obligations” that attend to the receipt of universal service support—to the findings described in Table 2 (and Figure 1), summarizes these results. Specifically, Table 3 reports the average broadband carriage value for packages offered within the specified communities at locales served by an unregulated monopolist (i.e., a provider subject to neither the Commission's public interest obligations at that locale, nor subject to wireline competition), at distinct locales served by a regulated monopoly (i.e., a provider subject to the public interest obligations at that locale, but not subject to any competition), and at distinct locales served by providers facing competition (i.e., providers subject to wireline competition).

Spencer, *Ziply Fiber Completes Acquisition of Frontier Communications' Northwest Operations*, PORTLAND BUS. J., May 1, 2020 (3:01 AM EDT).

124. As in Figure 1, the horizontal axis is truncated for readability. *See supra* note 88 and accompanying text.

Table 3: Broadband Carriage Value (Download Speed Per Dollar)

<u>State</u> (Provider)	<u>Unregulated Monopoly</u> (Communities Surveyed)	<u>Regulated Monopoly</u> (Communities Surveyed)	<u>Competition</u> (Communities Surveyed)
Arizona (CenturyLink)	0.05 mbps / \$ (Flagstaff)	0.51 mbps / \$ (Flagstaff)	0.61 mbps / \$ (Flagstaff)
Arizona (Frontier)	0.20 mbps / \$ (Snowflake)	0.27 mbps / \$ (Snowflake)	0.56 mbps / \$ (Snowflake)
California (AT&T)	0.28 mbps / \$ (Julian, Ramona)	0.36 mbps / \$ (Julian, Ramona)	0.91 mbps / \$ (Ramona)
California (Frontier)	0.27 mbps / \$ (Inyokern, Ridgecrest)	0.31 mbps / \$ (Inyokern)	1.16 mbps / \$ (Inyokern)
Georgia (AT&T)	0.33 mbps / \$ (Bishop, Watkinsville)	0.64 mbps / \$ (Bishop, Watkinsville)	6.31 mbps / \$ (Watkinsville)
Georgia (Frontier)	0.31 mbps / \$ (Fairmount, Ranger)	0.45 mbps / \$ (Ranger)	1.38 mbps / \$ (Fairmount, Ranger)
Minnesota (CenturyLink)	0.22 mbps / \$ (Cannon City, Faribault)	0.61 mbps / \$ (Faribault)	1.22 mbps / \$ (Faribault)
Minnesota (Frontier)	0.27 mbps / \$ (Green Isle, Henderson)	0.31 mbps / \$ (Green Isle, Henderson)	0.45 mbps / \$ (Henderson)

Montana (CenturyLink)	0.24 mbps / \$ (Bozeman)	0.84 mbps / \$ (Bozeman)	1.43 mbps / \$ (Bozeman)
Montana (Ziply [formerly Frontier])	0.38 mbps / \$ (Troy)	0.89 mbps / \$ (Troy)	0.61 mbps / \$ (Troy)
New York (Frontier)	0.30 mbps / \$ (Hemlock)	0.30 mbps / \$ (Hemlock)	0.56 mbps / \$ (Hemlock)
New York (Windstream)	0.05 mbps / \$ (Kennedy)	0.15 mbps / \$ (Kennedy)	1.12 mbps / \$ (Kennedy)
Washington (CenturyLink)	0.24 mbps / \$ (Port Angeles)	0.34 mbps / \$ (Port Angeles)	0.61 mbps / \$ (Port Angeles)
Washington (Ziply [formerly Frontier])	0.50 mbps / \$ (Kennewick)	0.56 mbps / \$ (Kennewick)	1.37 mbps / \$ (Kennewick)
Average (across Geographies & Providers)	0.26 mbps / \$	0.47 mbps / \$	1.31 mbps / \$

Figure 3: Broadband Carriage Value (Download Speed Per Dollar)

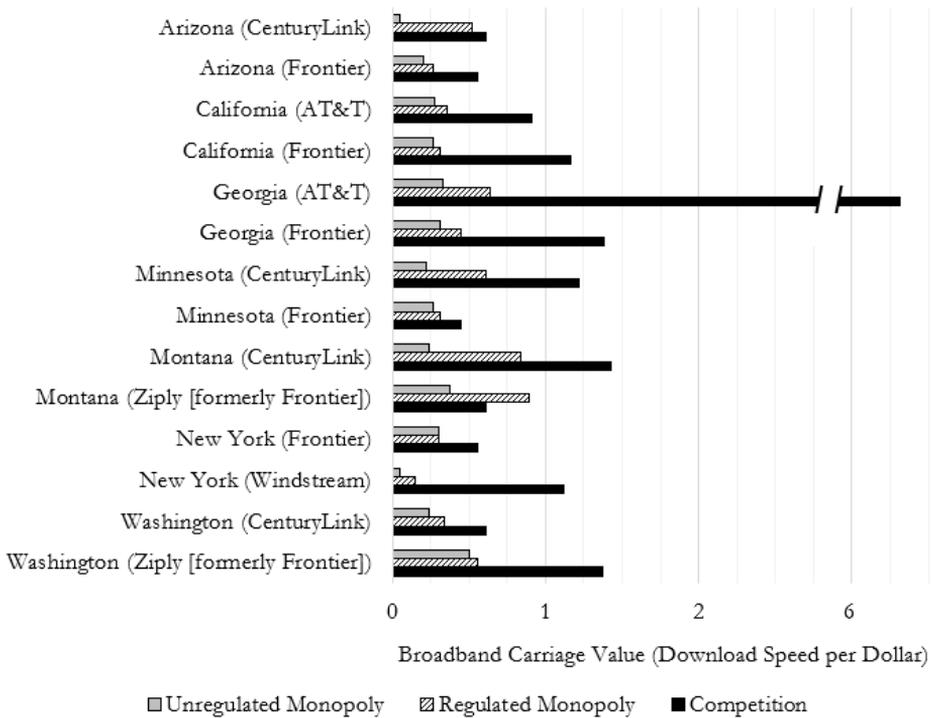
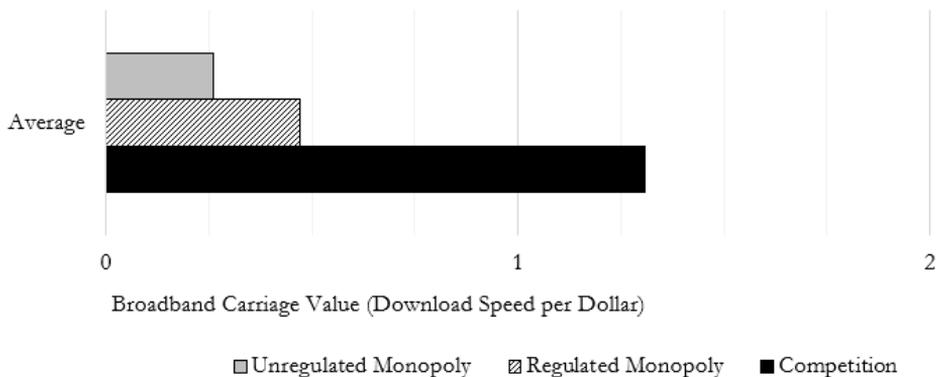


Figure 4: Broadband Carriage Value (Download Speed Per Dollar)



In sum, regulated monopolists consistently offer better broadband carriage value than unregulated monopolists (but typically less value than is available in competitive markets, though competition’s average lead in Figure 4 may be

somewhat overstated by outliers such as AT&T's offerings in competitively-served regions of Georgia).

B. TOWARD A NEW STATUTORY REGIME

These results suggest a way for policymakers to address the modern puzzle at the heart of the Commission's decision at issue in *MDTC v. FCC*. As I explained above, the Telecommunications Act of 1996 imagined a communications landscape that looked much as it had for most of its preceding century, "closely identify[ing] . . . categories of service with a particular medium of transmission."¹²⁵ The internet's mediation of these various physical networks has undermined this assumption inherent to the Act's structure. As *MDTC v. FCC* suggests, the Act conflates transmission with applications, thereby requiring the Commission to choose among difficult and nonideal options, including the continued regulation of competitive markets or the deregulation of monopoly markets.¹²⁶ In some cases, as in *MDTC*, the Commission has preferred a deregulatory path.¹²⁷

But this lack of both competition and regulation can give rise to significant consumer effects: Consumers get worse service at higher prices. As a result, applications markets suffer, too, as applications ranging from video, voice, teleconferencing, virtual education, and telehealth (to name only a few) depend on quality transmission via broadband carriage.¹²⁸ Policymakers should thus directly regulate monopoly broadband carriers, subsidized or not, as they already do in the universal service context, until those markets become competitive.

The 1996 Act's structure emphasized competition across applications and facilities (as evidenced by the local exchange carrier test, among many other provisions) but was nevertheless pragmatic about the benefits of regulating monopoly providers, allowing local authorities to set prices for markets beholden to monopolists. The next telecommunications act can do the same, but with greater attention to the distinction between transmission-layer services and application-layer services, encouraging competition (where it is likely to exist, as in applications markets) while protecting consumers from monopoly providers, including some broadband carriers.

I have accordingly set out a model statute in Appendix A designed to roughly mimic the rate regulation and effective competition provisions at issue in *MDTC*, but modified to address concerns specific to broadband carriage, a transmission-layer service. I describe that model statute's major provisions—

125. NUCHESTERLEIN & WEISER, *supra* note 7, at 17.

126. See *supra* Part II.B (outlining these two nonideal options through the lens of *MDTC*).

127. See *MDTC v. FCC*, 983 F.3d 28, 30 (1st Cir. 2020).

128. See, e.g., *supra* notes 16, 122 (noting Hulu's connection requirements).

including some changes from the cable service regime—in the following sections. While I focus here on one possible regime of rate regulation for a future act, the lessons embodied in this model statute—a careful disaggregation of transmission-layer services from the application-layer, and a preference for competition paired with consumer protections from persistent monopoly providers—can inform a wide range of legislative and regulatory priorities in telecommunications, including network neutrality and interconnection regulation.¹²⁹

1. *A Pragmatic Preference for Competition*

Tables 2 and 3 confirm what has long been explicit in communications regulation: Market competition offers a comparatively efficient and reliable means of inducing improvements in price and service quality. Where competition appears to exist, Tables 2 and 3 evince substantial improvements in broadband carriage value. Policymakers should thus continue to induce competition in local broadband carriage markets, as they have in previous generations of telecommunications statutes. For example, the 1992 Cable Television Consumer Protection and Competition Act emphasizes facilities-based competition among cable operators, explaining that “the public interest is served by . . . competition” among different facilities operators, and thus aims to “encourage . . . robust competition” from “wireless and private cable systems, cable overbuilds, and [satellite-based providers].”¹³⁰ And the 1996 Act adds telephone companies to this list of facilities-based providers.

But, as described *supra*, federal and state regulators were nevertheless permitted to regulate cable service rates in the absence of effective competition, given that some “rate increases imposed by some cable operators [we]re not justified economically” and that some “cable operators ha[d] abused their . . . market power and ha[d] unreasonably raised the rates they charge subscribers.”¹³¹ Hence, the Act is pragmatic about its approach to competition, prioritizing facilities-based competition, but nevertheless allowing regulation

129. See, e.g., Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 142 (2003) (proposing transmission-layer network neutrality rules to promote application-layer competition); Tejas N. Narechania & Tim Wu, *Sender Side Transmission Rules for the Internet*, 66 FED. COMM'NS L.J. 467, 473–75 (2015) (describing the effect of longstanding transmission-layer rules on application-layer competition); see also Tejas N. Narechania, *Symmetry and (Network) Neutrality*, 119 MICH. L. REV. ONLINE 46, 57–59 (2020) (arguing in favor of transmission-layer network neutrality rules to promote application-layer competition); Tejas N. Narechania, *Network Nepotism and the Market for Content Delivery*, 67 STANFORD L. REV. ONLINE 27, 29–30 (2014).

130. H.R. Rep. 102-628 (1992) at 44.

131. H.R. Rep. 102-628 (1992) at 30–34.

in monopoly markets in order to “protect consumers from unreasonable cable rates.”¹³² In sum, the Act’s structure reflects Congress’s

belie[f] that competition ultimately will provide the best safeguard for consumers . . . and [thus] strongly prefers competition and the development of a competitive marketplace to regulation[, while] also recogniz[ing], however, that until true competition develops, some tough yet fair and flexible regulatory measures are needed.¹³³

These rate regulation provisions, moreover, helped to address the problems of deregulated monopoly pricing in local cable markets. Scholars and researchers have concluded that “[t]he rate regulation sections of the 1992 Act effectively controlled [the] runaway price escalation” that had persisted after the deregulation of cable systems in 1984.¹³⁴ To the extent these rate regulation provisions have been criticized for failing to control rates over the long term, such critiques have often focused on the Commission’s failure to fully define the regulated service, leading providers to unbundle services and change available programming (for example, cable channels) in order to “distort the quality of regulated service” and “evade the regulations.”¹³⁵ But even

132. H.R. Rep. 102-628 (1992) at 34.

133. H.R. Rep. 102-628 (1992) at 30.

134. See *The Cable Act at 20: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 112th Cong. 36 (2012) (statement of Dr. Mark Cooper, Dir. of Research, Consumer Federation of America). Other studies comparing regulated rates with deregulated ones have found similar results. See, e.g., Diane Bruce Anstine, *The Impact of the Regulation of the Cable Television Industry: The Effect on Quality-Adjusted Cable Television Prices*, 36 APPLIED ECON. 793, 793 (2004) (comparing rates before deregulation with those after and concluding that “[o]n average, regulation benefited consumers by keeping prices below monopolist’s profit maximizing price”); see also Yasuji Otsuka, *Welfare Analysis of Local Franchise and Other Types of Regulation: Evidence from the Cable Television Industry*, 11 J. REG. ECON. 157 (1997); John W. Mayo & Yasuji Otsuka, *Demand, Pricing, and Regulation: Evidence from the Cable TV Industry*, 22 RAND J. ECON. 396, 397 (1991) (finding that regulation “did act to keep prices below monopoly level” even though it “did not lead to economically efficient (marginal cost) prices for basic cable service”).

135. See George S. Crawford, *The Impact of the 1992 Cable Act on Household Demand and Welfare*, 31 RAND J. ECON. 422, 423 (2000); see also Rafael J. Prohias, *Longer than the Old Testament, More Confusing Than The Tax Code: An Analysis Of The 1992 Cable Act*, 2 COMMLAW CONSPECTUS 81, 90–93 (1994) (explaining that the Commission’s regulations allowed cable operators to move some stations out of regulated tiers of service, and allowed operators to increase some prices if it could offset those increases elsewhere, and lauding the Commission for taking further steps to address these gaps); Thomas W. Hazlett, *Prices and Outputs During Cable TV Regulation*, 12 J. REG. ECON. 173, 193–94 (1997) (concluding that the Commission did succeed in lowering rates but did not effectively control quality-adjusted rates because “quality variation is relatively feasible” across cable packages, and so the “regulated [cable programming] supplier . . . circumvent[ed] the constraints imposed via price controls”). I address concerns regarding the possibilities for similar evasion strategies in the broadband carriage context *infra* note 171 and accompanying text.

accounting for such regulatory gaming, rate regulation seems to have proved effective in moving prices closer to competitive levels: Before the implementation of the 1992 Act's regulatory scheme, monopoly providers charged 8.4% more than providers in competitive markets; after implementation, that difference narrowed to 1.2% for regulated providers.¹³⁶ These results seem analogous to those reported in Table 3 above. Competition can be the most effective tonic for monopoly pricing, but competition does not come to all markets, and even when it does, it can take decades. Hence, in persistent monopoly markets, or even during a lengthy transition to competition, regulation can help to move prices closer to competitive levels.

2. *Regulating Monopoly Providers of Broadband Transmission Services*

Just as many members of Congress described “unreasonable cable rates” as one motive for the 1992 Act's rate regulation provisions, President Biden has likewise said that “Americans pay too much for Internet service.”¹³⁷ Policymakers should thus consider a similar structure to address the problems of monopoly rates for broadband carriage. Monopoly broadband carriers (likely charging monopoly prices) are appropriately subject to “some tough yet fair and flexible regulatory measures.”¹³⁸

Specifically, where broadband carriage is available only through a local monopolist, then local (or, if necessary, state or federal) regulators should set rates for a basic tier of broadband carriage; and where broadband carriage is competitively available, such regulatory oversight is unneeded. Hence, unlike calls for either generalized broadband rate regulation under Section 201 of the

136. *Compare* Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, 12 FCC Rcd. 3239, ¶¶ 7–8 (1997) <https://transition.fcc.gov/Bureaus/Cable/Reports/fcc96499.txt> (reporting that “prior to the implementation of rate regulation,” noncompetitive providers charged 8.4% more) *with* Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, 15 FCC Rcd. 10927 at Tables 5, 7, 8 (2000) (showing that for “operators whose [basic service tiers] were regulated by a local regulatory authority,” prices were within about 1.2% of those charged by competitive providers (\$12.18 to \$12.03), whereas prices charged by unregulated providers were nearly 6.5% above competitive levels (\$12.81 to \$12.03)). Later reports do not separately identify rate-regulated noncompetitive providers from unregulated noncompetitive providers. But, as noted above, the decision to deregulate Charter's rates in view of DirecTV Now threatened to substantially increase rates for monopoly-served consumers. Charter Effective Competition Order, *supra* note 41, at *16 (Rosenworcel, Comm'r, concurring).

137. See respectively, H.R. Rep. 102-628 (1992) at 34 and Joseph R. Biden, Remarks on the American Jobs Plan (March 31, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/31/remarks-by-president-biden-on-the-american-jobs-plan/>.

138. H.R. Rep. 102-628 (1992) at 30.

Communications Act,¹³⁹ or for regulatorily-mandated facilities sharing and a concomitant regime of wholesale price regulation,¹⁴⁰ my more focused proposal—framed as a statute, but also potentially implemented through regulatory process¹⁴¹—allows for the retail rate regulation of a basic service tier in monopoly-served broadband carriage markets.

I prefer this more targeted approach to rate regulation for three primary reasons. First, an approach focused on basic service in monopoly markets helps to limit any investment-depressing effects of such regulatory measures.¹⁴² Second, I prefer direct retail ratesetting to a system of line-sharing and wholesale regulation for its simplicity.¹⁴³ While such “open access” regimes have proved successful in other jurisdictions,¹⁴⁴ it can be far more complex to decide which network elements will be subject to an open access mandate, to set wholesale rates for those elements, and to ensure that such rules survive judicial review.¹⁴⁵ And third, targeting only monopoly markets helps to preserve a relatively straightforward and credible benchmark for efficient rates, namely, rates in competitive markets.

139. See, e.g., Gigi B. Sohn, *Keynote Address, Social Justice or Inequality: The Heart of the Net Neutrality Debate*, 80 U. PITT. L. REV. 779, 785 (2019); see also Nuechterlein & Shelanski, *supra* note 21 (summarizing some such calls for broadband rate regulation).

140. See, e.g., Crawford, *Looming Monopoly*, *supra* note 24, at 39 (advocating in favor of “policies requiring line-sharing at regulated rates”); Crawford, *Crisis*, *supra* note 24, at 261–62.

141. The Commission could adopt the scheme proposed here through its powers over telecommunications services. If the Commission treats broadband carriage as a telecommunications service subject to its powers under Title II of the Communications Act, then the Commission could exercise its powers under § 201 to promulgate a limited scheme of rate regulation—limited to basic service tiers in monopoly-served locales (as I describe and elaborate in the subsequent sections and Appendix A) and otherwise forbearing from rate regulation under 47 U.S.C. § 160. See also 47 U.S.C. § 1302(a) (directing the “[FCC] and each State commission with regulatory jurisdiction over telecommunications services” to use “price cap regulation” to encourage broadband deployment and adoption).

One drawback to this approach is that it vests ratesetting power in federal, rather than state and local, authorities. And it is true that rates set by federal authorities would suffer from the lack of local expertise and accountability that state and local regulators can offer. See generally Narechania & Stallman, *supra* note 3.

There are some responses to this objection, which are described *infra* notes 157–159 and accompanying text. Moreover, the federal Commission would have to play *some* role in rate-setting for those regions where state and local authorities have no authority to regulate broadband carriage. See, e.g. *infra* note 156 and accompanying text.

142. See *infra* Part IV.B.4.

143. Nuechterlein & Shelanski, *supra* note 21, (describing the complexity that attends to a system of wholesale rate regulation).

144. See Crawford, *Looming Monopoly*, *supra* note 24, at 39 (describing such successes).

145. Cf. U.S. Telecom Ass’n v. Fed. Comm’n Comm’n (USTA II), 359 F.3d 554, 564–73 (D.C. Cir. 2004) (reviewing and sustaining a challenge to Commission rules that sought to make certain network elements available to competing, non-facilities-based transmission providers).

Hence, I propose a regime focused on ratesetting for a regulatorily specified basic service tier. Such a regime gives rise to at least three concerns: defining the basic tier; setting rates; and identifying an appropriate regulator. I address each in turn below.

First, the model statute directs the Commission to define a basic tier of broadband service, establishing a floor for service that any broadband carrier may offer.¹⁴⁶ Moreover, though the statute grants the Commission power to modify this standard over time, the statute also specifies a minimum standard for such basic service—a floor on the floor. Consistent with industry recommendations,¹⁴⁷ the proposed statute specifies that any basic tier for broadband service must, at minimum, be capable of sending 25 mbps in both upstream and downstream directions. This standard is sufficient to accommodate several simultaneous videoconferences (for remote work and remote learning across multiple adults and children), or several connected devices.¹⁴⁸ Indeed, the Commission currently defines “broadband” as any service that offers download speeds of 25 mbps and upload speeds of 3 mbps, citing patterns of typical residential broadband *consumption*, i.e., downstream uses (while largely overlooking services that demand upstream capacity).¹⁴⁹ But drawing on critiques of this asymmetric standard—critiques that may seem especially poignant in the wake of sudden increases in demand for upload capacity¹⁵⁰—the model statute moves toward a symmetric standard. Indeed, a bipartisan cohort of U.S. Senators recently called for a symmetric standard, defining basic broadband at 100 mbps in each direction for new deployments.¹⁵¹ And, finally, while the Commission may begin with the floor

146. Such powers are analogous to the Commission’s current responsibility to set out a minimum standard defining broadband carriage under Section 706 of the Telecommunications Act of 1996. *See, e.g.*, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, 30 FCC Rcd. 1375, 1403, ¶ 45 (2015) ¶ 45 (setting latest broadband-defining standard at 25 mbps (download) and 3 mbps (upload)).

147. *See id.* at 1403–04, ¶ 47 n. 211 (noting Verizon’s recommendation of 25/25 Mbps for “normal everyday stuff”).

148. *See, e.g.*, *System Requirements for Windows, macOS, and Linux*, ZOOM (May 23, 2022), <https://support.zoom.us/hc/en-us/articles/201362023-System-requirements-for-Windows-macOS-and-Linux>; *cf.* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, 30 FCC Rcd. 1375, 1479–80 (statement of Tom Wheeler, Chairman) (describing the broadband demands that 25 mbps can accommodate).

149. 2015 Broadband Progress Report, *supra* note 146.

150. *See, e.g.*, COMCAST, 2020 NETWORK REPORT, at 4 (noting that growth in upstream traffic outpaced growth in downstream traffic during the 2020 pandemic).

151. Letter from Sens. Bennet, King, Portman, and Manchin to Sec’y Vilsack, Acting Chairwoman Rosenworcel, Sec’y Raimondo, and Dir. Deese (Mar 4, 2021), <https://>

specified in the statute, or adopt the more aggressive proposal advanced by some Senators, or choose some other standard, the model statute also makes allowances for where it is “technically infeasible” to satisfy whatever standard Commission selects.

Second, the model statute allows authorities to set rates for this basic tier of broadband service (and only the basic tier, leaving other tiers of service unregulated).¹⁵² Such regulatorily set rates, moreover, are to be based primarily on the rates charged in competitively served locales (while also accounting for providers’ actual costs and differences across locales and geographies, such as facilities costs and franchise fees¹⁵³). Hence, rather than engage in cost-of-service or rate-of-return ratemaking—which often entails lengthy and complicated regulatory proceedings, can suffer from information asymmetries, and is thus susceptible to capture and manipulation—the mode of rate regulation advanced here more closely resembles price-cap regulation.¹⁵⁴ Specifically, rate caps are to be set, as they are in the universal service context, by reference to competitive markets (though at levels less lax than the 95th percentile of such rates). In short, because competition seems to offer an efficient means of improving consumer value, the statute allows competition to help set rates even in monopoly markets (by using information gathered from comparable but competitive markets).

Third, the model statute vests this ratemaking authority, in the first instance, with state and local authorities, recognizing that such regulators are likely better equipped to analyze other competitive regional markets, to assess which offer useful comparators, and to set rates accordingly.¹⁵⁵ But where no local authority has the power to regulate local providers—where, for example, state statutes strip state and local commissions of power over broadband¹⁵⁶—

www.bennet.senate.gov/public/index.cfm/2021/3/bennet-king-portman-manchin-urge-biden-administration-to-create-modern-unified-federal-broadband-standard [hereinafter Letter] (proposing symmetric standard for new deployments, at 100 mbps/100 mbps). It is reasonable to think that policymakers would set a higher standard for new broadband deployments subsidized with federal funds than they would for rules regulating existing broadband networks, relying, at least in part, on earlier technologies.

152. See, e.g., S.B. S2506-C, Part NN (N.Y. 2021) (requiring broadband carriers to provide \$15 monthly broadband subscriptions to eligible low-income households).

153. See Letter, *supra* note 151.

154. See 47 U.S.C. § 1302(a) (directing the “[FCC] and each State commission with regulatory jurisdiction over telecommunications services” to use “price cap regulation” to encourage broadband deployment and adoption).

155. See Narechania & Stallman, *supra* note 3, at 598–620 (describing the benefits of vesting regulatory power over local networks with local authorities); see also *supra* note 154; Tejas N. Narechania, *Federal and State Authority for Broadband Regulation*, 18 STAN. TECH. L. REV. 456 (2015).

156. See, e.g., Georgia Code Ann. § 46-55-222(a) (“The Public Service Commission shall not have any jurisdiction, right, power, authority, or duty to impose any requirement or

the statute allows the federal Commission to serve as a backstop. While federal ratemaking may miss some local nuance that local and states regulators are likely better equipped to capture, the experience with the rate controls attending to the receipt of universal service funds suggests that even federal ratesetting can improve affordability for such monopoly-served communities.¹⁵⁷ In short, local rate regulation might be better than federal regulation—but federally-set rates are better than unregulated monopoly rates.¹⁵⁸ Moreover, federal authorities may even tailor rates to some particular locales, as they have for Alaska under the universal service scheme of rate regulation.¹⁵⁹

In sum, the statute aims to build on the successes of regulation (*vis-à-vis* unrestrained monopoly power) in delivering better broadband rates and service. Specifically, the model statute confers “fair and flexible” broadband-specific regulatory powers on federal and local authorities,¹⁶⁰ powers akin to (but stronger than) those attending to grants of federal universal service funds and helping to improve rates and service where competition is absent.

3. *Defining Effective Competition for Broadband*

But how is the Commission to determine which markets are competitive—i.e., not subject to this scheme of rate regulation—and which are not? Again, the model statute draws from the design of the Cable Act, but with some important modifications.

First, the model statute explains that where two wireline providers offer comparable service to a substantial portion of a market, the market is competitive, no matter the market share of either provider.¹⁶¹ This emphasis on wireline carriers reflects the capacity constraints, noted above, that currently limit the extent to which wireless (both fixed and mobile) and satellite effectively compete with wireline providers.¹⁶²

But, as noted above, the model statute contemplates the possibility that future advances will make other means of delivering broadband carriage

regulation relating to the setting of rates or terms and conditions for the offering of broadband service, VoIP, or wireless services.”); *see also* Indiana Code § 8-1-2.6-1.1; Michigan Comp. Law. § 484.2401.

157. *See supra* Table 3: Broadband Carriage Value (Download Speed Per Dollar)

158. *Cf.* VOLTAIRE, PHILOSOPHICAL DICTIONARY (Juliet Sutherland & Lisa Reigel eds., Carlton House 2006) (1770) (suggesting that perfect can be the enemy of the good).

159. *See, e.g.*, Wireline Competition Bureau and Office of Economics and Analytics Announce Results of 2021 Urban Rate Survey for Fixed Voice and Broadband Services, Posting of Survey Data and Explanatory Notes, and Required Minimum Usage Allowance for Eligible Telecommunications Carriers, 35 FCC Rcd. 13667 (2020).

160. H.R. Rep. 102-628 (1992) at 30.

161. *Cf.* Pacheco & Ramachandran, *supra* note 78.

162. *See supra* note 70 and accompanying text.

competitive with wireline facilities—just as the Cable Act contemplated the possible growth in satellite-based video programming services.¹⁶³ And so the model statute also deems a market competitive where any two (or more) providers—regardless of facility or technology used—offer comparable service to a substantial portion of a market, and where the second-largest provider has captured at least fifteen percent of the market. Presently, satellite and fixed wireless providers account for only about 3% of all residential broadband subscriptions.¹⁶⁴ But, just as the capacity and the popularity of satellite television eventually grew to exceed the Cable Act’s fifteen percent benchmark, so too could satellite- or fixed-wireless-based broadband carriage eventually support a broader swath of the population. Hence, the model statute, while emphasizing traditional competition among wireline competitors, accounts for the possibility that competition will come from other sources, too. And in any such competitive markets, the statute withdraws the authority to regulate rates.

4. *Rate Regulation and Avoiding Regulatory Failure*

In all, the proposal offered here aims to address the problem of unrestrained monopoly pricing in local broadband markets, drawing from an existing regime of rate regulation similarly aimed at addressing the problem of unrestrained monopoly pricing in local cable markets. But, as I noted above, rate regulation is an oft-maligned policy—notwithstanding its overlooked successes, such as in the universal service context described above—drawing criticisms regarding capture and information asymmetry, regulatory arbitrage, and incentive effects.¹⁶⁵

I have already addressed the concerns regarding information asymmetry. Such concerns are most severe in the context of cost-of-service or rate-of-return ratemaking, where ratesetting depends on hidden signals internal to the regulated entity (i.e., the costs of doing business) that it has both the incentive and the ability to manipulate.¹⁶⁶ But the scheme of rate regulation advanced here depends primarily on external, available signals (i.e., prices charged in competitive markets) that are less easily manipulated. I do not mean to suggest that broadband carriers will not attempt to influence regulators, or that regulators will be immune to such persuasion. Indeed, the Commission’s

163. *Compare* H.R. Rep. 102-628 (1992) at 46 (identifying the potential of “Direct Broadcast Satellite” systems, but noting that “none . . . currently is operational”) *with* *NATOA v. FCC*, 862 F.3d 18 (D.C. Cir. 2017) (affirming, twenty-five years later, a rebuttable presumption that all cable systems are subject to effective competition from such systems).

164. *See supra* note 70.

165. *See supra* note 62 and accompanying text.

166. *See supra* note 153–155 and accompanying text; *see also* NUECHTERLEIN & WEISER, *supra* note 7, at 33–34.

decision to deem rates at about the 95th percentile of those charged in urban locales as “reasonably comparable” may be evidence of such influence.¹⁶⁷ Carriers can charge much more than in most competitive markets, and while such rates may be justified (at least in part) by reference to higher deployment costs in these difficult-to-serve areas, these carriers are sure to appreciate the ability to charge these higher prices.¹⁶⁸ So it is true that even this scheme of price regulation, relying on external market signals as benchmarks, will not be perfect. But the relevant comparator is not some fictitious, idealized scheme of rate regulation. Rather, it’s the status quo characterized by monopoly pricing. Viewed against this metric, it seems likely—especially in view of the evidence gathered above—that this scheme will offer a substantial improvement in affordability vis-à-vis present monopoly prices.

Other criticisms of rate regulation regard regulatory arbitrage. Indeed, this is one of the primary criticisms of the 1992 Cable Act’s scheme, as some scholars have contended that the 1992 Act, which provides the basis for the proposal advanced here, failed to meaningfully improve welfare because quality decreased as rates were regulated.¹⁶⁹ Specifically, cable providers minimized the quality and breadth of programming available in the regulated basic service tier in order to induce customers to subscribe to more expensive, unregulated tiers of service. But this criticism, as directed to broadband carriage, falls short. In cable television, “quality variation is relatively feasible” through the manipulation of available channels, and so one predictable consequence of price-cap rate regulation is to starve the regulated service.¹⁷⁰ But broadband carriage is less susceptible to such quality variation. Assuming network neutrality protections,¹⁷¹ broadband carriage is defined by only a few key dimensions: download and upload speeds; capacity allowances (i.e., data caps); equipment fees; and installation, activation, and termination fees. Regulators can straightforwardly account for all these dimensions when defining a basic service tier and set rates accordingly.¹⁷²

167. See *supra* note 121.

168. See, e.g., Connect Am. Fund, 29 FCC Rcd. 13485, ¶ 5 (2014) (noting support for this methodology from various industry associations).

169. See *supra* note 135 (collecting such criticisms).

170. Hazlett, *supra* note 135 at 193–94.

171. Of course, without network neutrality protections, quality variation becomes more feasible, as providers can create various packages that limit or block access to popular services, or that degrade the quality of, say, video programming applications. In short, without network neutrality protections, broadband providers are free to sell internet access in a form that resembles channel bundles. For example, Google, Twitter, and Amazon are in a premier tier, while Bing, Facebook, and Overstock are in the basic.

172. Cf. Connect Am. Fund, 29 FCC Rcd. 13485, ¶¶ 7–8 (2014) (noting that the Commission’s existing approach to setting reasonably comparable rates for reasonably comparable service accounts for several such dimensions).

Finally, and most substantially, critics of ratesetting contend that such regulation tends to depress investment by market providers (because it reduces the expected return on those investments, and so negatively affects incentives to invest).¹⁷³ It is useful, however, to consider three types of such investments: first, investments by participants in competitive markets; second, investments by putative competitors considering entry into a monopoly-served market; third, investments by putative monopolists into an unserved market. Critics of rate regulation contend that ratesetting will tend to depress all three varieties of rate regulation.¹⁷⁴ But that is not necessarily so; rather, such effects depend on the specific regime at issue. The scheme advanced here should have no effect on investments made by participants in a competitive market, because the scheme does not apply to competitive markets. It applies only to monopoly-served markets. Likewise, the scheme should have no effect on investments made by putative competitors to incumbent monopolists, because the model statute withdraws the authority to regulate rates once a market becomes competitive. Hence, any competitor's expected return on entry should be based on market rates rather than regulated rates.¹⁷⁵ But I concede that rate regulation may depress the incentives to enter unserved markets, as, under the scheme advanced here, putative entrants to such markets could no longer count on the promise of monopoly profits to justify entry.¹⁷⁶ But we have already seen that other inducements—federal subsidies, for example, such as universal service funds—can be sufficient to persuade carriers to enter unserved markets, even when attached to ratesetting conditions.¹⁷⁷ Hence, though local regulators and policymakers would do well to consider how they can facilitate broadband access in digital deserts—for example, subsidies and access to rights-of-way—in order to boost the availability of broadband carriage in unserved areas, such gains need not come at the expense of

173. See, e.g., Nuechterlein & Shelanski, *supra* note 21.

174. Nuechterlein & Shelanski, *supra* note 21 (criticizing other proposals for rate regulation on all three of these grounds).

175. It is true that, in some instances, regulators may erroneously characterize a market as noncompetitive, or may be slow to recognize competition in a changing market. But such errors alone are not a sufficient reason to cast aside proposals such as the one offered here. Rather, we must assess the likelihood and severity of such errors, and weigh them against the benefits, in terms of affordability, that such a regime will bring to the range of monopoly-served locales. I save that assessment for another day, noting only, as I do above, that the persistent digital divide, driven by affordability concerns, seems to call for a price-oriented regulatory solution, and the one offered here does well to avoid many of the pitfalls of rate regulations. See *supra* text accompanying notes 173–175.

176. Cf. *Verizon Commc'ns, Inc. v. L. Offs. of Curtis V. Trinko LLP*, 540 U.S. 398, 407 (2005) (“The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”).

177. See *supra* Table 3.

extractive and welfare-diminishing monopoly prices. In short, it is possible to address both access and affordability concerns simultaneously.

V. CONCLUSION

DirecTV Now's role in the interpretation of the 1992 Cable Act highlights an important tension between transmission-layer services and application-layer. The Act was designed for a different technological era, before the network convergence occasioned by the modern internet. Our regulatory response to such convergence has focused, in significant part, on the deregulation of newly competitive application-layer markets, such as video programming.

But this focus on application-layer markets has obscured the persistent local monopolies in transmission-layer markets. Such durable and deregulated monopoly markets contribute to a stubborn digital divide, driven by higher costs for broadband carriage. One response to this problem of affordability is to return to the program instituted in the 1992 Act itself, namely, a scheme of retail rate regulation, limited to monopoly markets. Such a scheme can help deliver billions of dollars in economic value to consumers, all while improving economic, educational, and health outcomes for a significant portion of the population.

APPENDIX A: A STATUTORY PROPOSAL

A. COMPETITION PREFERENCE; LOCAL AND FEDERAL REGULATION

(1) In General

The Federal Communications Commission, and State commissions and franchising authorities with authority over broadband internet access service, may regulate the rates for the provision of broadband internet access service only to the extent provided under this section. No Federal agency, State commission, or franchising authority may regulate the rates for broadband internet access service that is owned or operated by a local government or franchising authority within whose jurisdiction that service is located and that is the only service available within such jurisdiction.

(2) Preference for Competition

If a provider of broadband internet access service demonstrates to the Federal Communications Commission that its broadband internet access service is subject to effective competition, the rates for the provision of such service by such provider shall not be subject to regulation by the Federal Communications Commission or by a State commission or franchising authority under this section. If the Federal Communications Commission finds that such service is not subject to effective competition—

- (A) the rates for the provision of a basic service tier of broadband internet access service shall be subject to regulation by any State commission or franchising authority with jurisdiction over broadband internet access service;
- (B) where no State commission or franchising authority has jurisdiction over broadband internet access service, including where such authority has been revoked under paragraph (5), the rates for a basic service tier of broadband internet access service shall be subject to regulation by the Federal Communications Commission.

(3) Qualification of State Commission or Franchising Authority

A State commission or franchising authority that seeks to exercise the regulatory jurisdiction permitted under paragraph (2)(A) shall file with the Federal Communications Commission a written certification that—

- (A) the State commission or franchising authority will adopt and administer regulations with respect to the rates subject to regulation under this section in a manner consistent with the requirements of subsection (b);

- (B) the State commission or franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and
- (C) procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties.

(4) Approval by Federal Communications Commission

A certification filed by a State commission or franchising authority under paragraph (3) shall be effective 30 days after the date on which it is filed unless the Federal Communications Commission finds, after notice to the commission or authority and a reasonable opportunity for the commission or authority to comment, that—

- (A) the State commission or franchising authority has adopted or is administering regulations with respect to the rates subject to regulation under this section that are not consistent with the regulations prescribed by the Federal Communications Commission under subsection (b);
- (B) the State commission or franchising authority does not have the legal authority to adopt, or the personnel to administer, such regulations; or
- (C) procedural laws and regulations applicable to rate regulation proceedings by such authority do not provide a reasonable opportunity for consideration of the views of interested parties.

If the Federal Communications Commission disapproves a State commission or franchising authority's certification, the Federal Communications Commission shall notify the State commission or franchising authority of any revisions or modifications necessary to obtain approval.

(5) Revocation of Jurisdiction

Upon petition by a broadband internet access service provider or other interested party, the Federal Communications Commission shall review the regulation of broadband internet access service rates by a State commission or franchising authority under this subsection. A copy of the petition shall be provided to the franchising authority by the person filing the petition. If the Federal Communications Commission finds that the State commission or franchising authority has acted inconsistently with the requirements of this subsection, the Commission shall grant appropriate relief. If the Federal Communications Commission, after the State commission or franchising

authority has had a reasonable opportunity to comment, determines that the State and local laws and regulations are not in conformance with the regulations prescribed by the Commission under subsection (b), the Federal Communications Commission shall revoke the jurisdiction of such authority.

(6) Exercise of Jurisdiction by Federal Communications Commission—

If the Federal Communications Commission disapproves a State commission or franchising authority's certification under paragraph (4), or revokes such authority's jurisdiction under paragraph (5), the Federal Communications Commission shall exercise the franchising authority's regulatory jurisdiction, as under paragraph (2)(B), until the State commission or franchising authority has qualified to exercise that jurisdiction by filing a new certification that meets the requirements of paragraph (3). Such new certification shall be effective upon approval by the Federal Communications Commission. The Federal Communications Commission shall act to approve or disapprove any such new certification within 90 days after the date it is filed.

B. ESTABLISHING BASIC SERVICE TIER REGULATIONS; RATE REGULATIONS

(1) Obligation to Subscribers

The Commission shall, by regulation, ensure that the rates and services for a basic service tier of broadband internet access service are just and reasonable.

(2) Competitive Benchmarks

Regulations governing the rates charged for a basic service tier of broadband internet access service shall be designed to achieve the goal of protecting subscribers of any provider not subject to effective competition from rates that exceed the rates that would be charged if such provider were subject to effective competition.

(3) Rate Regulations

In prescribing regulations regarding the rates charged, the Federal Communications Commission, and State commissions and franchising authorities with authority over broadband internet access service, may regulate the rates for the provision of a basic service tier of broadband internet access service. In prescribing such regulations, the Commission—

- (A) shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission;

- (B) may adopt formulas or other mechanisms and procedures in complying with the requirements of subparagraph (A); and
- (C) shall take into account the following factors, emphasizing the factor set out in paragraph (i):
 - (i) the rates and services for broadband internet access service providers that are subject to effective competition in comparable markets;
 - (ii) the costs and revenues of providing broadband internet access service in regulated markets and comparable markets;
 - (iii) the subsidies (if any) received by a provider for the purpose of providing broadband internet access service to subscribers;
 - (iv) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority
 - (v) any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental uses of broadband internet access service; and
 - (vi) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).
- (D) Nothing in this section shall be understood to preempt any prior agreement that regards, or any provision or law of any State that regulates, the rates and services for broadband internet access service offered to—
 - (i) low-income or economically disadvantaged subscribers;
 - (ii) public and nonprofit elementary and secondary school classrooms, health care providers, and libraries;
 - (iii) public institutional users.

(4) Implementation and Enforcement

The regulations prescribed by the Commission under this subsection shall include additional standards, guidelines, and procedures concerning the implementation and enforcement of such regulations, including—

- (A) procedures by which broadband internet access service providers may implement and franchising authorities may enforce the regulations prescribed by the Commission under this subsection;

- (B) procedures for the expeditious resolution of disputes between broadband internet access service providers and franchising authorities concerning the administration of such regulations;
- (C) standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment subject to regulation under this section, which standards shall require that charges for changing the service tier selected shall be based on the cost of such change and shall not exceed nominal amounts; and
- (D) standards and procedures to assure that subscribers receive notice of the availability of the basic service tier required under this section.

(5) Notice

The procedures prescribed by the Commission pursuant to paragraph (5)(A) shall require a broadband internet access service provider to provide 30 days' advance notice to a franchising authority of any increase proposed in the price to be charged for the basic service tier.

(6) Components of a Basic Service Tier Subject to Rate Regulation

- (A) Each broadband internet access service provider shall provide its subscribers a basic tier of service. Such basic service tier shall consist of the following:
 - (i) access to all lawful internet content, applications, and services that is—
 - (1) not blocked;
 - (2) not impaired or degraded; and
 - (3) not subject to paid prioritization or unreasonable interference or disadvantage;
 - (4) except that any reasonable network management practice shall not be understood as impairing, degrading, or unreasonably interfering with or disadvantaging such access.
 - (ii) access to all lawful internet content that satisfies minimum speed standards to be prescribed by the Commission, but no lower than 25 Mbps download and upload,
 - (1) except, where it is technically infeasible to offer service satisfying the Commission's standard, the best available service nevertheless below that standard;

- (2) except that any provider whose basic service tier falls into the exception set out in subparagraph (B)(6)(A)(ii)(1) shall not qualify as an effective competitor for purposes of Section (I)(1);
 - (iii) no limits on a user's capacity allowance,
 - (1) except, where it is technically infeasible to offer unlimited capacity allowances, the best available service nevertheless below that standard;
 - (2) except that any provider whose basic service tier falls into the exception set out in subparagraph (B)(6)(A)(iii)(1) shall not qualify as an effective competitor for purposes of Section (I)(1);
 - (iv) such limits on installation, activation, termination, equipment, and other such fees as the Commission prescribes.
- (B) The prescription of a basic service tier shall not be understood to prevent broadband internet access service providers from offering higher tiers of service. The rates and services for such higher tiers of service shall not be subject to regulation by the Commission or by a State or franchising authority under this section.
- (C) Broadband internet access service providers may not offer any tier of service that is below the benchmarks prescribed by the Commission, except as noted in subparagraphs (A)(ii) and (A)(iii).
- (D) Broadband internet access service providers shall advertise the availability of a basic service tier in a manner, and with such prominence, as any other tier of service offered by such provider. Broadband internet access providers may not impose requirements to subscribe to the basic service tier greater or more onerous than those required to subscribe to any other tier.

(7) Buy-Through Prohibited

A provider of broadband internet access service may not require the subscription to any tier other than the basic service tier as a condition of subscribing to any other service offered by the provider, nor may a provider

require the subscription of any other service as a condition of subscribing to the basic service tier. A broadband internet access service provider may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for additional services.

C. REPORTS ON AVERAGE PRICES

The Commission shall publish an annual statistical report on the average rates for the basic tier of broadband internet access service and for other service tiers, and for other costs, that the Commission has found are subject to effective competition under subsection (a)(2) compared with rates that the Commission has found are not subject to such effective competition.

D. DISCRIMINATION; ACCESSIBILITY

Nothing in this subchapter shall be construed as prohibiting any Federal agency, State, or a franchising authority from—

- (A) prohibiting discrimination among subscribers and potential subscribers to broadband internet access service, except that no Federal agency, State, or franchising authority may prohibit a provider of broadband internet access service from offering reasonable discounts to senior citizens or any economically-disadvantaged group; or
- (B) requiring and regulating the installation or rental of equipment which facilitates the provision of broadband internet access service to hearing impaired or visually impaired individuals.

E. NEGATIVE OPTION BILLING PROHIBITED

A provider of broadband internet access service shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

F. COLLECTION OF INFORMATION

The Commission shall, by regulation, require broadband internet access service providers to file with the Commission or a franchising authority, as appropriate, within one year after the passage of this section and annually

thereafter, such financial information as may be needed for purposes of administering and enforcing this section.

G. PREVENTING EVASIONS

The Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this section and shall, thereafter, periodically review and revise such standards, guidelines, and procedures.

H. SMALL PROVIDERS

(1) No Rate Regulation for Small Providers

Subsections (a) and (b) do not apply to any provider of broadband internet access service that serves fewer than 50,000 subscribers and that is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.

(2) Administrative Burdens

In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for provider of broadband internet access service that have 1,000 or fewer subscribers.

I. DEFINITIONS

(1) The term “effective competition” means that—

- (A) the franchise area is served by at least two unaffiliated broadband internet access service providers, each of which offers comparable service that satisfies the Commission’s speed benchmarks for basic service over a fixed wireline facility to at least 67 percent of the households in the franchise area; or
- (B) the franchise area is—
 - (i) served by at least two unaffiliated broadband internet access service providers, each of which offers comparable service, regardless of the technology or facility used to offer such service, to at least 67 percent of the households in the franchise area; and
 - (ii) the number of households subscribing to services offered by the broadband internet access service

provider other than the largest provider exceeds 15 percent of the households in the franchise area.

(2) The term “broadband internet access service” means a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence or that is used to evade the protections set forth in this part.

APPENDIX B: DATA: RESULTS AND METHODS

A. SUPPLEMENTAL RESULTS

Table 4: Available Broadband Service for Residents in Comcast's Formerly Regulated Footprint

<u>Community</u>	<u>No Service</u> (Population)	<u>Monopoly Service</u> (Population)	<u>Competitive Service</u> (Population)
Acushnet	19	7,509	2,765
Agawam	265	27,496	0
Amesbury	95	15,887	0
Amherst	515	21,703	365
Attleboro	312	42,496	221
Avon	6	4,349	0
Barnstable	431	44,399	0
Berkley	14	4,553	1,828
Beverly	72	36,732	184
Blackstone	0	5,465	3,515
Bridgewater	348	20,971	482
Brockton	961	91,058	23
Buckland***	61	3,682	0
Cambridge	1,014	82,789	4,257
Carlisle	7	4,845	0
Chatham	11	6,011	0
Clinton	14	13,203	325
Concord	0	330	15,640
Dartmouth	38	25,317	3,202
Deerfield	15	4,778	0
Dennis	378	13,707	0
Dighton	21	6,985	0
Dracut	663	26,238	2,544
East Bridgewater	46	13,613	0
Eastham	13	4,943	0
Essex	4	3,424	76
Fairhaven	29	15,520	0
Fall River	1,016	86,106	0
Falmouth	87	30,936	0
Freetown	65	3,843	4,870

Gardner	41	18,905	0
Gloucester	66	28,273	0
Granby	21	5,992	226
Greenfield	60	16,586	204
Groveland	88	6,371	0
Hanson	41	8,543	1,605
Harwich	74	12,000	0
Hatfield	26	3,253	0
Haverhill	376	59,203	0
Holyoke	438	38,057	0
Lancaster	22	4,520	1,856
Longmeadow	53	15,203	0
Lowell	886	100,062	1,225
Manchester-By-The-Sea	28	5,099	0
Merrimac	13	6,302	0
Milton	166	7,544	6,368
Montague	72	8,221	2
New Bedford	589	92,517	0
Newbury	17	6,229	315
Newburyport	27	17,003	0
Northampton	227	25,148	18
Norton	175	16,576	502
Orleans	28	5,774	0
Palmer	206	11,710	164
Peabody	943	47,860	1,928
Pelham	17	1,272	32
Plainville	65	7,659	510
Provincetown	27	2,871	0
Quincy	1387	89,302	158
Rehoboth	0	11,588	8
Rockport	8	6,875	0
Salem	252	39,265	53
Saugus	145	23,185	2,963
Scituate	66	16,943	939
Sharon	236	16,618	688
Somerset	21	17,875	0
South Hadley	32	15,122	160

Southwick	11	9,476	0
Springfield	824	143,786	2,773
Sunderland****	355	4,772	0
Swansea	45	15,607	0
Templeton	29	7,746	0
Ware	131	9,578	154
Warren	243	3,826	1,061
Wellfleet	52	2,697	0
West Bridgewater	15	6,756	1
West Springfield	364	27,673	184
Westfield	309	6,976	30,833
Westhampton	8	1,492	107
Weymouth	691	52,323	269
Whitman	61	14,382	0
Williamsburg*****	936	2,593	0
Winthrop	97	17,348	0
Yarmouth	251	23,359	14
TOTAL	17,881	1,834,804	95,617

Table 5: Available Broadband Service for Residents in Cox's Formerly Regulated Footprint

<u>Community</u>	<u>No Service</u> (Population)	<u>Monopoly Service</u> (Population)	<u>Competitive Service</u> (Population)
Holland**	17	4,016	286

B. APPENDIX TO TABLES 1, 4–5

Tables 1, 4, and 5 are based on the Commission's fixed broadband deployment data (Form 477 data) for the state of Massachusetts.¹⁷⁸ The FCC's data tables include columns for the unique fifteen-digit census block code used in the 2010 US Census (BlockCode), the available facility (or facilities) for broadband transmission (TechCode) in each census block, and the maximum download (MaxAdDown) and upload (MaxAdUp) speeds advertised in each

178. See Form 477 Broadband Deployment Data – June 2019 (version 1), <https://www.fcc.gov/form-477-broadband-deployment-data-june-2019-version-1>. The particular version used for these data tables was MA-Fixed-Jun2019-v1.csv (February 25, 2020).

census block. The Census Bureau also provides population data (by census block).

Each community identified in each provider's petition for deregulation (for example, Charter's Petition for Determination of Effective Competition) can be divided into one or more census tracts, with each tract comprising a group of census blocks. Because the census block codes do not directly identify the name of the community to which they belong (the code only offers information about its respective block's state, county, and tract) a research assistant generated tables of tract codes for each community by visually examining the FFIEC Geocoding/Mapping System and identifying the borders of each community.¹⁷⁹ Although the vast majority of communities were made up of one or more tracts, a few smaller communities shared tract codes with neighboring communities (that is, one tract crossed the community's border and extended into a neighboring locality). Such communities are denoted with asterisks in Tables 1, 4, and 5, and details are elaborated in footnote 180.¹⁸⁰ Such communities account for less than one percent of the total results, and do not affect my conclusion that cable monopolists tend to be broadband monopolists.

This data was compiled to yield a table listing each community with its tract codes, census block codes (and population per census block). These census block codes were then cross-referenced with the FCC's broadband deployment data per census block to identify those monopoly-served and competitively-served census blocks (using the Commission's definition for broadband as a baseline for service).

C. APPENDIX TO TABLE 2–3

Tables 2 and 3 begin with two main sources: the Universal Service Administrative Company's Connect America Fund (CAF) Broadband Map; and the FCC's Fixed Broadband Deployment Map.

I selected seven states—Arizona, California, Georgia, Minnesota, Montana, New York, and Washington—semi-randomly, with the constraints that the sample is broadly representative of the nation's major regions, and that each state in the sample offers the opportunity to compare competitive service,

179. See FFIEC Geocoding System, <https://geomap.ffiec.gov/FFIECGeocMap/GeocodeMap1.aspx> (last visited Sept. 26, 2022).

180. These communities shared tract codes with the neighboring communities noted below:

- * Richmond, MA shares tract code(s) with Hancock, MA and New Ashford, MA.
- ** Holland, MA shares tract code(s) with Wales, MA.
- *** Buckland, MA shares tract code(s) with Shelburne, MA.
- **** Sunderland, MA shares tract code(s) with Whatley, MA.
- ***** Williamsburg, MA shares tract code(s) with Goshen, MA.

regulated service, and unregulated monopoly service across a set of a reasonably proximate locales. I tried, for example, to include Nebraska as representative of the Great Plains and Midwest, but switched to Minnesota once the latter constraint could not be satisfied. Within each state, a research assistant selected two broadband providers that had received the most CAF II support based on dollars received or locations deployed.

For each provider, we located three residential addresses for each of three categories (competitively-served, regulated-monopoly-served, unregulated-monopoly-served). As explained above, unregulated monopolists are those providers that are neither subject to the Commission's public interest obligations in the relevant locale, nor subject to market competition (excluding satellite and fixed wireless providers). Regulated monopolists are those providers that are subject to the public interest obligations, but not subject to any competition (excluding, again, satellite and fixed wireless providers). And competitive providers are those subject to wireline competition. The research assistant selected residential addresses that she visually estimated were located as closely together as possible: Visual estimation proved to be the best method for identifying these sets of locales.

The research assistant entered each selected residential address into the appropriate provider's website to procure a quote for internet service at that address. These quotes were obtained during March and April 2021. For the vast majority of residential addresses, the provider offered only one package, namely, one promised top speed for one monthly price (often subject to a post-promotion price increase). Some, however, offered a variety of speeds at varying monthly prices. The research assistant recorded all available information and captured screen images of these results.

The resulting dataset contains nine residential addresses per broadband provider for each state—three for each of the three categories, as well as a corresponding cost for broadband carriage at each address. The average broadband carriage value (the metric used in Tables 2 and 3) for each state-provider pair is average across all three addresses of the average mbps per dollar across the packages available at each address.

Where possible, the prices recorded exclude any temporary promotional discounts. The prices, however, include some non-temporary discounts, such as discounts for ordering service online. The prices exclude installation fees and equipment fees, or other such costs.

Where providers offered more than one package at a residential address, each package counts, as noted above. However, some narrative descriptions (in the Article's main text above) of geographic comparisons emphasize more limited, but direct, comparisons. Where, for example, a narrative description

refers to a \$55.00 offering, it describes only offerings at that price point, notwithstanding any other available options.

Table 6: Sampled Data

State	Provider	Category	Street ¹⁸¹	City	Price	Speed
AZ	CenturyLink	Unregulated Monopoly	Hidden Hollow Road	Flagstaff	\$49.00	1.5
AZ	CenturyLink	Unregulated Monopoly	W Hashknife Trail	Flagstaff	\$49.00	3
AZ	CenturyLink	Unregulated Monopoly	W Hashknife Trail	Flagstaff	\$49.00	3
AZ	CenturyLink	Regulated Monopoly	W Whitman Trail	Flagstaff	\$49.00 \$49.00	30 15
AZ	CenturyLink	Regulated Monopoly	W Dreamview Trail	Flagstaff	\$49.00	10
AZ	CenturyLink	Regulated Monopoly	W Raven Road	Flagstaff	\$49.00 \$49.00	40 30
AZ	CenturyLink	Competitive	N Nancy Way	Flagstaff	\$49.00	30
AZ	CenturyLink	Competitive	Magdalena Road	Flagstaff	\$49.00 \$49.00	40 20
AZ	CenturyLink	Competitive	W Red Rock Lane	Flagstaff	\$49.00	30
AZ	Frontier	Unregulated Monopoly	S Hoyt Street	Snowflake	\$44.99	12
AZ	Frontier	Unregulated Monopoly	Hoyt Road	Snowflake	\$44.99	12
AZ	Frontier	Unregulated Monopoly	White Antelope Road	Snowflake	\$37.99	3
AZ	Frontier	Regulated Monopoly	W Darlene Lane	Snowflake	\$44.99	12
AZ	Frontier	Regulated Monopoly	N 4th Street W	Snowflake	\$44.99	12
AZ	Frontier	Regulated Monopoly	Despain Avenue	Snowflake	\$44.99	12

181. Complete address redacted.

AZ	Frontier	Competitive	W 8th Street S	Snowflake	\$44.99	25
AZ	Frontier	Competitive	W 6th Street S	Snowflake	\$44.99	25
AZ	Frontier	Competitive	W Center Street	Snowflake	\$44.99	25
CA	AT&T	Unregulated Monopoly	C Street	Julian	\$55.00	18
CA	AT&T	Unregulated Monopoly	Keyes Road	Ramona	\$55.00	10
CA	AT&T	Unregulated Monopoly	2nd Street	Julian	\$55.00	18
CA	AT&T	Regulated Monopoly	Apple Lane	Julian	\$55.00	25
CA	AT&T	Regulated Monopoly	Elm Street	Ramona	\$55.00	10
CA	AT&T	Regulated Monopoly	Pamo Road	Ramona	\$55.00	25
CA	AT&T	Competitive	Keyes Road	Ramona	\$55.00	25
CA	AT&T	Competitive	B Street	Ramona	\$55.00	50
CA	AT&T	Competitive	Ash Street	Ramona	\$55.00	75
CA	Frontier	Unregulated Monopoly	Casper Avenue	Inyokern	\$44.99	12
CA	Frontier	Unregulated Monopoly	S Forest Knoll Street	Ridgecrest	\$44.99	12
CA	Frontier	Unregulated Monopoly	S Forest Knoll Street	Ridgecrest	\$44.99	12
CA	Frontier	Regulated Monopoly	N Blackbird Street	Inyokern	\$44.99	12
CA	Frontier	Regulated Monopoly	Sierra Vista Street	Inyokern	\$44.99	18
CA	Frontier	Regulated Monopoly	Ridgecrest Boulevard	Inyokern	\$44.99	12
CA	Frontier	Competitive	Valley Avenue	Inyokern	\$44.99	25
CA	Frontier	Competitive	Ash Avenue	Inyokern	\$54.99	90
CA	Frontier	Competitive	Brown Road	Inyokern	\$54.99	70
GA	AT&T	Unregulated Monopoly	Maple Lane	Watkinsville	\$55.00	5

GA	AT&T	Unregulated Monopoly	Macon Highway	Bishop	\$55.00	25
GA	AT&T	Unregulated Monopoly	Macon Highway	Bishop	\$55.00	25
GA	AT&T	Regulated Monopoly	Macon Highway	Bishop	\$55.00	75
GA	AT&T	Regulated Monopoly	Greenfield Lane	Watkinsville	\$55.00	5
GA	AT&T	Regulated Monopoly	Macon Highway	Bishop	\$55.00	25
GA	AT&T	Competitive	Simonton Bridge Road	Watkinsville	\$55.00 \$65.00 \$80.00	100 300 1000
GA	AT&T	Competitive	Wilson Road	Watkinsville	\$55.00 \$65.00 \$80.00	100 300 1000
GA	AT&T	Competitive	Lawanna Drive	Watkinsville	\$55.00 \$65.00 \$80.00	100 300 1000
GA	Frontier	Unregulated Monopoly	Pinhook Road SE	Fairmount	\$44.99	12
GA	Frontier	Unregulated Monopoly	Pinhook Road SE	Fairmount	\$44.99	12
GA	Frontier	Unregulated Monopoly	Pack Road NE	Ranger	\$44.99	18
GA	Frontier	Regulated Monopoly	Pittman Road NE	Ranger	\$44.99	12
GA	Frontier	Regulated Monopoly	Red Bud Road NE	Ranger	\$54.99	45
GA	Frontier	Regulated Monopoly	Shirley Road SE	Ranger	\$44.99	12
GA	Frontier	Competitive	Red Bud Road NE	Ranger	\$44.99	18
GA	Frontier	Competitive	Fairmount Highway SE	Fairmount	\$54.99	90
GA	Frontier	Competitive	Fairmount Highway SE	Fairmount	\$54.99	115

MN	CenturyLink	Unregulated Monopoly	Kenyon Boulevard	Faribault/ Cannon City	\$49.00	10
MN	CenturyLink	Unregulated Monopoly	Cannon City Boulevard	Faribault/ Cannon City	\$49.00	20
MN	CenturyLink	Unregulated Monopoly	Canby Avenue	Faribault	\$49.00	3
MN	CenturyLink	Regulated Monopoly	Morristown Boulevard	Faribault	\$49.00	40
MN	CenturyLink	Regulated Monopoly	Faribault Boulevard	Faribault	\$49.00	40
MN	CenturyLink	Regulated Monopoly	220th Street E	Faribault	\$49.00	10
MN	CenturyLink	Competitive	23rd Avenue NW	Faribault	\$49.00	60
MN	CenturyLink	Competitive	Glynview Trail	Faribault	\$49.00	60
MN	CenturyLink	Competitive	Chestnut Lane	Faribault	\$49.00	60
MN	Frontier	Unregulated Monopoly	345th Avenue	Henderson	\$44.99	12
MN	Frontier	Unregulated Monopoly	331st Avenue	Green Isle	\$44.99	12
MN	Frontier	Unregulated Monopoly	341st Lane	Henderson	\$44.99	12
MN	Frontier	Regulated Monopoly	226th Street	Henderson	\$44.99	12
MN	Frontier	Regulated Monopoly	226th Street	Henderson	\$44.99	12
MN	Frontier	Regulated Monopoly	228th Street	Green Isle	\$44.99	18
MN	Frontier	Competitive	N 5th Street	Henderson	\$44.99	18
MN	Frontier	Competitive	S 5th Street	Henderson	\$44.99	25
MN	Frontier	Competitive	S 3rd Street	Henderson	\$44.99	18
MT	CenturyLink	Unregulated Monopoly	Chapman Road	Bozeman	\$49.00	10
MT	CenturyLink	Unregulated Monopoly	Blackwood Road	Bozeman	\$49.00	15
MT	CenturyLink	Unregulated Monopoly	Gooch Hill Road	Bozeman	\$49.00	10

MT	CenturyLink	Regulated Monopoly	Clark Way	Bozeman	\$49.00 \$49.00	80 40
MT	CenturyLink	Regulated Monopoly	Blackwood Road	Bozeman	\$49.00	15
MT	CenturyLink	Regulated Monopoly	Fowler Lane	Bozeman	\$49.00 \$49.00	40 30
MT	CenturyLink	Competitive	Alpha Drive	Bozeman	\$49.00 \$49.00	60 40
MT	CenturyLink	Competitive	Driftwood Drive	Bozeman	\$49.00 \$49.00	100 60
MT	CenturyLink	Competitive	Leverich Road	Bozeman	\$49.00 \$49.00	100 60
MT	Ziplay (formerly Frontier)	Unregulated Monopoly	Sunrise Road	Troy	\$45.00	3
MT	Ziplay (formerly Frontier)	Unregulated Monopoly	Sunset Lane	Troy	\$45.00	3
MT	Ziplay (formerly Frontier)	Unregulated Monopoly	110 E Spokane Avenue	Troy	\$45.00	45
MT	Ziplay (formerly Frontier)	Regulated Monopoly	Valley of the Moon Road	Troy	\$45.00	25
MT	Ziplay (formerly Frontier)	Regulated Monopoly	Iron Creek Road	Troy	\$45.00	70
MT	Ziplay (formerly Frontier)	Regulated Monopoly	Welch Road	Troy	\$45.00	25
MT	Ziplay (formerly Frontier)	Competitive	E Missoula Avenue	Troy	\$45.00	12
MT	Ziplay (formerly Frontier)	Competitive	E Kootenai Avenue	Troy	\$45.00	35

MT	ZiPLY (formerly Frontier)	Competitive	E Missoula Avenue	Troy	\$45.00	35
NY	Frontier	Unregulated Monopoly	Rix Hill Road	Hemlock	\$44.99	12
NY	Frontier	Unregulated Monopoly	Blank Road	Hemlock	\$37.99	9
NY	Frontier	Unregulated Monopoly	Blank Road	Hemlock	\$44.99	18
NY	Frontier	Regulated Monopoly	Blank Road	Hemlock	\$44.99	12
NY	Frontier	Regulated Monopoly	Blank Road	Hemlock	\$44.99	18
NY	Frontier	Regulated Monopoly	Harder Road	Hemlock	\$37.99	9
NY	Frontier	Competitive	Pleasant Street	Hemlock	\$44.99	25
NY	Frontier	Competitive	Main Street	Hemlock	\$44.99	25
NY	Frontier	Competitive	Clay Street	Hemlock	\$44.99	25
NY	Windstream	Unregulated Monopoly	Mud Creek Road	Kennedy	\$67.00	4
NY	Windstream	Unregulated Monopoly	Page Road	Kennedy	\$67.00	4
NY	Windstream	Unregulated Monopoly	Waterman Road	Kennedy	\$67.00	1.5
NY	Windstream	Regulated Monopoly	Page Road	Kennedy	\$67.00	10
NY	Windstream	Regulated Monopoly	Mud Creek Road	Kennedy	\$67.00	10
NY	Windstream	Regulated Monopoly	Miller Valley Road	Kennedy	\$67.00	10
NY	Windstream	Competitive	Wheelock Road	Kennedy	\$67.00	15
NY	Windstream	Competitive	2nd Street	Kennedy	\$67.00 \$77.00	50 200
NY	Windstream	Competitive	Maple Shade Lane	Kennedy	\$67.00 \$77.00	50 100

WA	CenturyLink	Unregulated Monopoly	Guy Kelly Road	Port Angeles	\$49.00	15
WA	CenturyLink	Unregulated Monopoly	Guy Kelly Road	Port Angeles	\$49.00	10
WA	CenturyLink	Unregulated Monopoly	Blue Ridge Road, Main Unit	Port Angeles	\$49.00	10
WA	CenturyLink	Regulated Monopoly	Lake Farm Road	Port Angeles	\$49.00	20
WA	CenturyLink	Regulated Monopoly	Lake Farm Road	Port Angeles	\$49.00	20
WA	CenturyLink	Regulated Monopoly	Blue Mtn Road	Port Angeles	\$49.00	10
WA	CenturyLink	Competitive	Fern Road	Port Angeles	\$49.00	30
WA	CenturyLink	Competitive	Breezy Lane	Port Angeles	\$49.00	40
WA	CenturyLink	Competitive	Guy Kelly Road	Port Angeles	\$49.00	20
WA	Ziplay (formerly Frontier)	Unregulated Monopoly	Spirit Lane	Kennewick	\$45.00	25
WA	Ziplay (formerly Frontier)	Unregulated Monopoly	S 816 Prairie SE	Kennewick	\$45.00	25
WA	Ziplay (formerly Frontier)	Unregulated Monopoly	E Canyon Meadow Drive	Kennewick	\$45.00	18
WA	Ziplay (formerly Frontier)	Regulated Monopoly	S 855 Prairie SE	Kennewick	\$45.00	25
WA	Ziplay (formerly Frontier)	Regulated Monopoly	S 855 Prairie SE	Kennewick	\$45.00	25
WA	Ziplay (formerly Frontier)	Regulated Monopoly	S 855 Prairie SE	Kennewick	\$45.00	25

WA	Ziply (formerly Frontier)	Competitive	S 855 Prairie SE	Kennewick	\$45.00	25
WA	Ziply (formerly Frontier)	Competitive	S Grandview Lane	Kennewick	\$45.00	45
WA	Ziply (formerly Frontier)	Competitive	S 887 Prairie SE	Kennewick	\$45.00	115

PROMETHEUS SERVING: INCUBATING DIVERSE AND INCLUSIVE MEDIA IN THE PUBLIC INTEREST THROUGH DATA DEMOCRACY

Catherine J.K. Sandoval[†]

ABSTRACT

This Article invites Congress to expand data requirements for the National Telecommunications and Information Administration (NTIA) and Federal Communications Commission (FCC) so that minority and female ownership in telecommunications can be better understood. This Article calls for action to end the “data darkness” created by the FCC’s failure to publish decades of its licensing records in a digital format that supports rigorous analysis. The U.S. Supreme Court’s 2021 *FCC v. Prometheus Radio Project* decision countenanced under the Administrative Procedure Act the FCC’s decision to shift to the public the burden of gathering and analyzing FCC broadcast licensing records for the Commission’s quadrennial media ownership rule reviews required by the Telecommunications Act of 1996. While *Prometheus* leaves the FCC wide discretion to determine how to gather rulemaking data, it fails to address the

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FCC's public interest duties under the Communications Act. This Article contends that the FCC's poor data jurisprudence disserves the public interest and contributes to the dearth of minority and female broadcast licensees. This Article offers a taxonomy of the FCC's licensing and data jurisprudence, identifying four distinctive periods: the Nascent Era (1934–1968), the Civil Rights Era (1969–1978), the Opportunity Era (1978–1995) and the Consolidation Era (1995–present). For each era, this Article examines the expansion or contraction of minority and female ownership within the telecommunications sphere. This socio-legal-historical examination highlights the nexus between the FCC's licensing, data jurisprudence, and the public interest.

This Article urges Congress to order the FCC to digitize its archival data and create a free, public-facing, machine-readable database that supports longitudinal analysis. Ending the FCC's tolerance of data darkness will inform public policy, enable service to all Americans, foster opportunity, and spur equity in the public interest.

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I. INTRODUCTION: FROM DATA DARKNESS TO DATA DEMOCRACY

I Led Men On The Road

Of Dark And Riddling Knowledge; And I Purged

The Glancing Eye Of Fire, Dim Before,

And Made Its Meaning Plain. These Are My Works.

-Aeschylus, Prometheus Bound, 430 B.C.E.¹

A. FCC LICENSING AND DATA JURISPRUDENCE

Just as the mythical god Prometheus changed the course of history when he gave fire to humankind, harnessing the electromagnetic spectrum created new means of communication that transformed society and enabled the information age. To ensure that the electromagnetic spectrum serves the public interest, Congress created the Federal Communications Commission (FCC) through the Communications Act of 1934 ('34 Act), with the goal of promoting a worldwide and nationwide system of wireless and wireline communication.² Thirty-three years later, the Telecommunications Act of 1996 ('96 Act, or Telecom Act) raised the limits on the number of FCC broadcast licenses that an entity could hold, ushering in a massive consolidation of FCC broadcast licensing holdings. Section 202(h) of the '96 Act directed the FCC to biennially review its media ownership rules, a requirement later changed to quadrennial review.³ As the '96 Act reached its twenty-fifth anniversary, the U.S. Supreme Court's 2021 *FCC v. Prometheus Radio Project* decision⁴ countenanced under the Administrative Procedure Act (APA) the FCC's decision to shift to the public the burden of gathering and analyzing FCC broadcast licensing records for the Commission's quadrennial media ownership rule reviews.⁵ This Article rejects the *Prometheus* decision's invitation

1. AESCHYLUS, PROMETHEUS BOUND, (Daniel C. Stevenson ed., The Internet Classics Archive 1994) (430 B.C.E), <http://classics.mit.edu/Aeschylus/prometheus.html>.

2. 47 U.S.C. § 151 (2018).

3. *See* *Prometheus Radio Project v. FCC*, 652 F.3d 431, 462 (3d Cir. 2011) (*Prometheus II*) (determining that evidence presented by the FCC of significant radio consolidation at the national level (as opposed to within local markets) was properly considered under the APA in the FCC's review of media ownership rules).

4. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021) (overturning *Prometheus Radio Project v. FCC*, 939 F.3d 567, 573, 584 (3d Cir. 2019) (*Prometheus IV*)).

5. *See* *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1152 (2021). Consistent with FCC practice, this Article adopts the nomenclature of "media ownership" to mean control of FCC licenses by an individual or entity; *see also* *FCC v. Sanders Bros. Radio Station*, 309 U.S.

to defer to the “data darkness”⁶ created by the FCC’s failure to publish decades of its licensing records in a digital format that supports rigorous analysis. This Article contends that the FCC’s poor data jurisprudence disserves the public interest and contributes to the dearth of minority and female broadcast licensees by confounding tracking, analysis, and reform proposals.

This Article adds to communications and administrative jurisprudence⁷ by examining FCC data jurisprudence—administrative and legal decisions about data access and analysis—as a driver of FCC licensing jurisprudence and the dearth of minority licensees. This Article introduces to legal jurisprudence the term “data darkness” to mean decisions that obscure information and analysis. Maintaining unanalyzed records in analog format inaccessible through modern databases perpetuates data darkness. That policy choice yields an incomplete record that undermines administrative decision-making and the public interest. Data darkness frustrates comparative and longitudinal analysis that would inform FCC review of its media ownership rules and promote access to FCC licenses.

This Article distinguishes data jurisprudence from data governance or management. Data jurisprudence is developed by judicial, regulatory, and agency decision-making about data. Data theory and practice influence legal and regulatory decision-making. While agencies such as the FCC proclaim a commitment to data access and openness, administrative practice reveals the “unrules” shaping data and regulatory decisions. “Unrules” are unwritten actions, practices, and decisions that drive rules and rulemaking.⁸ “Unrules” are often spoken of in lore, not law, despite their outsized and persistent influence and ability to perpetuate data darkness.

470, 475 (1940) (“The policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license.”).

6. See FERAS BATARSEH & RUIXIN YANG, DATA DEMOCRACY: AT THE NEXUS OF ARTIFICIAL INTELLIGENCE, SOFTWARE DEVELOPMENT, AND KNOWLEDGE ENGINEERING 14 (2020) (discussing “early [technology] adopters who helped to fuel the rise of data and grew a small flame lighting the ‘data darkness’ into raging fires ready to consume the world.”).

7. See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 638 (1994) (declining to question the validity of the spectrum scarcity rationale “as support for our broadcast jurisprudence.”); *id.* at 640 (observing that “the special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence.”) (citations omitted); Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1987 (2015) (identifying principles of administrative jurisprudence “(1) authorization, (2) notice, (3) justification [the requirement for reasoned decision-making], (4) coherence, and (5) procedural fairness.”).

8. Cf. Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885, 889 (2021) (analyzing unrules as “carveouts and dispensations” from rules).

The FCC's data jurisprudence obscures its licensing jurisprudence and confounds analysis of the effects of its licensing and programmatic decisions. After its establishment in 1934, the FCC did not award its first radio license to an African American until 1949. By 1971, the FCC had awarded only ten radio licenses to minorities.⁹ The FCC did not award a television license to a minority until 1973, and did not adopt policies to promote minority license access until 1978.¹⁰ The FCC reported in 2017 that non-minority/non-Hispanic individuals controlled over 94% of FCC full-power television licenses and 92% of commercial radio licenses.¹¹ Most FCC radio and television licensees were men.¹²

Despite its professed commitment to data transparency, the FCC collected no data about many of its broadcast licensing actions and left other data languishing in analog obscurity. In 2011, the Third Circuit in *Prometheus II* emphasized that the Commission's media ownership decision "referenced *no* data on television ownership by minorities or women and *no* data regarding commercial radio ownership by women. This is because, as the Commission has since conceded, it has no accurate data to cite."¹³ In 2016, the Third Circuit in *Prometheus III* faulted the FCC's media ownership review including its 2008 Diversity Order. A "large part of the problem was inadequate data. An independent review concluded that 'all the researchers (and the peer reviewers) agree that the FCC's databases on minority and female ownership are inaccurate and incomplete and their use for policy analysis would be fraught with risk.'"¹⁴

9. *TV 9, Inc. v. FCC*, 495 F.2d 929, n.28 (D.C. Cir. 1973).

10. Ivy Group, *Whose Spectrum is it Anyway, Historical Study of Market Entry Barriers, Discrimination, and Changes in Broadcast and Wireless Licensing, 1950 to Present*, Submitted to the F.C.C., 7–8 (Dec. 2000); Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 (1978) [hereinafter *Minority Ownership Policy Statement*].

11. FCC, *Fourth Report on Broadcast Stations, FCC Form 323 and Form 323-E Ownership Data as of October 1, 2017*, 2–4 (Feb. 2020), <https://docs.fcc.gov/public/attachments/DA-20-161A1.pdf> [hereinafter, *FCC, Fourth Report on Ownership of Broadcast Stations*]. (Note, 2017 is the most recent year for which the FCC reported data. This Article's recommendations will improve the FCC's capacity to conduct and publish more timely data analysis.)

12. *Id.* (reporting that in 2017 men controlled the voting interests for 53.7% of full power commercial television stations and over 80.9% of AM and FM radio licenses).

13. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 470 (3d Cir. 2011) (*Prometheus II*).

14. *Prometheus Radio Project v. FCC*, 824 F.3d 33, 44 (3d Cir. 2016), *as amended* (June 3, 2016) (*Prometheus III*).

The Supreme Court's 2021 *Prometheus* decision concluded that the APA did not require the FCC "to conduct or commission their own empirical or statistical studies" or to create or publish databases.¹⁵ That decision allows the FCC to make decisions based on data acknowledged to be incomplete, even when relevant data can be found in the agency's archives.

The central issue in *Prometheus* was whether the FCC engaged in reasoned decision-making under the APA when it relied on a record, largely created by third parties through the notice-and-comment process, with acknowledged "gaps in the data."¹⁶ Reliable data on minority and female FCC license ownership was missing, particularly for the years from the FCC's founding until the '96 Act. Data gaps remain in the FCC forms and databases created for post-'96 Act licensees. Rather than digitize the FCC's analog database to make it available for longitudinal analysis and comment, the FCC "repeatedly ask[ed] [third-party commenters] for data on the issue [and] received no other data on minority ownership and no data at all on female ownership levels."¹⁷

The Court determined that neither the '96 Act, nor any other statute, obligated the FCC to create its own data or to conduct studies.¹⁸ The "APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," *Prometheus* concluded.¹⁹ "And nothing in the Telecommunications Act (or any other statute) requires the FCC to conduct its own empirical or statistical studies before exercising its discretion under Section 202(h)."²⁰ "The Commission further explained that its best estimate, based on the sparse record evidence, was that repealing or modifying the three [media ownership] rules at issue here was not likely to harm minority and female ownership. The APA requires no more," the Court concluded.²¹

Prometheus marks a fork in the FCC decision-making road. For its quadrennial media ownership rule reviews, including its assessment of initiatives to increase access to FCC licenses for minorities and women, the FCC can take the Promethean path and ask third parties to provide for free studies and data, even the FCC's own data. *Prometheus* determined that the FCC could use its predictive judgment based on record data submitted by third parties, even if the record remains incomplete, without violating the APA.

15. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1152 (2021) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 518–20 (2009); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)).

16. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1159 (2021).

17. *Id.*

18. *Id.* at 160.

19. *Id.* (citing *Fox Television*, 556 U.S. at 518–520; *Vermont Yankee*, 435 U.S. at 524).

20. *Id.*

21. *Id.*

The FCC's twentieth century paper records are kept in archives reminiscent of the final scene of *Raiders of the Lost Ark*.²² *Prometheus* leaves latitude for the FCC, Congress, the Administration, and the public to choose a different path. The FCC can end its Promethean cycle of data darkness and flawed analysis of its media ownership rules based on shoddy or absent data. Digitization of analog FCC data would enable longitudinal analysis that supports reasoned decision-making and serves the public interest. The FCC and Congress face a decision-making problem, not a technical issue.

This Article urges Congress, the FCC, and the National Telecommunications and Information Administration (NTIA) to reject *Prometheus's* invitation to remain in data darkness for decades to come and continue decision-making based on incomplete data. Congress should require the FCC to use twenty-first century technology to make its public data publicly accessible to support effective regulation, access to FCC licenses, and serve the public interest. NTIA should also build on the Agency's decade of research and reports on minority access to FCC licenses²³ and develop a methodology to study FCC licensing data to establish a baseline for longitudinal analysis. The data democracy initiative this Article recommends builds on the principles of the 2019 Foundations for Evidence-Based Policymaking Act (Evidence Act) and the Open, Public, Electronic, and Necessary Government Data Act (OPEN Act).²⁴

There is a rich and growing literature on data democracy and open government which this Article's limits do not provide room to explore.²⁵ Instead, this Article's socio-legal-historical analysis focuses on *why* the FCC's

22. See KPMG LLP, *Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC, Part II*, F.C.C. at 11–12 (Dec. 2000) [hereinafter *KPMG Utilization Rates*].

23. See, e.g., NTIA, 1997 COMMERCIAL BROADCAST OWNERSHIP FINDINGS, <https://www.ntia.gov/legacy/reports/97minority/findings.htm> (last visited Apr. 26, 2021); NAT'L TELECOMM. AND INFO. ADMIN., <https://www.ntia.doc.gov/> (last visited Mar. 9, 2021).

24. Pub. L. No. 111–435 (Jan. 14, 2019), 5 U.S.C. § 101. The Open Act applies to independent agencies such as the FCC while the Evidence Act applies to Executive Agencies and a limited number of other agencies, not including the FCC.

25. See, e.g., BATARSEH & YANG *supra* note 6, at 29; Max Cragliaa & Lea Shanley, *Data democracy – increased supply of geospatial information and expanded participatory processes in the production of data*, 8 INT'L J. DIGITAL EARTH 679 (2015), <http://dx.doi.org/10.1080/17538947.2015.1008214>; Harlan Yu & David G. Robinson, *The New Ambiguity of "Open Government,"* 59 UCLA L. REV. DISCOURSE 178, 182, 208 (2012) (citing IM DAVIES, OPEN DATA, DEMOCRACY, AND PUBLIC SECTOR REFORM: A LOOK AT OPEN GOVERNMENT DATA USE FROM DATA.GOV.UK (2010), <http://practicalparticipation.co.uk/odi/report/wp-content/uploads/2010/08/How-is-open-government-databeingused-in-practice.pdf>); Tiago Peixoto, *The Uncertain Relationship Between Open Data and Accountability: A Response to Yu and Robinson's the New Ambiguity of "Open Government,"* 60 UCLA L. REV. DISCOURSE 200, 207 (2013).

licensing and data jurisprudence, and the lopsided distribution of licenses that resulted, make data democracy imperative.

This Article deploys a socio-legal-historical framework to analyze FCC licensing and data jurisprudence. Socio-legal research examines “how law, legal phenomena and/or phenomena affected by law and the legal system occur in the world, interact with each other and impact upon those who are touched by them.”²⁶ This Article’s socio-legal-historical framework identifies missing FCC data as if they were empty folders in the *Library of Missing Datasets*.²⁷ Identification of missing datasets provides a roadmap to address neglected issues and underserved populations and improve data jurisprudence and administrative practice.

To analyze FCC licensing and data jurisprudence, this Article offers a novel socio-legal taxonomy that identifies and examines four distinct FCC licensing and administrative jurisprudential eras. These eras are the FCC’s: (1) Nascent Era from 1934 to 1968, when technology and regulation developed in the context of *de jure* and *de facto* segregation in many parts of American life; (2) Civil Rights Era between 1969 to 1978 following the Civil Rights Act of 1968²⁸ and the assassination of Dr. Martin Luther King; (3) Inclusive Opportunity Era between 1978 and 1995 when the FCC adopted programs to promote minority access to broadcast licenses, affirmed by the Supreme Court in *Metro Broadcasting v. FCC* under an intermediate scrutiny standard,²⁹ and; (4) Media Consolidation Era during the internet’s expansion following the ’96 Act and the Supreme Court’s 1995 shift in *Adarand v. Peña*’s to a strict scrutiny standard in 1995 for programs that took race into account.³⁰ FCC data jurisprudence throughout the FCC’s Nascent, Civil Rights, Inclusive Opportunity, and Media Consolidation Eras shaped Commission licensing policies, license distribution, the informational matrix carried on the airwaves since 1934.

26. Lisa Webley, *The Why And How To Of Conducting A Socio-Legal Empirical Research Project* in ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS 59 (Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie, eds.) (2020).

27. See Mimi Onuoha, *The Library of Missing Datasets* (2016), <https://mimionuoha.com/the-library-of-missing-datasets#>.

28. Pub. L. No. 90–284, 82 Stat. 73 (adopting the Indian Civil Rights Act making many provisions of the bill of rights applicable to Native American tribes, adopting the Fair Housing Act, and making it made it a federal crime to “by force or by threat of force, injure, intimidate, or interfere with anyone . . . by reason of their race, color, religion, or national origin, handicap or familial status.”).

29. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564–65 (1990) (upholding FCC programs that took race and ethnicity into account on an intermediate scrutiny standard), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (regarding the standard of review).

30. *Adarand Constructors, Inc.*, 515 U.S. at 235.

This Article's nine sections analyze the nexus of FCC data jurisprudence and the Commission's professed policies to promote diversity in FCC licensing and broadcast service. Section II of this Article examines the development of the FCC's media ownership rules that limit how many broadcast licenses an entity can control in a local market or nationally. This Section also examines the legal framework for FCC regulation under the Communications Act and the FCC's reliance on broadcasters to determine what to air. Those decisions influence the media matrix, access to the airwaves, and society.

Section III examines the Supreme Court's 2021 *Prometheus* decision's textualist interpretation of the Communications Act to countenance under the APA FCC predictive judgements based on a record with obvious and acknowledged gaps. It argues that *Prometheus* perpetuates the regulatory stalemate that undermines FCC analysis of its professed policies to promote minority and female access to FCC licenses. Yet, *Prometheus* also leaves the FCC with discretion to break that stalemate by choosing a different path for its data maintenance and analysis. This Section also examines the constitutional standard of review applicable to minority or female ownership initiatives in the context of FCC media ownership review.

Section IV analyzes broadcast licensing during the FCC's Nascent Era between 1934 and 1968 through a socio-legal-historical framework that highlights the nexus between the FCC's licensing and data jurisprudence. It adds to the literature by analyzing the role of Congress's 1952 Communications Act in shaping FCC license access. That amendment prohibited the FCC from considering whether other parties would better serve the public interest in a proposed broadcast license transfer. The 1952 Communications Act amendment transformed incumbent broadcasters into gatekeepers of secondary market FCC licensing deals. This Section also analyzes the FCC's adoption of non-discrimination policies beginning in 1960. Those policies did not meaningfully increase the ranks of minority broadcast licensees during an era in which *de facto* and *de jure* segregation were prevalent in many parts of American life.

Section V analyzes FCC licensing jurisprudence during the Civil Rights Era between 1969 to 1978. It examines FCC initiatives to promote service to diverse American communities including minorities and prohibit discrimination by broadcasters. It analyzes the FCC's 1978 Minority Ownership Policy Statement and programs to promote minority access to FCC licenses adopted forty-four years after the FCC's founding.

Section VI examines the Inclusive Opportunity Era at the FCC between 1978–1996. It explores the FCC's analysis of the nexus between minority license access and its media ownership rules from 1983 through the Telecom

Act of '96. This analysis refutes government and industry petitioners' claims at the *Prometheus* oral argument that the FCC did not consider minority or female license access in the development of its media ownership rules.

Section VII discusses the Consolidation Era following the '96 Act during the internet's expansion. The '96 Act lifted the cap on radio ownership nationally and increased the number of stations an entity could control locally. *Adarand*, decided in the year before the Telecom Act's adoption, applied a strict scrutiny standard to race-conscious measures.³¹ The FCC's poor data jurisprudence undermines analysis required to meet *Adarand's* standard and contributes to the stagnation of minority and female FCC broadcast license ownership at low levels.

Section VII also argues that the FCC has underexamined safety in its media ownership rule reviews despite the '34 Act's mandate that the FCC advance America's public safety through its regulation of wireless and wireline service to all Americans.³² Broadcasting remains important source of public and safety information even as internet use has expanded.

Section VIII recommends data democracy initiatives the FCC and Congress should adopt. It suggests Executive Branch action to order NTIA to develop methodologies for FCC broadcasting data analysis. It argues that consistent with the Communications Act and the Open Act, the FCC should make its public data, including its archival, analog broadcast licensing and rulemaking data, publicly accessible in a machine-readable database to facilitate longitudinal analysis that serves the public interest.

Finally, Section IX summarizes this Article's data democracy recommendations. It contends that digitization and publication of FCC broadcast data will inform media ownership rule evaluation, promote diverse access to FCC licenses, and serve America's information, safety, and communications needs. This Article urges Congress to act as the modern Prometheus and require the FCC to digitize and bring to light data long kept in analog darkness.

II. FCC STRUCTURAL MEDIA OWNERSHIP RULES CONSTRUCT THE MEDIA MATRIX

"The matrix is everywhere. It is all around us even now in this very room. You can see it when you look out your window or when you turn on your television."

31. *Id.*

32. *Mozilla Corp. v. FCC*, 940 F.3d 1, 60 (D.C. Cir. 2019).

Lawrence Fishburne (as Morpheus) – *The Matrix*, 1999

Lana Wachowski, *The Matrix: The Shooting Script*³³

A. FCC BROADCAST REGULATION CREATES THE FUTURE

The FCC's licensing and regulatory decisions since its founding in 1934 reverberate in today's media environment, influencing regulation and society. Those decisions form the legal and regulatory matrix driving what is seen on television screens, heard on the radio, and the circulation of information between broadcasting, print journalism, and the internet. Broadcasting shapes America's narratives, perspectives, and the future.

FCC licensing and structural ownership rules animate the legal and regulatory issues analyzed in *Prometheus* and FCC media ownership reviews under § 202(h) of the '96 Act. "Structural" media ownership rules dictate how many licenses an entity could control in a market nationally or locally and have also been applied to limit cross-ownership of distinct types of media.

FCC licensees decide what is aired, whose viewpoints are represented, who is hired, and which editorials or commercials reach the public through the airwaves, subject to the requirement to serve the public interest.³⁴ It is "upon [license] ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news."³⁵ The D.C. Circuit's 1973 *TV 9* decision emphasized the central role of media ownership in promoting first amendment values.³⁶

Both the public and broadcasters have speech rights at stake in broadcast regulation.³⁷ "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,"³⁸ the Supreme Court determined in *Red Lion Broadcasting Co. v. FCC* The public's right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences" from broadcasters is crucial in FCC spectrum regulation.³⁹ "The public, not some private interest, convenience, or necessity governs the issuance of licenses under the [Communications] Act."⁴⁰

33. LANA WACHOWSKI, *THE MATRIX: THE SHOOTING SCRIPT* (Newmarket Press 2001).

34. *See* *CBS Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 105 (1973) ("Congress chose to leave broad journalistic discretion with the [FCC] licensee.").

35. *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973).

36. *See id.*

37. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

38. *Id.*

39. *Id.*

40. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945).

Red Lion grounded its recognition of the value of broadcast licensing diversity to first amendment values on the marketplace of ideas theory recognized in the 1945 *Associated Press* antitrust law case.⁴¹ *Red Lion* did not address the creation of an inclusive marketplace. The metaphor of the marketplace of ideas often overlooks who is allowed to speak in the marketplace, relegated to the audience, or remains unserved or underserved.

The FCC created a broadcast marketplace of ideas in which only ten radio licenses were awarded to minorities by 1971, and no minority was awarded a television license until 1973.⁴² It took more than forty-four years after the Communications Act's passage in 1934 for the FCC to adopt programs to promote inclusion of minorities in the ranks of FCC licensees.⁴³

B. FCC STRUCTURAL MEDIA OWNERSHIP RULES

The Communications Act of 1934 requires the FCC to grant broadcast licenses in the public interest and regulate as the 'public convenience, interest, or necessity requires.'⁴⁴ In *NBC v. FCC*, the D.C. Circuit emphasized the electromagnetic spectrum "is not the private property of any individual or group,"⁴⁵ but is regulated in the public interest to benefit all Americans. Communications Act § 307(b) requires the FCC to "provide 'a fair, efficient and equitable distribution' of broadcast facilities to each of the States and communities."

The Supreme Court observed in *Federal Communications Commission v. Pottsville Broadcasting Co.* that in adopting the '34 Act, "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this, Congress provided for a system of permits and licenses."⁴⁶ The Commission grants a licensee the right to "the use of" the spectrum for a set period of time "but not the ownership thereof."⁴⁷ The FCC refers to its regulations on license control and consolidation as "media ownership rules," although licensees do not technically "own" FCC licenses.

41. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

42. *TV 9, Inc. v. FCC*, 495 F.2d 929, n.28 (D.C. Cir. 1973); Ivy Group, *supra* note 10.

43. *Minority Ownership Policy Statement*, *supra* note 10, at 13.

44. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1155 (2021); 47 U.S.C. §§ 151, 303, 309(a) (2006).

45. *NBC v. FCC*, 516 F.2d 1101, 1191 (D.C. Cir. 1975) (citing 47 U.S.C. § 301) ("No such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.")

46. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940).

47. 47 U.S.C. § 301 (2018); *see also* *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

In 1938, the FCC first adopted rules limiting control of FCC licenses by an individual or entity. FCC media ownership rules regulate issues including how many television or radio licenses an entity can control in a local market or nationally. These structural regulations include voting and equity interest thresholds that trigger application of those rules, known as attribution rules.

In *Genesee Radio Corp.*, the FCC adopted a strong presumption against granting licenses which would create duopolies, defined as ownership of two broadcast stations in a market by one entity.⁴⁸ *Genesee Radio Corp.* set a high standard for approval of a local duopoly, requiring the applicant to show “it overwhelmingly appears that the facility, apart from any benefit to the business interests of the applicant, is for the benefit of the community, fulfilling a need which cannot otherwise be fulfilled.”⁴⁹

The FCC’s presumption against radio duopoly ownership became a prohibition when the Commission adopted rules governing commercial FM service in June 1940.⁵⁰ For FM radio, the FCC in 1940 set a six-station national ownership limit threshold presumed to reflect concentration of control over broadcast licenses.⁵¹ Reaching the six-station limit raised questions about whether the public interest should permit that owner to acquire more broadcast station licenses. The purpose of the FCC’s six FM station national limit was “[t]o obviate possible monopoly, and encourage local initiative.”⁵²

In *National Broadcasting Corporation v. U.S.* and *U.S. v. Storer Broadcasting Co.*, the Supreme Court upheld FCC rules imposing limits on the number of FCC licenses a single entity could control.⁵³ The Court found these rules consistent with the FCC’s duty to ensure that broadcasting operates in the public interest. The Court has consistently recognized that the Communications Act empowers the FCC to regulate in a dynamic field, allowing it to consider a variety of factors that affect spectrum regulation in the public interest.

48. *In re Genesee Radio Corp.*, Flint, Michigan, 5 F.C.C. 183, 187 (1938); see also *In re Louisville Times Co.*, Louisville, Kentucky S. O. Ward & P. C. Ward, Louisville Broad. Co., Louisville, Kentucky, 5 F.C.C. 554, 559 (1938). The FCC uses duopoly to refer to control by an entity of two stations in a market, in contrast to the definition of duopoly used in antitrust law to mean market control by two competitors. Cf. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 724 (D.C. Cir. 2001) (“In a duopoly, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger.”).

49. *Genesee Radio Corp.*, 5 F.C.C. at 187.

50. See FCC, *Sixth Annual Report Fiscal Year 1940*, 68 (1941), <https://docs.fcc.gov/public/attachments/DOC-308656A1.pdf> [hereinafter *FCC, Sixth Annual Report*].

51. Rules Governing High Frequency Broadcast Stations, 5 Fed. Reg. 2382, 2384 (1940).

52. *FCC, Sixth Annual Report*, *supra* note 50.

53. *NBC v. United States*, 319 U.S. 190 (1943); *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956).

In 1946, a year after the conclusion of World War II, the FCC effectively limited AM station ownership to seven stations nationally. The FCC denied CBS's application to buy an AM station in San Jose, California on the grounds that the applicant had reached its full complement of licenses.⁵⁴ The Commission's denial of the transfer of control application found "that in AM, as in FM, it is against the public interest to permit a concentration of control of broadcasting facilities in any single person or organization. Such concentration of control— particularly in AM—is not a factor of the absolute number of stations alone but depends also upon the character of the facilities involved, e.g., the powers and the frequencies of the stations."⁵⁵ The Commission determined that "public interest in broadcasting is better served by entrusting the operation of radio stations to a maximum number of qualified people rather than by having a large number of stations controlled by a single person or organization."⁵⁶

Television was an "experimental" service in the 1930s and grew after the FCC approved standards for black and white television in 1941.⁵⁷ After World War II, television evolved from an experimental service to a growing platform that served millions of Americans. As AM radio expanded, FM radio technology improved, and radio listening increased, the FCC reviewed its broadcast ownership limits. It also considered cross-media limits to constrain broadcast and newspaper holdings in the same market.

C. FCC NATIONAL LICENSE OWNERSHIP LIMITS PROMOTE DIFFUSION OF LICENSE CONTROL IN THE PUBLIC INTEREST

To promote a diversity of voices and viewpoints, the FCC adopted national ownership limits beginning in 1955. From 1953 to 1954, the FCC set a national ownership limit of seven AM, seven FM, and seven Television stations, only 5 of which could be Very High Frequency (VHF) stations.⁵⁸ FCC Commissioner Mark Fowler and Dan Brenner commented that the FCC "arrived at the 7-7-7 figure by taking as a ceiling the largest number of stations

54. *In re Brunton*, 11 F.C.C. 407, 412–13 (1946).

55. *Id.*

56. *Id.*

57. FCC, *The Technology of Television* 4 (Summer 2003), https://transition.fcc.gov/omd/history/tv/documents/76years_tv.pdf.

58. Amendment of Section 3.636 of the Commission's Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations, 43 F.C.C. 2d 2797, 2801–02 (1954); Amendment of Sections 3.35, 3.240, and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM, and Television Broadcasting Stations, 18 F.C.C. 2d 288 (1953); *see also* 47 C.F.R. §§ 73.240(a)(2), 35(b)(1), 636(a)(2) (1981). The Commission arrived at the 7-7-7 figure by taking as a ceiling the largest number of stations held by any one licensee at the time of the rule's adoption.

held by any one licensee at the time of the rule's adoption."⁵⁹ FCC Commissioner Henry Rivera explained at the 1984 D.C. Circuit Judicial Conference that the 7-7-7 rule "was, and remains, rooted in the notion of maximizing media ownership diversity."⁶⁰

The 7-7-7 national ownership limit remained in place from 1953 until 1985 when the FCC reconsidered that limit in the context of its 1978 minority ownership policies. In 1978, the FCC adopted a Statement of Policy on Minority Ownership of Broadcasting Facilities.⁶¹ That Policy Statement recognized that FCC non-discrimination policies adopted in the wake of the civil unrest following the 1968 assassination of Dr. Martin Luther King had proved insufficient to promote access to FCC licenses for minorities.⁶² The FCC adopted its 1978 Minority Ownership Policy Statement one month before the Supreme Court's *Bakke* decision recognized diversity as a permissible factor to consider in order to promote educational dialogue and first amendment values.⁶³

The 1978 Minority Ownership Policy Statement adopted programs to promote minority ownership—including a "tax certificate" to incentivize incumbent broadcasters to sell their licenses to minorities by allowing sellers to defer the tax gain on the license sale. Congress' 1952 amendment to the Communications Act gave broadcast licensees discretion to determine who would be the parties to a broadcast license transfer application. That amendment, codified as Communications Act Section 310(d), forbid the FCC from considering whether another party would better serve the public interest. The Tax Certificate sought to expand the pool of players brought into deals by incumbent broadcasters.

During the regulatory proceedings to evaluate whether to lift the national limit to 12-12-12, the FCC considered minority ownership for the first time in the context of its structural licensing ownership limits.⁶⁴ In 1983, FCC

59. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 257, n.166 (1982).

60. Proceedings of the Forty-Fifth Judicial Conference of the District of Columbia Circuit, 105 F.R.D. 251, 351 (N.D. Tex., 1984).

61. *Minority Ownership Policy Statement*, *supra* note 10.

62. *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C. 2d 240 (1969); NAT'L ADVISORY COMM'N ON CIV. DISORDERS, SUMMARY OF REPORT (Bantam Books 1968), <http://www.eisenhowerfoundation.org/docs/kerner.pdf>.

63. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

64. *In re Corp. Ownership Reporting & Disclosure by Broad. Licensees. Amendment of Sections 73.35, 73.240, & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, Fm, & Television Broad. Stations. Amendment of Sections 73.35, 73.240, 73.636, & 76.501 of the Commission's Rules Relating to Multiple Ownership of Am, Fm, & Television*

Chairman Fowler led the charge during the Reagan Administration to increase the limit to 12-12-12 radio and television stations an entity could control nationally.⁶⁵ That proceeding also examined the effects of the FCC's media ownership rules on minority groups' access to FCC licenses.

In 1984, the FCC recognized "that a relaxation of the benchmark [for triggering application of multiple ownership rules] might serve the public interest by increasing investment in the industry and by promoting the entry of new participants, particularly minorities, by increasing the availability of start-up capital to these entities."⁶⁶ In 1985, the FCC again tied its evaluation of structural media ownership rules to its consideration of initiatives to promote minority access to FCC licenses. Concomitant with its increase of the national ownership limits from 7-7-7 to 12-12-12, the FCC determined "we believe that both the audience reach and numerical station limits should be adjusted to promote minority ownership of broadcast facilities."⁶⁷

For more than forty-three years since its 1978 Minority Ownership Policy statement, the FCC has intertwined consideration of its structural media ownership rules and its minority ownership initiatives. Academic literature and the Courts have underrecognized the depth and length of this linkage between the FCC's media ownership policies and its minority license access initiatives.

In 1993, the FCC suspended the comparative hearing process used from 1945 to 1993 to award FCC licenses after the Supreme Court's *Ashbacker v. FCC* decision required a comparative process to award FCC licenses.⁶⁸ The FCC abandoned comparative hearings after the D.C. Circuit's 1993 decision in *Bechtel v. FCC* upheld a challenge to the "integration" factor used in comparative hearings to consider the license owner's proposed involvement in

Stations & CATV Sys. Reexamination of the Commission's Rules & Policies, 97 F.C.C.2d 997, 1002 (1984) [hereinafter *1984 Multiple Ownership Rule Review*].

65. The FCC initiated Gen. Docket No. 83-1009 in 1983 to evaluate whether to change its 7-7-7 media ownership rule.

66. *Id.*

67. *In re* Amendment of Section 73.3555 (Formerly Sections 73.35, 73.240, & 73.636) of the Commission's Rules Relating to Multiple Ownership of Am, Fm & Television Broad. Stations, 100 F.C.C.2d 74, 76 (1985) (decided upon reconsideration of Report and Order in Gen. Docket No. 83-1009, FCC 84-350, 49 Fed. Reg. 31877 (Aug. 9, 1984), *appeal docketed sub nom.* Black Citizens for Fair Media v. FCC, No. 84-1503 (D.C. Cir. filed Oct. 9, 1984)) [hereinafter *1985 Multiple Ownership Rule Review*].

68. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945).

daily station management.⁶⁹ After 1995, contested license applications could be obtained through an FCC auction.⁷⁰

The '96 Act removed limits on the number of radio licenses a single entity could nationally hold. That Act also imposed a tiered limit on the number of radio stations that a single entity could own locally based on market size. In 2004 Congress set by statute the number of television station licenses an entity could control nationally at 39% of U.S. television households.⁷¹ These laws and FCC rulemakings allowed license holding consolidation to increase. Professor Akilah Folami observed that following the '96 Act, “radio consolidation enhance[d] a station’s ability to control what the public hears on the radio or at a live concert.”⁷²

License transfer applications enabled by the '96 Act were subject to broadcaster deals and FCC reviews under § 310(d). Per the Communications Act’s 1952 amendment, the licensee determines who would have the opportunity to participate in the license transfer deal. For large transactions involving multiple stations and high dollar values U.S. Department of Justice antitrust review and approval is also required.

To address the FCC’s more than half-century late start in promoting license access for minorities,⁷³ Congress directed the FCC through §§ 309(h)-(j) and § 257 of the '96 Act to promote access for small, minority, and women-owned businesses to FCC licenses allocated through competitive bidding. Sections 309(h)-(j) require the FCC to promote access for s

mall, minority, and women-owned businesses through its auction process. Congress adopted those directives to “promot[e] economic opportunity and

69. Allen S. Hammond IV, Catherine J.K. Sandoval & Leonard Baynes, COMMUNICATIONS LAW IN THE PUBLIC INTEREST 214 (Wolters Kluwer 2020) (citing *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993)).

70. See *How to Apply for a Radio or Television Broadcast Station*, FCC, <https://www.fcc.gov/media/radio/how-to-apply#NCE> (last visited Apr. 16, 2021).

71. See Oral Argument, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021) (No. 19–1231), <https://argument2.oyez.org/2021/fcc-v-prometheus-radio-project/> [hereinafter *Sandoval, Prometheus Oral Argument Comment*].

72. Akilah N. Folami, *From Habermas to “Get Rich or Die Tryin’”: Hip Hop, the Telecommunications Act of 1996, and the Black Public Sphere*, 12 MICH. J. RACE & L. 235, 298 (2007); see also Adam J. Van Alstyne, *Clear Control: An Antitrust Analysis of Clear Channel’s Radio and Concert Empire*, 88 MINN. L. REV. 627, 640 (2004).

73. *Minority Ownership Policy Statement*, *supra* note 10. Consistent with FCC definitions of minorities, this Article defines minorities’ ownership of an FCC license as de jure or de facto voting control of the entity which holds an FCC license by one or more persons who are Latino/Hispanic, African American, Native American/Alaska Native, Asian, Native Hawaiian/Pacific Islander. See 47 CFR § 73.3555 (FCC ownership attribution rules); see also FCC, *Fourth Report on Ownership of Broadcast Stations*, *supra* note 11 at 2–4.

competition and ensur[e] that new and innovative technologies are readily accessible to the American people.”⁷⁴

The ’96 Act also set in motion FCC media ownership rule reviews. Section 202(h) of the ’96 Act directed the FCC to biennially review its media ownership rules, a requirement later switched to quadrennial review.⁷⁵

Beginning with the FCC’s media ownership rule review concluded in 2004, the Third Circuit obtained jurisdiction through a judicial lottery after litigants appealed the FCC’s decisions in multiple jurisdictions. The Third Circuit retained jurisdiction over the *Prometheus* docket until the Supreme Court heard and decided an appeal of *Prometheus IV* in 2020–2021.

The *Prometheus* Court ultimately recognized that minority ownership was a longstanding FCC policy considered in the context of its media ownership rules. The legal issue became what, if any, record the FCC was required to develop to support its § 202(h) analysis of media ownership rules.

III. TO STUDY OR NOT TO STUDY: THE PROMETHEUS DOCKET ANALYZES FCC MEDIA OWNERSHIP REVIEW

A. PROMETHEUS RISING, THE PROMETHEUS DOCKET, 2004–2021

The Third Circuit’s *Prometheus* docket reviewed the appeal of FCC media ownership decisions from 2004 to 2019. The Third Circuit’s four decisions in the *Prometheus* docket repeatedly criticized the FCC’s failure to rationally consider the impact of its media ownership rule decisions on minorities and women, despite the FCC’s insistence that license ownership diversity remained a policy priority.⁷⁶

The FCC orders at issue before the Supreme Court in *Prometheus* involved three decisions adopted as presidential administrations changed. In 2016, when Tom Wheeler was FCC Chair and Barack Obama was President, the FCC adopted a decision that retained many of its media ownership rules including the newspaper-broadcast cross-ownership rule, the local television ownership rule, and the local radio ownership rule. The FCC did so, based in part on its

74. 47 U.S.C. § 309(j)(4)(C) (2018).

75. *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 462 (3d Cir. 2011) (*Prometheus II*) (determining that evidence presented by the FCC of significant radio consolidation at the national level, as opposed to within local markets, was properly considered under the APA in the FCC’s review of media ownership rules).

76. *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 382–89 (3d Cir. 2004); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 438–44 (3d Cir. 2011) (*Prometheus II*); *Prometheus Radio Project v. FCC*, 824 F.3d 33, 49 (3d Cir. 2016), *as amended* (June 3, 2016) (*Prometheus III*); *Prometheus Radio Project v. FCC*, 939 F.3d 567, 584 (3d Cir. 2019) (*Prometheus IV*).

determination that this action would not harm its goal of promoting minority and female ownership of broadcast television and radio stations.⁷⁷

In 2017, following the inauguration of Donald Trump as President and the appointment of Ajit Pai as FCC Chair, the FCC decided upon reconsideration to repeal the newspaper-broadcast ownership rule, though it conducted no new fact-finding. The FCC's 2018 Incubator Order sought to promote opportunities for small businesses, including those owned by minorities and women, by allowing broadcasters to invest in and "incubate" eligible entities in exchange for relief from some of the FCC's structural ownership limits on the number of broadcast stations that could be owned locally.

The Third Circuit's decision in *Prometheus II* criticized the FCC for the lack of data and analysis supporting its incubator proposals, a factual and analytical gap persisting at the time of the 2020 *Prometheus* appeal. The Third Circuit in *Prometheus II* criticized the lack of reasoned explanation underlying its proposal for a revenue-based "eligible entity" definition to support broadcast diversity goals. *Prometheus II* found the FCC "offered no data attempting to show a connection between the definition chosen and the goal of the measures."

The Third Circuit in *Prometheus IV* faulted the FCC for relying on incompatible datasets (NTIA data gathered before 2000 and FCC Form 323 reports gathered after 1998) to analyze the effect of its media ownership rules on minority and female license ownership. "Attempting to draw a trendline between the NTIA data and the Form 323 data is plainly an exercise in comparing apples to oranges, and the Commission does not seem to have recognized that problem or taken any effort to fix it," the Third Circuit concluded in *Prometheus IV* in 2019.⁷⁸

After the Third Circuit vacated the FCC's 2016, 2017, and 2018 decisions for APA violations, the U.S. Government and National Association of Broadcasters petitioned the U.S. Supreme Court to review the case. Petitioners argued that the Third Circuit's *Prometheus IV* decision did not properly apply the APA and should have deferred to the FCC's decisions under the *Chevron* standard of review which gives agencies latitude to interpret ambiguous statutes under their jurisdiction. The central issue in *Prometheus* was whether the FCC was required to do more analysis to compensate for its incomplete record and address its professed policy commitment to promote FCC licensing opportunities for minorities and women.

77. *In re* 2014 Quadrennial Regulatory Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 31 FCC Rcd. 9864, n.830 (2016) [hereinafter *FCC, 2016 Media Ownership Review Order*].

78. *Prometheus Radio Project v. FCC*, 939 F.3d 567, 586 (3d Cir. 2019) (*Prometheus IV*).

B. APA STANDARD OF REVIEW

The Communications Act gives the FCC broad power to regulate in the public interest, “so long as [its] view is based on consideration of permissible factors and is otherwise reasonable.”⁷⁹ The reasonableness of the FCC’s or a federal agency’s decision-making is reviewed under the APA.

Chevron’s two-step framework is deployed to review agency reasoning involving statutory interpretation.⁸⁰ Per *Chevron*, a reviewing court first examines whether the relevant statute is ambiguous, and Congress charged the administrative agency with responsibility for interpreting it. “If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”⁸¹

As the Court explained in *Prometheus*, the “APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency.”⁸² “A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.”⁸³

The APA “requires agencies to engage in ‘reasoned decisionmaking,’” and “directs that agency actions be ‘set aside’ if they are ‘arbitrary’ or ‘capricious.’”⁸⁴ An agency’s action is arbitrary and capricious if the reasons for its decisions are not “logical and rational.”⁸⁵ An “arbitrary and capricious” regulation receives no *Chevron* deference to an administrative agency’s statutory analysis or interpretation.⁸⁶

79. *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 793 (1978).

80. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

81. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 843–44).

82. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

83. *Id.* (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14; *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

84. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015); *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992); 5 U.S.C. § 706(2)(A) (2018)).

85. *See Michigan v. EPA*, 576 U.S. 743, 750 (2015).

86. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (citing *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

Administrative decision-making must rest on a reasoned explanation that does not “run[] counter to the evidence before the agency.”⁸⁷ To ensure that agencies have engaged in reasoned decisionmaking as required by the APA, courts “examin[e] the reasons for [an] agency decision[.]” and assess “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”⁸⁸

The APA requires that an agency must “articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts.”⁸⁹ “[I]n order to permit meaningful judicial review, an agency must ‘disclose the basis’ of its action.”⁹⁰

At issue in *Prometheus* was whether the requirement for reasoned decision-making obligated the agency to acquire and analyze data or conduct studies to examine the issues within the proceeding’s scope. Years earlier, the Court concluded in *State Farm*, when “available data do not settle a regulatory issue,” an agency “must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.”⁹¹ The Third Circuit in *Prometheus III* directed that if the Commission, “needs more data” to analyze the eligible entity issue relevant to its proposed incubator program, the FCC “must get it.”⁹²

In 2009, the D.C. Circuit’s *Stilwell* decision, written by then Judge Kavanaugh, concluded that the “APA imposes no general obligation on agencies to produce empirical evidence,” rather, an agency only has to justify its rule with a reasoned explanation.⁹³ Consistent with the logic of *Stilwell* and using a textualist interpretation of the APA and the Communications Act as amended, *Prometheus* determined that the FCC was not required to obtain relevant data or conduct studies. Instead, *Prometheus* allows the FCC to rely on third-party commentators to decide whether to produce relevant and timely studies and data, even if doing so results in an incomplete record with obvious data gaps.⁹⁴

87. *State Farm*, 463 U.S. at 43.

88. *Judulang v. Holder*, 565 U.S. 42, 53 (2011) (internal quotation marks omitted).

89. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

90. *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 167–69).

91. *State Farm*, 463 U.S. at 52.

92. *Prometheus Radio Project v. FCC*, 824 F.3d 33, 49 (3d Cir. 2016), *as amended* (June 3, 2016) (*Prometheus III*).

93. *Stilwell v. Off. of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009).

94. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1152 (2021) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 518–20; *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)).

C. PROMETHEUS PERPETUATES THE REGULATORY STALEMATE

The Supreme Court's 2021 *Prometheus* decision overturned the Third Circuit's determination in *Prometheus IV* that the FCC violated the APA. The Court determined that as long as the FCC's decision reflected a rational analysis of the record before it, the APA requires no more, even for an admittedly deficient record.⁹⁵

Prometheus determined that the "APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies."⁹⁶ The Court emphasized that "nothing in the Telecommunications Act (or any other statute) requires the FCC to conduct its own empirical or statistical studies before exercising its discretion under Section 202(h)."⁹⁷

The Court in *Prometheus* found the FCC's decision based on incomplete data was "a reasonable predictive judgment" based on the record.⁹⁸ *Prometheus* defers to an agency's judgment under the APA, even when based on a sparse and admittedly incomplete record. The FCC "relied on the data it had (and the absence of any countervailing evidence) to predict that changing the rules was not likely to harm minority and female ownership."⁹⁹ "In light of the sparse record on minority and female ownership and the FCC's findings with respect to competition, localism, and viewpoint diversity, we cannot say that the agency's decision to repeal or modify the ownership rules fell outside the zone of reasonableness for purposes of the APA," the Court concluded.¹⁰⁰

Respondents' merits brief in the *Prometheus* appeal highlighted that "Congress confirmed the breadth of the public-interest mandate and its commitment to race and gender diversity. *See* 47 U.S.C. §§ 151, 257."¹⁰¹ Respondents emphasized, "[o]ften at Congress's direction, the Commission has adopted rules to foster diverse ownership opportunities," citing to Section 309(j).¹⁰² The Supreme Court's *Prometheus* decision was silent about these provisions of the Communications Act and their implications for FCC quadrennial review of its media ownership rules required by Section 202(h) of the '96 Act.

95. *Prometheus Radio Project*, 141 S. Ct. at 1160.

96. *Id.* at 1152 (citing *Fox Television*, 556 U. S. at 518–20; *Vermont Yankee*, 435 U. S. at 524).

97. *Id.*

98. *Id.* at 1160 (citing *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)).

99. *Id.* at 1159.

100. *Id.* at 1160.

101. Brief for the Respondents, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021) (Nos. 19–1231, 19–1241) [hereinafter *Respondents Brief*].

102. *Id.*

The Supreme Court's *Prometheus* decision ignored the Court's own canon of statutory construction that instructs "[w]e do not, however, construe statutory phrases in isolation; we read statutes as a whole."¹⁰³ "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."¹⁰⁴ "And beyond context and structure, the Court often looks to 'history [and] purpose' to divine the meaning of language."¹⁰⁵

The *Prometheus* Court's reading of the '96 Act effectively says: § 202(h) does not *expressly* require the FCC to conduct empirical or statistical studies before making decisions about its media ownership reviews, leaving it to the FCC's discretion to do so or to shift that burden to the public. That interpretation ignores other statutory provisions that direct the FCC to regulate in the public interest, identify and remove barriers to licenses for small business, minorities, and women, and promote opportunities for licensing by a diverse range of Americans.¹⁰⁶

Prometheus let stand what it characterized as the FCC's predictive decision-making in its 2017 order on reconsideration in its 2010 and 2014 media ownership review combined proceeding.¹⁰⁷ That 2017 order repealed the FCC's Newspaper/Broadcast Cross-Ownership Rule and the Radio/Television Cross-Ownership Rule, and modified the Local Television Ownership Rule, based in part on the FCC's determination that doing so would not harm FCC license access opportunities for minorities and women.¹⁰⁸ *Prometheus* found that the Commission "explained that its best estimate, based on the sparse record evidence, was that repealing or modifying the three rules at issue

103. *United States v. Morton*, 467 U.S. 822, 828 (1984).

104. *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019), *reh'g denied* (2019) (citing *Nat'l Assn. of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007)); *see Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) ("[R]easonable statutory interpretation must account for both the specific context in which . . . language is used and the broader context of the statute as a whole" (internal quotation marks omitted)).

105. *Gundy*, 139 S. Ct. at 2126. (citing *Maracich v. Spears*, 570 U.S. 48, 76 (2013)).

106. *See* 47 U.S.C. §§ 151, 257, 309(j) (2018). In 2018 following the adoption of the orders at issue in *Prometheus*, Congress amended section 257 of the Telecom Act to remove the requirements for reporting to Congress on FCC efforts to identify and remove market entry barriers.

107. *In re* 2014 Quadrennial Review, Reconsideration Order, and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802, 9803 ¶ 2 (2017); *see also In re* Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, Report and Order, 33 FCC Rcd. 7911 (2018); *cf.* FCC, *2016 Media Ownership Review Order*, *supra* note 77.

108. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1154, 1160 (2021).

here was not likely to harm minority and female ownership. The APA requires no more.”¹⁰⁹

Prometheus excused the FCC from a legal duty to cure its poor data jurisprudence, concluding that the APA allows an agency to rely on the record presented to it, even if that record has acknowledged gaps. *Prometheus* leaves the FCC’s record-gathering, including its decisions about whether to make agency records available in digital format, a matter of administrative and congressional discretion. *Prometheus* allows the FCC to relegate to the public data gathering and analysis of the Commission’s longstanding policy priorities, even if doing so creates a Swiss cheese record marred by information holes.

Under the data deference standard *Prometheus* sets, the FCC can proclaim adherence to its policy of promoting license access for minorities and women while failing to effectively manage its data to advance that policy. *Prometheus* limited use of the APA as a yardstick to measure the adequacy of FCC decisions about gathering and maintaining data. The Communications Act and the Open Act, however, require more from the FCC.

The FCC’s failure to modernize its data jurisprudence and make its paper archives available through digital databases harms the public interest and undermines the democratic First Amendment values broadcasting serves. The FCC’s poor data practices may also contribute to findings that remedial action is warranted to compensate for agency decisions that created and perpetuate low levels of access to FCC licenses for minorities and women.

D. *PROMETHEUS* ON THE SHOALS OF STRICT SCRUTINY

The Supreme Court’s *Prometheus* decision effectively allows the FCC—and potentially other administrative agencies—to leave the development of a proceeding’s administrative record to third parties or to agency discretion unless statute directs the agency to do otherwise. Programs and policy initiatives may run aground on Promethean shoals unless a third-party develops and submits record comments the agency may consider, or the agency uses its discretion to develop an informative record.

The ’96 Act imposes on the FCC an ongoing duty to review its media ownership rules quadrennially. If the FCC chooses to advance its Incubator program adopted in the FCC’s 2017 media ownership rules, the FCC must develop program rules including defining which entities are eligible for incubation services that result in credits to sponsoring broadcasters. If the

109. *Id.* at 1158.

Incubator program, or any other FCC program considers race/ethnicity or gender, the FCC must develop a record sufficient to meet the strict or intermediate scrutiny legal standard, respectively, applicable to such factors.

Adarand v. Pena's shift to a strict scrutiny standard in 1995 for programs that take race into account made data gathering and analysis critical for efforts to promote access to licenses for minorities.¹¹⁰ Initiatives to promote license access for women are subject to an intermediate scrutiny standard.¹¹¹

In its 1990 *Metro Broadcasting v. FCC* decision the Court relied heavily on Congressional findings about underrepresentation of minorities in the media to uphold FCC programs that took race into account using an intermediate scrutiny standard.¹¹² *Metro* recognized that Congress' "broad remedial powers" derive from its express constitutional authority "to enforce equal protection guarantees,"...and because of its competence to find as a factual matter the existence of past identifiable discrimination.¹¹³ Such Congressional findings were found to be "of overriding significance" to the Court's 1990 decision to affirm FCC minority ownership programs in 1990 under an intermediate scrutiny standard.¹¹⁴ Those more than twenty-year old findings would need to be updated by Congress or facts developed in an FCC record to support contemporary consideration of race/ethnicity or gender in FCC programs.

The FCC's 2008 Diversity Order recognized that evidence and analysis are necessary to meet the legal standard of review for any proposals that consider race/ethnicity or gender.¹¹⁵ That order recognized that after *Adarand*, "racial classifications imposed by the federal government are subject to strict scrutiny, and thus may be upheld as constitutional "only if they are narrowly tailored measures to further compelling governmental interests.""¹¹⁶ The FCC Diversity Order advised:

[P]arties who contend that a race-conscious classification would be the best approach, or indeed even a permissible approach, to

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

111. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (establishing an intermediate standard of scrutiny for programs that consider gender).

112. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 588 (1990).

113. *Fullilove v. Klutznick*, 448 U.S. 448, 481, 506 (1980); *see also* *W. Mich. Broad. Co. v. FCC*, 735 F.2d 601, 615–16 (D.C. Cir. 1984).

114. *Fullilove*, 448 U.S. at 547, 563.

115. *In re Promoting Diversification of Ownership in the Broad. Services 2006 Quadrennial Regulatory Review—Review of the Commissions Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 2002 Biennial Regulatory Review—Review of the Commissions Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act*, 23 FCC Rcd. 5922, 5937–38 (2008) [hereinafter *FCC Diversity Order*].

116. *Id.*

encourage ownership diversity and new entry must explain specifically, using empirical data and legal analysis, how such a classification would not just be tailored, but narrowly tailored, to advance a governmental interest that is not simply important, but compelling.¹¹⁷

The FCC invited empirical data in 2008 to determine whether *Adarand's* strict scrutiny standard could be met. The FCC's failure to make its own data practically available through a digitized database that facilitates longitudinal analysis frustrates research on this topic and achievement of the FCC's longstanding professed priorities. This poor data jurisprudence may also be a factor in adopting remedial measures to address FCC practices which created and perpetuated low levels of minority and female FCC license ownership.

In 2011, the Third Circuit upheld the FCC's proposals in the Diversity Order to conduct longitudinal research on minority and women ownership trends.¹¹⁸ The Third Circuit's *Prometheus* docket recognized the contradictions in the FCC's call for data to support its rulemakings and the Commission's lack of effort to acquire any such data. In *Prometheus II*, the Third Circuit remanded several of the FCC's media ownership decisions based on the lack of reasoned analysis to support its conclusion.¹¹⁹

The FCC's poor data jurisprudence frustrates analysis of whether there is a remedial or forward-looking basis to adopt programs that take race/ethnicity or gender into account. While *Prometheus* affirmed agency discretion to determine how data is gathered or analyzed, data remains essential to meeting the constitutional standard for any FCC programs that take race, ethnicity, or gender into account.

In the higher education context, the Supreme Court has upheld the forward-looking rationale of promoting diversity to improve education, understanding, and training to support a compelling state interest in considering race or ethnicity as a factor in admissions decisions. "[A] university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity.'"¹²⁰ "The Supreme Court in *Grutter v. Bollinger* held that race may be a factor in admitting law students to promote diversity in the educational setting and better

117. *Id.*

118. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 471 (3d Cir. 2011) (*Prometheus II*).

119. *Id.* at 470 (emphasis in original).

120. *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016) (citing *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 298 (2013)); see also *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

prepared students for the workforce and the world ahead.”¹²¹ Such a “forward-looking compelling state interest, promoting diversity of dialogue, is fundamental to the purpose of broadcasting.”¹²²

The Supreme Court will scrutinize these precedents in 2022–2023 in the consolidated cases, *Students For Fair Admissions v. President and Fellows of Harvard* (docket 20–1199) and *Students For Fair Admissions v. University of NC, et al.* (docket 21–707).¹²³ The decision in those consolidated cases may influence the FCC’s ability to adopt programs that consider race/ethnicity based on a forward-looking rationale to promote first amendment values through more diverse broadcast licensing.

In *Red Lion* the Supreme Court recognized the FCC’s role in fostering a “marketplace of ideas” that supports speech “concerning public affairs...the essence of self-government.”¹²⁴ On multiple occasions, the FCC and scholars including this author have examined and found a nexus between minority ownership of FCC licenses and viewpoint diversity that serves the public interest and first amendment values.¹²⁵ Dam Hee Kim’s 2016 analysis found a

121. Christine M. Bachen, Allen S. Hammond, IV & Catherine J.K. Sandoval, *Serving the Public Interest: Broadcast News, Public Affairs Programming, and the Case for Minority Ownership, in* MEDIA DIVERSITY AND LOCALISM: MEANINGS AND METRICS 288 (Philip Napoli, ed., L. Erlbaum Assoc. 2007).

122. *Id.*

123. U.S. SUP. CT., ORDER LIST 595 U.S., (Jan. 24, 2022), https://www.supremecourt.gov/orders/courtorders/012422zor_m6io.pdf; *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022) (granting cert.).

124. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (citing *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

125. *See, e.g.*, Christine Bachen, Allen Hammond, Laurie Mason & Stephanie Craft, *Content/Ownership Study, Diversity of Programming in the Broadcast Spectrum: Is there a Link between Owner Race or Ethnicity and News and Public Affairs Programming?*, FCC (Dec. 2000) (finding that minority-owned stations tended to have more minorities in news and public affairs staff positions than white-owned stations, and as racial and ethnic minorities on staff increase, greater attention is paid to minority issues. Minority-owned radio stations, on average, focused more of their news and public affairs programming on issues and events of presumed interest to minority communities); Cong. Rsch. Serv., *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (1988) (On file with the Library of Congress, Washington D.C.); Jeffrey A. Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. CAL. L. REV. 841, 869 (1995); Peter Siegelman & Joel Waldfogel, *Race and Radio: Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities*, in ADVERTISING AND DIFFERENTIATED PRODUCTS, 73, 73–108 (M.R. Baye & J.P. Nelson eds., 2001); S. Derek Turner, *Off the Dial: Female and Minority Radio Ownership in the United States, How FCC Policy and Media Consolidation Diminished Diversity on the Public Airwaves, Review of Current Status and Comparative Statistical Analysis*, FREEPRESS (2007), https://www.freepress.net/sites/default/files/legacy-policy/off_the_dial.pdf; Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and The FCC’s Incubator Program*, 24 COMM. L. & POL’Y 403 (2019) (“Racial and ethnic minority owners are more likely to produce minority

positive correlation between minority media ownership, minority employment, and content targeted to minorities (the “Triangle”).¹²⁶

Two FCC-Commissioned studies in 2008 found no linkage between minority ownership and viewpoint diversity, though their research methodologies were questionable. One study, labeled by the FCC as study 8a, presumed diversity could be measured by following television viewing choices, while study 8b based its analysis on a limited set of words used in television programming broadcast in English.¹²⁷ Study 8a’s methodology effectively presumed diversity had already been achieved and merely needed to be selected by viewers, while Study 8b failed to consider broadcast context or non-English language programming.

The record would need to be updated to determine whether any FCC program that takes gender or race/ethnicity into account would contribute to viewpoint diversity, a long-held value recognized by the FCC.¹²⁸ Digitizing FCC licensing and administrative decision-making data will provide an important foundation to inform that analysis.

“The FCC’s judgments about the value of promoting viewpoint diversity or how to measure those contributions” were not at issue in *FCC v. Prometheus*.¹²⁹ Viewpoint diversity studies do not examine the issues at the heart of the sixteen-year *Prometheus* docket and FCC media ownership reviews—how

targeted content, and more than eight out of ten owners providing minority programming are operating six or fewer stations.”); cf. Adam D. Rennhoff & Kenneth C. Wilber, *Local Media Ownership and Viewpoint Diversity in Local Television News* (2011), <https://www.fcc.gov/general/2010-media-ownership-studies> [hereinafter *Study 8a*]; Lisa M. George & Felix Oberholzer-Gee, *Diversity in Local Television News* (2011), <https://www.fcc.gov/general/2010-media-ownership-studies> [hereinafter *Study 8b*].

126. Dam Hae Kim, *Diversity Policies in the Media Marketplace: A Review of Studies of Minority Ownership, Employment, and Content*, 10 INT’L J. COMM. 2201 (2016), <https://ijoc.org/index.php/ijoc/article/viewFile/2458/1647>.

127. Rennhoff & Wilber, *supra* note 125; George & Oberholzer-Gee, *supra* note 125.

128. See, e.g., *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1154 (2021) (“In conducting its public interest analysis under Section 202(h), the FCC considered the effects of the rules on competition, localism, viewpoint diversity, and minority and female ownership of broadcast media outlets.”); *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (“In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.”); *In re Applications of Comcast Corp.*, 26 FCC Rcd. 4238, 4316 (2011) (approving the proposed Comcast/NBC Universal license transfers and merger in part by awarding credit for contributions to viewpoint diversity through Telemundo’s programming and Comcast’s allocation of some of its channel capacity to independent broadcasters).

129. Brief as Amicus Curiae Professors of Communications Law, Policy, and Administrative Law, and Drs. of Economics and Social Science in Support of Respondents, at 36, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021) [hereinafter *Amicus Brief, Professors of Communications Law*].

do the FCC's media ownership rules, FCC consolidation policies and programs, affect opportunities for market entry, expansion, and service for minorities and women? Analyzing this question requires analysis of past FCC licensing, programs, and consolidation policies, including those in place prior to the '96 Act.

The Supreme Court has also recognized that governmental entities have a compelling interest in remedying the effects of discrimination.¹³⁰ In *Adarand* the Supreme Court observed, “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”¹³¹

“To establish such a compelling interest, the governmental actor must show ‘a strong basis in evidence for its conclusion that remedial action [i]s necessary.’”¹³² The “government must show that it is remedying either its own discrimination, or discrimination in the private sector in which the government has become a ‘passive participant,’ as distinguished from ‘general societal discrimination.’”¹³³ The role of data jurisprudence in creating and perpetuating discrimination and creating barriers to license access has been underexamined.

Dean and Professor Leonard Professor Baynes observed that the study by KPMG commissioned by the FCC for its first Section 257 report found that with respect to financial “liabilities, applicants with minority participation were treated less favorably than those applicants with lesser or no minority participation.”¹³⁴ The KPMG study found that a disparity existed in the implementation of the comparative hearing process towards the minority applicants.²³⁰ Conversely, “applicants with minority participation received extra credit for assets relative to applicants with lesser or no minority participation.”¹³⁵ “KPMG stated that the results can be interpreted to suggest ‘that financial weakness may have been judged more harshly when minorities were present in applications and financial strength may have been judged more favorably when minorities were present.’”¹³⁶

130. Leonard M. Baynes, *Making the Case For A Compelling Governmental Interest And Re-Establishing FCC Affirmative Action Programs For Broadcast Licensing*, 57 RUTGERS L. REV. 235, 261 (2004) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)).

131. *Id.* (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

132. *Id.* (citing *Croson*, 488 U.S. at 500).

133. *Id.* (citing *Croson*, 488 U.S. at 492, 500).

134. *Id.* at 265 (citing KPMG, FINAL REPORT: LOGISTIC REGRESSION MODELS OF THE BROADCAST LICENSE AWARD PROCESS FOR LICENSES AWARDED BY THE FCC 24 (Nov. 2002), https://transition.fcc.gov/opportunity/meb_study/broadcast_lic_study_pt3.pdf).

135. *Id.*

136. *Id.* at 265–66.

KPMG's findings raise questions about the FCC's conduct of Comparative Hearings and its consequences for license access. Those findings merit more study. Yet, the FCC has not returned to its archives to study those findings in depth. Neither has the FCC made those archives readily available to analysis in digital format.

David Honig argued that “[w]hether characterized as ratification, validation, permissiveness, benign neglect, or passive participation, the agency's acts and omissions were a very significant reason why minority ownership is so palpably inadequate.”¹³⁷ Honig contends that the FCC's “assistance to segregated state universities, its licensing of segregationists and discriminators, its use of irrationally stringent financial and other attributes as licensing criteria, and its failure to enforce its equal employment regulations” evidence the FCC's active role in creating low levels of minority access to FCC licenses.¹³⁸

“Agencies do not like to confess error, and thus it is unsurprising that only *once* has the FCC acknowledged its own history of systemic discrimination,” Honig emphasized.¹³⁹ The FCC's 1996 Notice of Inquiry for the Section 257 proceeding recognized “that a good case could be made that “[a]s a result of our system of awarding broadcast licenses in the 1940s and 1950s, no minority held a broadcast license until 1956 or won a comparative hearing until 1975 and . . . special incentives for minority businesses are needed in order to compensate for a very long history of official actions which deprived minorities of meaningful access to the radiofrequency spectrum.”¹⁴⁰

The FCC created the world where predominantly non-minority/non-Hispanic men, controlled more than 90% of FCC broadcast licenses in 2017. This situation did not grow organically but was created by FCC administrative decision-making. The FCC's poor data jurisprudence contributed to this skewed license distribution.

The FCC's record-keeping and data availability, particularly for broadcast data from 1934–2009, is so deficient that the FCC's data practices constitute a barrier to minority and female license access. In conjunction with the FCC's licensing practices that awarded few licenses to minorities or women, the FCC's poor data jurisprudence may be a factor that supports a remedial basis for programs that consider race/ethnicity or gender to remedy the agency's

137. David Honig, *How the FCC Suppressed Minority Broadcast Ownership, and How the FCC Can Undo the Damage It Caused*, 12 S.J. POL'Y & JUST. 44, 60 (2018).

138. *Id.*

139. *Id.*

140. Proceeding for Identifying and Eliminating Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 FCC Rcd, 6280, 6306 (1996) (citing *Southland Television Co.*, at 159); Statement of David Honig, Executive Director, Minority Media and Telecommunications Council, *En Banc* Advanced Television Hearing, MM Docket No. 87–268 (Dec. 12, 1995) at 2–3 and n.2)).

discriminatory conduct.¹⁴¹ The FCC's poor data practices should not remain an excuse to shroud the FCC's role in creating and perpetuating this skewed license distribution.

Analyzing four eras of FCC administrative and data jurisprudence introduced in this Article—the Nascent Era from 1934–1968, the Civil Rights Era from 1969–1978, the Opportunity Era from 1978–1995, and the Consolidation Era following the Telecom Act of 1996 during the internet's expansion—unveils the nexus between FCC media ownership rules, poor data jurisprudence, and limited minority and female access to FCC licenses. This analysis highlights the importance of gathering and publishing FCC data in a digital format to support FCC media ownership rule reviews, access to licenses by a diversity of Americans, and to serve the public interest.

IV. THE FCC'S NASCENT ERA, CONSTRUCTION OF THE MEDIA MATRIX, 1934–1968

A Time Present of Things Future,

St. Augustine of Hippo, Augustine 397, p. XI, 20

A. FCC LICENSING AND DATA JURISPRUDENCE CONSTRUCTS THE FUTURE

The roots of the FCC's media ownership decisions at issue in *Prometheus* stem from FCC licensing, regulatory, and data jurisprudence decisions beginning in the FCC's Nascent Era from 1934 to 1968. The FCC's Nascent Era planted the pillars for the twenty and twenty-first century media marketplace and shifted control to incumbent broadcasters for access to secondary market license deals. Yet, many of those decisions remain shrouded in data darkness due to the FCC's licensing and data practices during and since this era.

Socio-historical analysis of FCC decision-making reveals the FCC's role as an agent shaping the times in which it regulates—and decades thereafter—and as an agency working within a broader social and legal context.¹⁴² Segregation

141. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (discussing adoption of race-conscious policies as remedial action for government or private sector discriminatory conduct).

142. Cf. Carole J. Buckner, *Realizing Grutter v. Bollinger's "Compelling Educational Benefits of Diversity" – Transforming Aspirational Rhetoric into Experience*, 72 UMKC L. REV. 877, 884 (2004) (“A combination of critical theoretical analysis and “sociohistorical/sociocultural theories” focuses attention on the social context of learning and “emphasizes the importance of understanding the individual as part of a social and historical context.”).

and discrimination under color of law, both *de jure* and *de facto*, were prevalent in many American communities and economic fields when the FCC was founded in 1934.¹⁴³ President Roosevelt maintained segregation in the military until 1941 when he initiated steps toward desegregation as the U.S. entered World War II.¹⁴⁴ Not until 1948 did President Truman desegregate the Army through Executive Order 9981.¹⁴⁵ Would segregation have ended sooner had there been a minority radio or television licensee during this time?

The FCC approved the first African-American owned radio license “in 1949, when Jesse B. Blayton purchased WERD in the secondary market in Atlanta,” and the FCC approved the license transfer application.¹⁴⁶ The Ivy Group reported to the FCC that the “first Hispanic station opened in the middle 1950s,” though it was not able to identify information about that FCC license.¹⁴⁷ The FCC-commissioned study *Whose Spectrum is it Anyway, Historical Study of Market Entry Barriers, Discrimination, and Changes in Broadcast and Wireless Licensing, 1950 to Present*, reported that in “1960, Andrew Langston, a Black man, started his more than 13-year process of acquiring a radio broadcast license from the FCC through a comparative hearing,” resulting in the award of a radio license directly from the FCC in 1974.¹⁴⁸

The FCC kept no data about its licensing decision rationale from its inception in 1934 until the development of a comparative process to allocate licenses after the Supreme Court’s 1945 *Ashbacker* decision. *Ashbacker* required the FCC to use a hearing process to decide between competing applications.¹⁴⁹ The Court determined that “where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.”¹⁵⁰ *Ashbacker* supports the

143. See, e.g., *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947) (holding segregation of Mexican-American school children unlawful); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (holding segregated education, though claimed to be “separate but equal,” violated the U.S. Constitution). Many *de jure* segregation statutes passed in the late nineteenth and early twentieth century perpetuated *de facto* segregation decades into the twentieth century. See, e.g., California Stats. 1893, ch. 193, p. 253 (authorizing school districts to establish “separate schools for Indian children” in addition to children of “Mongolian or Chinese descent”); California Stats. 1921, ch. 685, p. 1160 (extending authority to establish separate schools to include children of Japanese parentage).

144. Michael Waters, *A Look Back at the Desegregation of the U.S. Military*, ATLAS OBSCURA (Jul. 26, 2017), <https://www.atlasobscura.com/articles/desegregation-us-military>.

145. Exec. Order No. 9981, 3 C.F.R. 722 (1943–1948).

146. Ivy Group, *supra* note 10, at 8.

147. *Id.*

148. *Id.*

149. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 329–30 (1945).

150. *Id.* at 333.

principle that “an agency must provide adequate explanation before treating similarly situated parties differently, or else be in violation of the APA.”¹⁵¹

Prior to *Ashbacher*, the Commission did not hold comparative hearings to determine who should become the licensee. Nor was the FCC’s reasoning for granting those early licenses explained in the absence of a hearing process. This decision-making and data jurisprudence leaves more than a decade of FCC licensing and administrative jurisprudence in data darkness. Poor FCC record-keeping throughout the twentieth and early twenty-first century perpetuates the lopsided license distribution the FCC initiated during its Nascent Era.

“In 1945 there were 6 commercial television stations operating within the continental United States, all VHF,” all of which were awarded prior to *Ashbacher*’s comparative hearing requirements.¹⁵² “By September, 1948, the number of VHF stations had increased to 108, at which point a period of time known in the industry as ‘the freeze’ began.”¹⁵³ The FCC imposed a “freeze” on processing applications for new television stations licenses from September 1948 until mid-1952, to reallocate spectrum to make room for this emerging medium. “From September 1948 to July 1, 1952, the freeze period, the FCC processed no applications for television broadcasting licenses.”¹⁵⁴

After the freeze was lifted in 1952, “the vast majority of television licenses [were] awarded by the Eisenhower-appointed Commission.”¹⁵⁵ Professor Schwartz’s analysis found that most television licenses awarded to newspapers during that time were given to those who endorsed Eisenhower over his democratic rival.¹⁵⁶ The FCC awarded no television license to a racial minority until 1973.¹⁵⁷

During the decades following its founding in 1934, the FCC awarded licenses to parties known to practice segregation.¹⁵⁸ From 1945 to 1969, the

151. 5 Space Law § 40:26 (analyzing *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145 (D.C. Cir. 2005) (citing *Burlington Northern & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776–77 (D.C. Cir. 2005)); *Chadmoore Commc’ns. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997).

152. *Comm’r v. Ind. Broad. Corp.*, 350 F.2d 580, 583 (7th Cir. 1965).

153. *Id.*

154. *Id.*

155. Bernard Schwartz, *Comparative Television and the Chancellor’s Foot*, 47 GEO. L.J. 655, 665 (1959).

156. *Id.* (“some nine Democratic newspapers have been denied television licenses, while eight papers which have been Republicans or Eisenhower Democrats have been awarded channels. No newspaper which supported Stevenson at the election before its case was decided has received a channel, except in one case where such paper was a co-applicant with a leading Eisenhower paper.”).

157. *Ivy Group*, *supra* note 10, at 7.

158. *See, e.g., In re Applications of Southland Television Co., Shreveport, Louisiana* T. B. Lanford, R. M. Dean, Mrs. Mary Jewel Kimbell Lanford & Viola Lipe Dean Tr., A Partnership d/b/a Radio Station KRMD, Shreveport, Louisiana Don George, Henry E. Linam, Ben

FCC did not view a license applicant's practice of discrimination as a barrier to award of an FCC license. Honig notes that from the FCC's founding through the late 1960s, "the FCC routinely provided, then routinely renewed broadcast licenses for these segregated educational institutions, guaranteeing that a generation of trained broadcast employees would be Whites only."¹⁵⁹

In 1955, the FCC in *Southland Television Co.* awarded a television license to Shreveport Television Company whose principals included operators of the Don George theaters, which practiced racial discrimination. George was responsible for building Louisiana's first one story theaters while operating the state's only exclusively white drive-ins. Honig reports that "Louisiana law then governing movie theaters assumed that theaters had two stories, like the 19th century opera houses on which they were modeled. The law required the admission of all races to theaters so long as the theater owners restricted each story to members of a particular race."¹⁶⁰

As a federal agency, the FCC was not required to defer to state segregation laws. Instead, the Communications Act of 1934 required the FCC to regulate and grant licenses in the public interest to serve all Americans.¹⁶¹ Yet, in a Comparative Hearing, the FCC dismissed concerns about awarding a television license to George on the grounds that segregation in theaters was the law of the State of Louisiana.¹⁶² Seven months *after* the U.S. Supreme Court's decision in *Brown v. Board of Education* declared segregation in education unconstitutional, the FCC's *Southland Television* decision awarded the television license to George, despite the facts on the record regarding his segregationist business practices.¹⁶³

The FCC's poor data jurisprudence makes it extraordinarily difficult to answer this question: did the FCC ever decline to issue a license due to the applicant's known practice of racial segregation? Answering that question would require analysis of *all* FCC licenses awarded by a Comparative Hearing or similar procedure for which there is a paper record.

Beckham, Jr. & Carter Henderson, A Partnership d/b/a Shreveport Television Co., Shreveport, Louisiana, 20 F.C.C. 159, 163 (1955) [hereinafter *Southland Television Co.*]; Chapman Radio and Television, 24 F.C.C. 2d 282 (1971).

159. Honig, *supra* note 137, at 67.

160. *Id.* at 70–71 (citing *Southland Television Co.*, at 163).

161. 47 U.S.C. §§ 151, 303, 309 (2018).

162. *Southland Television Co.*, at 163 ("our conclusion that there was no basis for adverse reflection upon the qualifications of Don George or of Shreveport Television was founded upon the fact that it had not been demonstrated that George could admit Negroes to his theatres without violating the laws of the State of Louisiana.").

163. *Id.*; *cf.* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

The FCC's decisions also determined who would control subsequent license deals. The 1952 Congressional amendment to the Communications Act allowed broadcasters to determine the parties to an FCC license transfer deal and prohibited the FCC from considering whether others would better serve the public interest.¹⁶⁴ This amendment allowed broadcasters to determine who can access licenses on the secondary market, subject to FCC approval of the transaction upon a finding that it serves the public interest. Addressing barriers to broadcast license entry created by the 1952 amendment has been a primary objective of the FCC's minority ownership diversity policies.

B. The 1952 Congressional Amendment to the Communications Act Made Broadcasters Dealmakers and Gatekeepers

The secondary market where existing licensees sell or transfer licenses remains an important spectrum and license access source. FCC media ownership rules govern license holdings, whether these holdings are acquired in the secondary market or directly from the FCC. Congress's 1952 amendment to the Communications Act made incumbent broadcasters gatekeepers for secondary market deals and limited the factors the FCC could consider in determining whether those transactions served the public interest.

In 1952, Congress adopted an amendment to the Communications Act that prohibited the FCC from considering whether another party in a license transfer proposal would better serve the public interest.¹⁶⁵ That amendment allowed licensees to decide who would be their counterparty in an FCC license transfer application. While the FCC must review and determine whether to approve an application for a license transfer, incumbents determine which parties will be invited to the deal.

The 1952 Communications Act amendment displaced the "AVCO procedure" developed by the FCC in 1945 to evaluate petitions to transfer a license under Communications Act § 310 (as in effect at the time). Consistent with *Ashbacker*, the AVCO procedure established a process whereby upon the expiration of the license term, other parties could file to obtain the FCC license, in lieu of renewing the license holder's term, if the Commission determined the public interest, convenience, and necessity would be served thereby.¹⁶⁶

Through the AVCO procedure, the Commission considered "all competing bids filed in cases for consent to assignments or transfers of control

164. 47 U.S.C. § 310(d) (2018).

165. 47 U.S.C.A. § 310(b), 66 Stat. 716 (1952) (amending 48 Stat. 1086 (1934)).

166. See, e.g., *In re Applications of Royal Miller*, 11 F.C.C. 236, 236 (1946).

of licenses.”¹⁶⁷ “If it appears that the transferee selected by the licensee is the best qualified, and that the transfer is otherwise in the public interest, the Commission will grant such application without a hearing.”¹⁶⁸ The FCC would designate the application for a comparative hearing if it could not make such a determination on the basis of the application, under the then-existing AVCO procedure.¹⁶⁹

In 1952 Congress amended § 310 of the ’34 Act to proscribe the AVCO procedure.¹⁷⁰ As amended, Communications Act § 310(d) prohibits the FCC from considering whether the “public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.”¹⁷¹ Through this amendment, Congress required the FCC to determine if a license transfer application served the public interest, convenience, and necessity consistent with § 308 of the ’34 Act, but limited that consideration to the parties to the application.

The 1952 amendment prohibited the FCC from engaging in a “comparative analyses between the transferee and others, including the existing licensee,” in deciding whether to approve such an application.¹⁷² The D.C. Circuit observed in 1958 in *St. Louis Amusement Co. v. FCC* that the 1952 amendment operates to allow a private entity to decide who shall receive the permit, without regard to which one of these applicants the Commission has selected on a comparative basis.¹⁷³

Brenner highlighted the lack of legislative history to support or explain the 1952 amendment. “It is difficult to explain the origin of this provision,” Brenner observed, “other than as a reflection of broadcasters’ efforts to insulate the transfer process—the event at which the accreted capitalized value of a broadcast property is realized—from the competitive forces that come into play with regard to the issuance of other broadcast licenses.”¹⁷⁴

167. *Id.*

168. *Id.*

169. *Id.*

170. 47 U.S.C.A. § 310(b), 66 Stat. 716 (1952) (amending 48 Stat. 1086 (1934)); *In re Applications of MMM Holdings, Inc. for Transfer of Control of Lin Broad. Corp.*, 4 FCC Rcd. 6838 (1989) (citing S. Rep. No. 44, 82d Cong., 1st Sess. 8, 9 (1951)).

171. June 19, 1934, c. 652, Title III, § 310, 48 Stat. 1086; S. Rep. No. 44, 82d Cong., 1st Sess. 8 (1951); Hearings Amending Communications Act of 1934, House Interstate & Foreign Commerce Committee, 82d Cong., 1st Sess. 280, 305–06, 354 (1951).

172. *In re Applications of MMM Holdings*, 4 F.C.C. Rcd. 6838.

173. *St. Louis Amusement Co. v. FCC*, 259 F.2d 202, 204 (D.C. Cir. 1958).

174. Daniel L. Brenner, *Government Regulation of Radio Program Format Changes*, 127 U. PA. L. REV. 56, 110 (1978).

This 1952 amendment codified a system that contributed to the small number of minority and female broadcasters persisting more than sixty-nine years later. Nineteen years after that amendment's adoption, the FCC's 1978 Minority Ownership Policy Statement attempted to expand access to secondary market FCC broadcast license deals limited by the 1952 amendment.

The Ivy Group's FCC-commissioned study for the FCC's Section 257 analysis of market entry barriers identified an "old boy's network" that controlled access to FCC license transfer deals.¹⁷⁵ Broadcaster Don Cornwell stated, "Look, it's a club...I work pretty hard to get at least on the periphery of the club so I know most of the broadcasters. ... And when you're in the club, then you hear about things, okay? You hear about what's for sale, what it isn't, et cetera."¹⁷⁶ "The brokers and large lenders interviewed [for the Ivy Group's study] indicated that they had worked with very few or no women and minorities. The women and minorities, however, all observe examples of exclusion from this 'old-boy's' network."¹⁷⁷ The 1952 amendment to the Communications Act empowered that old-boy network by putting incumbent broadcasters in charge of determining who would get access to licensing deals on the secondary market.

The Tax Certificate program sought to broaden the circle of opportunity and the marketplace of ideas. The FCC's Tax Certificate program "provided incentives to broadcast owners who sold their properties to minorities (a minority buyer with 50.1% of voting control and 20.1% equity interest). The seller could then defer any gain realized on the sale of that broadcast property provided it was sold to a minority, and the gain was rolled over into a qualified replacement broadcast property within 2 years."¹⁷⁸ "During the tax certificate program's tenure, minority broadcast ownership increased from 40 radio and TV stations in 1978, to 288 radio and 43 TV stations in 1995."¹⁷⁹

The FCC's Tax Certificate program, in effect from 1978 until its repeal by Congress in 1995,¹⁸⁰ created incentives for sellers to reach out to a more diverse

175. Ivy Group, *supra* note 10; *see also* FCC *Creating Opportunity: Policy Forum on Market Entry Barriers*, FCC (2000), <https://www.fcc.gov/fcc-creating-opportunity-policy-forum-market-entry-barriers-december-12-2000> (collecting five FCC Section 257 studies) [hereinafter *FCC Sec. 257 studies*].

176. Ivy Group, *supra* note 10, at 46.

177. Ivy Group, *supra* note 10, at 47.

178. Ivy Group, *supra* note 10 (citing *Minority Ownership Policy Statement*, *supra* note 10).

179. Erwin G. Krasnow & Lisa M. Fowlkes, *The FCC's Minority Tax Certificate Program: A Proposal for Life After Death*, 51 FED. COMM. L.J. 665, 670 (1999).

180. Self-Employed Persons Health Insurance Act of 1995, Pub L. No. 104-7, § 2, 109 Stat. 93 (1995).

pool of buyers.¹⁸¹ “In an appropriations rider to the Self Employed Persons Health Care Extension Act of 1995, Congress repealed the tax certificate program for minorities.”¹⁸² “The legislative history suggests that the FCC repealed the tax certificate program because no showing of past discrimination was made, Congress was of the opinion that the program had no standards, and the program had evolved beyond its original intent.”¹⁸³ In fact, the Tax Certificate program had many rules and standards, and a showing of a remedial basis was not required to adopt it.

In the aftermath of Tax Certificate’s repeal, the FCC lost the ability to execute one of its most successful programs to expand minority ownership. Bills introduced in several sessions of Congress have urged the program’s renewal.

The author’s January 2020 testimony to Congress urged support for H.R. 3957 which proposed to revive the FCC Tax Certificate program to incentivize transfers of FCC licenses to small, women, and minority owned businesses.¹⁸⁴ The author’s oral testimony emphasized that since Communications Act 310(d) prohibits the FCC from considering whether another party would better serve the public interest than the transferee in an FCC license application, it is critical to create incentives for licensees to enter transactions with a diversity of parties.¹⁸⁵ Making more data available about FCC licensing and decision-making prior to the tax certificate, during its implementation, and following its abolition would inform Tax Certificate proposals, the development of programs to promote licensing diversity, and reviews of media ownership rules.

C. FCC LICENSING POLICIES IN THE SEGREGATED SPACE AGE, 1960–1968

During the segregated space age from 1960 to 1968,¹⁸⁶ the FCC adopted policies prohibiting discrimination by broadcasters and requiring service to

181. Ivy Group, *supra* note 10, at 14.

182. Baynes, *supra* note 130, at 246–47.

183. *Id.*

184. Catherine Sandoval, *Media Diversity Protects Democracy and the Public Interest*, Testimony to the United States Congress, House Energy & Commerce Committee, Communications and Technology Subcommittee, Hearing on Diversity in the Media Market, Jan. 15, 2020, 20, HHRG-116-IF16-Wstate-SandovalC-20200115.pdf [hereinafter *Sandoval Congressional Testimony*] (urging support for H. R. 3957, Congressman Butterfield, sponsor, Congressmembers Clarke, Cardenas, Rush, Hastings, and Veasy, co-sponsors, 116th Congress First Session, July 25, 2019).

185. *Id.*

186. See, e.g., Margot Shelly Lee, *Regarding segregation during the 1960’s space age*, in HIDDEN FIGURES (2016); Elizabeth Howell, *The Story Of Nasa’s Real “Hidden Figures,” African-American Women Working Behind The Scenes As “Human Computers” Were Vital To The Space Race*,

minority groups. In 1960, the FCC began to consider service to racial and ethnic minority groups as a factor in its licensing decisions.

The FCC's policies during this era bore little fruit for minority broadcast license ownership opportunities, most of which would not emerge until the Opportunity Era from 1978 to 1995. Quadrennial review of FCC media ownership decisions (such as those at issue in *Prometheus*) still considers whether non-discrimination policies are sufficient to promote media ownership diversity and service in the public interest.

The FCC's 1960 Report and Statement of Policy Re: Commission En Banc Programming Inquiry (1960 Programming Statement) determined that service to minority groups was one of the fourteen elements of public service that the Commission expected of broadcasters.¹⁸⁷ The FCC's 1960 Programming Policy Statement adopted guidelines to assess whether a broadcast licensee's programs served the public interest.¹⁸⁸ Those standards became a means of "ascertainment" to guide service in the public interest and required broadcasters to meet with and provide "service to minority groups," as part of fourteen criteria.¹⁸⁹

In 1965, the FCC adopted a Policy Statement On Comparative Broadcast Hearings, outlining two primary objectives to determine who should receive a broadcast television and radio station license: (1) providing the best practicable service to the public, and; (2) maximum diffusion of control of the media of mass communications.¹⁹⁰ "The basic criteria relating to the determination of which applicant will provide the best service to the public are listed as full-time

SCIENTIFIC AMERICAN (Jan. 24, 2017), <https://www.scientificamerican.com/article/the-story-of-nasas-real-hidden-figures-rdquo/>.

187. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291 (1960) [hereinafter *1960 Programming Statement*].

188. *Id.*

189. *Id.* (requiring that broadcasters ascertain the interests of their community of license regarding: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, and (14) entertainment programs); *see also* Carolyn M. Byerly, Professor, Dep't of Journalism, JHJ Sch. Of Comm., Howard Univ., Statement to Participants and Audience at Media Ownership Workshop on Diversity Issues: Gender and Race Conscious Research Toward Egalitarian Broadcast Ownership Regulation 2 (Jan. 27, 2010), <http://www.fcc.gov/ownership/workshop-012710/byerly.pdf>.

190. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965).

participation in station operation by owners, proposed program service, past broadcast record, efficient use of frequency, and character.”¹⁹¹

Those criteria favored applicants with prior broadcast license or employment experience, few of whom were racial or ethnic minorities. Gaining experience through broadcast employment would have been challenging for many people of color and women as *de jure* and *de facto* segregation and discriminatory practices persisted.

Despite the 1960 policy statement making service to minority groups an element of broadcaster’s public service obligation, in 1963, the FCC initiated a license revocation hearing for WIXX radio on the grounds “that the station had changed its programming plans from the 100% “general audience” format originally proposed in its licensing application” by devoting “17% of the station’s broadcast day to black-oriented news, public affairs, and music.”¹⁹² After the licensee dropped its black-oriented programming, the FCC dropped the license revocation hearing and challenges to the character of the licensee.¹⁹³

After threatening to revoke a station license for airing minority-oriented programming, within a few years the FCC confronted challenges to licensees who failed to serve minorities through their programming. In 1966, the FCC considered a petition to deny the renewal of television station WLBT’s license to serve the Jackson Mississippi market. The non-profit organization, the United Church of Christ, Office of Communications (UCC), challenged WLBT’s license renewal, arguing that the licensee failed to serve the public interest and violated the FCC’s then-existing “fairness doctrine” which required licensees to cover important issues of public interest and to cover “both sides.”¹⁹⁴ UCC’s Office of Communication was founded by Dr. C. Everett Parker and others after Dr. Martin Luther King asked Dr. Parker whether he could “do something about TV stations in the South?”¹⁹⁵

The UCC alleged that beginning in 1955, NBC affiliate WLBT posted a sign saying “Sorry Cable Trouble” instead of airing a network broadcast featuring Thurgood Marshall, then the General Counsel of the National Association for the Advancement of Colored People (NAACP), discussing the

191. *Citizens Commc’ns Ctr. v. FCC*, 447 F.2d 1201, 1207–08 (D.C. Cir. 1971), *opinion clarified*, 463 F.2d 822 (D.C. Cir. 1972).

192. Honig, *supra* note 137, at 72 (citing Broward Cnty. Broad., F.C.C. 63–817 (1963)).

193. *Id.*

194. *Office of Commc’n of the United Church of Christ v. FCC*, 359 F.2d 994, 998 (1966) [hereinafter *UCC I*]; *Office of Commc’n of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) [hereinafter *UCC II*].

195. Cheryl Leanza, *Martin Luther King and UCC, 60 Years Later*, in SOUTHWEST CONFERENCE, UNITED CHURCH OF CHRIST (Jan. 17, 2020), <http://www.swcucc.org/faith-in-action-blog/2020/1/17/martin-luther-king-jr-and-ucc-media-justice-60-years-later>.

landmark Supreme Court desegregation case *Brown vs. Board of Education*.¹⁹⁶ “In 1957 another complaint was made to the Commission that WLBT had presented a program urging the maintenance of racial segregation and had refused requests for time to present the opposing viewpoint. Since then, numerous other complaints have been made,” the FCC reported.¹⁹⁷

WLBT claimed it refused to carry “inflammatory” programming and declined to air “any program dealing with civil rights, racial issues, or integration.”¹⁹⁸ Despite its purported policy to eschew these topics, WLBT aired programming supporting segregationist viewpoints. “Shortly after the outbreak of prolonged civil disturbances centering in large part around the University of Mississippi in September 1962, the Commission again received complaints that various Mississippi radio and television stations, including WLBT, had presented programs concerning racial integration in which only one viewpoint was aired.”¹⁹⁹

The 1966 D.C. Circuit’s *UCC v. FCC* decision (*UCC I*) directed the FCC to treat UCC, the petitioner, as a party in FCC proceedings with rights to challenge on behalf of the local public WLBT’s application for license renewal.²⁰⁰ *UCC I* directed the FCC to determine after a hearing whether WLBT had served the public interest to justify license renewal or whether to revoke its license.

The FCC renewed WLBT’s license through a hearing in which the FCC treated the UCC, representing the public, with hostility.²⁰¹ The D.C. Circuit derided the FCC for inappropriately shifting the burden to the UCC to support license revocation, rather than placing the burden on the broadcaster to support its application for license renewal.²⁰² The D.C. Circuit in 1969 ordered that decision vacated, the WLBT license revoked, and the FCC to invite applications for that license.²⁰³

The landmark 1966 and 1969 *UCC* cases opened the door to public participation in FCC decision-making and helped defined service in the public interest. Those cases established the right of the public and public interest organizations to participate in FCC proceedings as full parties due the same rights and respect as other parties. The *UCC* cases also established a line in the

196. *UCC I*, 359 F.2d at 998; see also Bachen, Hammond & Sandoval, *supra* note 121, at 272.

197. *UCC I*, 359 F.2d at 998.

198. Bachen, Hammond & Sandoval, *supra* note 121, at 272.

199. *UCC I*, 359 F.2d at 998.

200. *Id.*; *UCC II*, 425 F.2d at 543.

201. *UCC II*, 425 F.2d 543.

202. *Id.*

203. *Id.*

sand delineating broadcast service falling so far below the standard for serving the public interest that license revocation by the D.C. Circuit was merited.

Denial of FCC license renewals remains relatively rare. Licensees bear the burden of showing they served the public interest during their license term and that renewal would serve the public interest. The '96 Act codified “renewal expectancy,” a longstanding FCC practice that encouraged broadcasters to expect license renewal to incentivize investment in programming, staff, equipment, capital, and other resources.²⁰⁴

Renewal expectancy heightens the importance of the initial license grant. FCC licensing policy allows broadcasters to pass their license to their children or other close family members or associates by holding a license in a corporate form. The 1952 Communications Act amendment allows licensees, including those whose license was renewed multiple times, to determine the parties in a license transfer deal. Each FCC license may be held for years or decades if the broadcaster can show it meets the public interest and other standards to hold a license.

Standing of the public and public interest organizations in FCC proceedings following the 1966 *UCC* case was critical as the FCC examined the impact of its media ownership rules and other policies in the aftermath of Dr. Martin Luther King’s assassination in 1968. Public interest organizations played a vital role in the development of the FCC’s minority ownership policy in 1978, review of media ownership rules, consideration of minority, and later female ownership as a policy priority, and analysis of consolidation and media ownership policy following the '96 Act.

V. THE CIVIL RIGHTS ERA: FOSTERING BROADCAST SERVICE TO DIVERSE COMMUNITIES, 1969–1978

I feel the weight

Of Atlas’ woes, my brother in the west

Aeschylus, *Prometheus Bound*, 430 BCE²⁰⁵

The next era of FCC administrative jurisprudence, the Civil Rights Era from 1969 to 1978, saw judicial impatience with the FCC’s lack of progress in awarding more than a handful of licenses to minorities. Following the assassination of Dr. Martin Luther King in 1968, the National Advisory Commission on Civil Disorders issued what is known as the Kerner Commission Report analyzing the roots of the ensuing civil disorder and

204. See 47 U.S.C. § 309(K)(1) (2018).

205. Aeschylus, *supra* note 1.

protests.²⁰⁶ The Kerner Commission identified the media's role in the absence or stereotyping of minorities as a factor contributing to civil unrest and dissatisfaction, and recommended steps to promote equity and opportunity.²⁰⁷

In 1969, the FCC adopted its first policy prohibiting FCC licensees from engaging in employment discrimination.²⁰⁸ In 1971, the U.S. Civil Rights Commission found the "FCC has no rule prohibiting racial or ethnic discrimination in the sale of radio or television stations. Nor has the Commission recommended legislation requiring broadcast station owners who desire to rid themselves of their franchise to turn in their license to the Commission rather than selling it on the open market."²⁰⁹

In *TV 9*, the D.C. Circuit emphasized that as of 1971, "of the approximate 7,500 radio stations throughout the country, only 10 are owned by minorities. Of the more than 1,000 television stations, none is owned by minorities."²¹⁰ FCC Commissioner Benjamin Hooks, who later became General Counsel of the NAACP, led FCC efforts to examine policies that limited minority access to licenses and service to diverse communities.

Commissioner Hooks cited the Kerner Commission's report which highlighted the link between the absence of minority ownership or radio licenses and "attitudes of racial injustice" in America:

The importance of this almost total absence of minorities from ownership of radio and television stations lies not only in the lost opportunities for minority entrepreneurship, but also in the significance of radio and television stations in shaping the Nation's attitudes of racial injustice. The National Advisory Committee on Civil Disorders, for example, reported that the communications media had 'not communicated' to the majority of their audience — which is a majority group — a sense of degradation, misery and hopelessness of living in the ghetto. Greater representation in these

206. *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240; *Report of the National Advisory Commission on Civil Disorders*, N.Y. TIMES 1 (1968), <https://www.hsdl.org/?abstract&did=35837> (reporting on the aftermath of the assassination of Dr. Martin Luther King and the roots of the civil disorder and protests that occurred, including the media's role in the absence or stereotyping of minorities and recommending steps to promote American equity and opportunity).

207. *Id.*

208. *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240; *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970) (adding "sex" as an impermissible basis for discrimination).

209. FEDERAL CIVIL RIGHTS EFFORT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 276 (1971), <https://files.eric.ed.gov/fulltext/ED062452.pdf> (recommending legislation that would have repealed or modified the 1952 amendment that adopted Sec. 310(d) of the Communications Act).

210. *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973).

important communications industries of people who are familiar with ghettos and barrios and who are sensitive to the feelings of hopelessness and frustration of those who live there and could contribute significantly to greater understanding on the part of majority white Americans.²¹¹

In his concurring statement in an FCC proceeding that led to the D.C. Circuit's *TV 9* decision, Commissioner Hooks emphasized "[a]s new interest groups and hitherto silent minorities emerge in our society they should be given more stake in and chance to broadcast on our radio and television frequencies."²¹²

Section 309(a) of the Communications Act "requires a Commission determination that the grant of a license for facilities will serve 'the public interest, convenience and necessity.'"²¹³ Commissioner Hooks noted that of "the 697 commercial television stations operating in the country as of this date, none of those stations are owned by blacks. Whether or not this fact, ipso facto, reflects a 'fair' and 'equitable' distribution of television facilities in the eyes of the black community is beyond reasonable argument."²¹⁴

Communications Act § 307(b) requires the FCC to "provide 'a fair, efficient and equitable distribution' of broadcast facilities to each of the States and communities."²¹⁵ This statute promotes "localism," service to local communities and the Communications Act's directive to "make available, so far as possible, to all the people of the United States, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."²¹⁶ Fairness, equity, localism, and the public interest require service to all of the people of the United States including communities of color, tribal, rural, and disadvantaged communities.

In 1973, the D.C. Circuit in *TV 9* heard an appeal from a Comparative Hearing where the FCC declined to consider the minority group membership of a license applicant as a factor in determining the license award, and determined that minority ownership was "a consideration relevant to a choice among applicants of broader community representation and practicable service to the public."²¹⁷ *TV 9* held "that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should

211. *In re Applications of Mid-Florida Television Corp.* 37 F.C.C.2d 559, 560 (1972) (Commissioner Hooks, concurring) (citing FEDERAL CIVIL RIGHTS EFFORT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 209, at 188).

212. *Id.*

213. Section 309(a) of the Communications Act, as amended, 47 U.S.C. § 309(a).

214. *In re Applications of Mid-Florida Television Corp.* 37 F.C.C.2d at 560.

215. *Id.*

216. 47 U.S.C. § 151 (2018).

217. *TV 9, Inc. v. FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973).

be awarded.”²¹⁸ “The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news.”²¹⁹

In response to *TV 9* and the D.C. Circuit’s 1975 decision *Garrett v. FCC*, the FCC began to analyze minority ownership as a factor in licensing awards.²²⁰ “In 1973, the FCC issued a construction permit to WGPR-TV (UHF) in Detroit, the first Black owned television station.”²²¹ In 1981, the FCC approved a settlement between parties applying for a television license in Orlando, Florida that resulted in minority group members having a license ownership interest.²²² The application which initiated that Comparative Hearing began in 1967.²²³

Sadly, little progress in promoting FCC license access for minorities was made until 1978. Baynes contrasted the FCC’s process of awarding a license when only one applicant applied (the singleton process) to comparative hearings.²²⁴ Under the singleton process, “the FCC would deem the solitary applicant qualified once meeting the FCC’s basic qualifications.”²²⁵ KPMG’s FCC-commissioned study found that “[d]uring the period 1970–1993, only 2,437 licenses were awarded by comparative hearing’ whereas 6,178 licenses were awarded through singleton applications.”²²⁶ Accordingly, “minority enhancements were unavailable for the vast majority of licenses that were distributed by the FCC.”²²⁷

Honig emphasized that through FCC “comparative hearings, or through grants of (rare) unopposed applications, the FCC gave minority owned companies, for free, *two* out of about 1,700 full power television licenses.”²²⁸ “Only about 100 minority owned applicants won construction permits for new

218. *Id.*

219. *Id.*

220. *Id.* at 938; *Garrett v. FCC*, 513 F.2d 1056, 1062–63 (D.C. Cir. 1975).

221. *See In re Application of W.G.P.R., Inc.*, 42 F.C.C.2d 836, 838 (1973) (denying a petition for reconsideration of the grant of the WGPR construction permit).

222. *In re Application of Mid-Florida Television Corp. Orlando*, 87 F.C.C.2d 203, 210 (1981).

223. *Id.*

224. Baynes, *supra* note 130, at 245.

225. *Id.*; 47 U.S.C. § 308(b) (2004) (requiring an applicant for an FCC license to demonstrate “citizenship, character, and financial, technical, and other qualifications”).

226. Baynes, *supra* note 130, at 245. (citing *KPMG Utilization Rates*, *supra* note 22, at 6).

227. *Id.*

228. Honig, *supra* note 137, at 76 (emphasis in the original) (citations omitted).

radio facilities.”²²⁹ “How different a nation we would be if the FCC had drawn straws for spectrum instead?” Honig asks.²³⁰

The FCC’s more than half-century late start in promoting license access for minorities and women shapes the media matrix and democracy. It influences images seen on television, voices heard on the radio, information accessible or received, and access to FCC licenses.

The United States Commission on Civil Rights’ 1977 report *Window Dressing on the Set* examined the dearth of minority broadcast ownership that resulted from FCC licensing and effect on the American public.²³¹ That report found a pattern that would be repeated for decades. Minorities “are underrepresented on network dramatic television programs and on the network news. When they do appear they are frequently seen in token or stereotyped roles.”²³²

More than forty years later, the lessons of *Window Dressing on the Set* still resonate. Its conclusion about the absence or stereotyping of people of color on broadcast television continues to animate policy debates at issue in FCC media ownership rule reviews and in other proceedings following *Prometheus*. Although *Prometheus* defers to FCC judgment to determine how to gather proceeding records, data is needed to study the effect of FCC programs and data jurisprudence on license access and service in the public interest.

VI. THE OPPORTUNITY ERA FOR MINORITY LICENSEES AND THE DIVERSE AMERICAN PUBLIC, 1978–1995

A. PROGRAMS TO PROMOTE FCC LICENSE ACCESS FOR MINORITIES, THE 1978 MINORITY OWNERSHIP POLICY STATEMENT

During the Opportunity Era from 1978 to 1995, the FCC initiated programs to promote access to licenses for minorities, and later for women. Beginning in 1984, the FCC interlaced consideration of policies to promote minority broadcast license access and FCC media ownership rules. As Justices Sotomayor and Kagan pointed out at the *Prometheus* oral argument, counsel for the FCC contradicted at oral argument the FCC’s briefs which recognized the

229. *Id.*

230. *Id.*

231. U.S. Comm’n on Civil Rights, *WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION* (1977), <https://www.loc.gov/item/77603555/> [hereinafter *WINDOW DRESSING ON THE SET*]

232. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 588 (1990) (citing *WINDOW DRESSING ON THE SET*, at 3).

longstanding relationship between media ownership and media licensing diversity policies.²³³

Analysis of FCC policies and licensing during the Opportunity Era requires access to records, which remain in analog darkness in FCC archives. The FCC's data jurisprudence continues to frustrate policy analysis and development, access to FCC licenses, and service to diverse American communities.

The FCC's 1978 Policy Statement on Minority Broadcast Ownership recognized that FCC non-discrimination policies adopted in the wake of the Kerner Commission Report had proved insufficient to promote access to FCC licenses for minorities.²³⁴ The FCC observed the views of racial minorities continued to be inadequately represented in the broadcast media as the number of minority radio or television licensees remained low.²³⁵ Dearth of control of FCC licenses by minorities "is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience."²³⁶ License holding diversity also "enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment,"²³⁷ the FCC concluded.

The 1978 Minority Ownership Policy Statement adopted several programs to encourage license sales to minorities, including tax certificates, distress sale rules, and the failed station solicitation rule.²³⁸ The FCC selected these tools in part because the 1952 Communications Act amendment prohibited the FCC from considering whether an application to transfer an FCC license would be better served by a different transferee.²³⁹ Incentivizing deals between minorities and licensees remains a predicate to the FCC's ability to approve a license transfer to a minority or female.

Tax Certificates were a key mechanism to increase minority license ownership diversity at a time when the FCC awarded fewer original licenses.

233. Oral Argument at 11:50, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021), https://www.supremecourt.gov/oral_arguments/audio/2020/19-1231 [hereinafter *FCC v. Prometheus, Oral Argument Transcript*].

234. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, *supra* note 62.

235. *Minority Ownership Policy Statement*, *supra* note 10, at 980–81.

236. *Id.* at 981.

237. *Id.*

238. *Id.*

239. 47 U.S.C.A. § 310(b), 66 Stat. 716 (1952) (amending 48 Stat. 1086 (1934)); *In re Applications of MMM Holdings*, 4 FCC Rcd. 6838 (citing S. Rep. No. 44, 82d Cong., 1st Sess. 8, 9 (1951)).

Congress ended the FCC's tax certificate program in 1995,²⁴⁰ less than one year before the '96 Act initiated more secondary license transfers and market consolidation.

The FCC approved "distress sales" to minority transferees for "licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues, but before the hearing is initiated," subject to confirmation that the proposed assignee meets other FCC qualifications.²⁴¹ The 1978 Minority Ownership Policy assumed the FCC's longstanding limit on station ownership, the 7-7-7 rule, adopted in 1953.

In 1984, the D.C. Circuit in *West Michigan Broadcasting Co. v. FCC* upheld the FCC's consideration of race as a factor in an FCC comparative hearing used to award an FCC license.²⁴² The D.C. Circuit emphasized the importance of Congressional approval of policies that take race into account in FCC licensing to address the underrepresentation of minorities the FCC's decisions created.

West Michigan Broadcasting Co. cited Congressional findings of "extreme underrepresentation of minorities and their perspectives in the broadcast mass media" resulting from "past inequities stemming from racial and ethnic discrimination."²⁴³ "Congress had explicitly found that the award of significant preferences to minority-controlled broadcast entities" was an appropriate way of "remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media of mass communications."²⁴⁴

The Supreme Court's 1990 *Metro Broadcasting v. FCC* decision upheld FCC programs that took race into account using an intermediate scrutiny standard.²⁴⁵ *Metro Broadcasting* emphasized that it was "of overriding

240. Self-Employed Persons Health Insurance Act of 1995, Pub L. No. 104-7, 109 Stat. 93 (1995).

241. *Minority Ownership Policy Statement*, *supra* note 10, at 983.

242. *W. Mich. Broad. Co. v. FCC*, 735 F.2d 601, 615-16 (D.C. Cir. 1984).

243. *Id.* (citing H.R. Conf. Rep. No. 97-765, U.S. Code Cong. & Admin. News 1982, p. 2287).

244. *W. Mich. Broad. Co.*, 735 F.2d at 613.

245. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) (upholding several FCC programs that took race and ethnicity into account on an intermediate scrutiny standard considering the record and Congressional recognition of FCC programs that took race into account through a prohibition on the FCC spending any funds to examine or change its minority ownership policies).

significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress.”²⁴⁶ “Congress enacted and the President signed into law the FCC appropriations legislation for fiscal year 1988. The measure prohibited the Commission from spending any appropriated funds to examine or change its minority ownership policies,” a prohibition that was twice renewed through appropriations bills.²⁴⁷ The Appropriations Committee report explained “Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences.”²⁴⁸

Legal challenges to FCC initiatives to promote minority ownership, which began in 1978, were dismissed in 1990 after the Supreme Court's *Metro Broadcasting* decision.²⁴⁹ The FCC cited *Metro Broadcasting* in its dismissal of a petition to reconsider its 1985 decision to permit an exception to the national multiple ownership rules to allow incentives for minority ownership.²⁵⁰

The FCC began to consider the overlap between minority ownership and its media ownership rules in 1983 during the Reagan Administration. The FCC considered and ultimately adopted rules in 1984 to increase the national ownership limit to 12-12-12. In the rulemaking docket that evaluated that change, the FCC considered the proposal's impact on diversity and the public interest including minority license ownership opportunities.

B. INTEGRATING MEDIA OWNERSHIP RULE REVIEW WITH POLICIES TO PROMOTE MINORITY OWNERSHIP, 1983 TO 1996²⁵¹

At oral argument in *FCC v. Prometheus*, Chief Justice Roberts and Justices Thomas, Sotomayor, Kagan, Kavanaugh, and Barrett asked whether the FCC was required to consider minority or female ownership in its media ownership rules or had a history of doing so. In their briefs and at oral argument, respondents emphasized that the FCC has considered the effect of its structural media ownership rules on minorities and women throughout its

246. *Id.* at 547, 563.

247. *Id.* at 560, 578.

248. *Id.* at 578 (citing S. Rep. No. 100–182, p. 76 (1987); S. Rep. No. 100–182, p. 76 (1987)).

249. *In re* Amendment of Section 73.3555 (Formerly Sections 73.35, 73.240, & 73.636) of the Commission's Rules Relating to Multiple Ownership of Am, Fm & Television Broad. Stations, 5 FCC Rcd. 5338 (1990).

250. *Id.*

251. This section draws from the author's analysis in *Sandoval, Prometheus Oral Argument Comment*, *supra* note 71.

media ownership reviews, making this an important issue the FCC must properly analyze under the APA.²⁵² The FCC's interlacing of media ownership rules and policies to promote license access for minorities and women began more than thirteen years prior to the '96 Act. These issues continue to be intertwined.

At multiple points during the *Prometheus* oral argument, Malcolm Stewart for Government Petitioners and Helgi Walker for Industry Petitioners overlooked the 35-year record of FCC consideration of minority and later female FCC license access in the development and analysis of FCC media ownership rules. Mr. Stewart incorrectly argued that the FCC had “historically looked at enhanced female and minority ownership as a goal to be achieved through some means, [but] it ha[d] not historically looked at that criteria as a basis for its cross-ownership restrictions and other structural media ownership rules.”²⁵³

Stewart's oral argument contradicted Government Petitioners' brief that recognized promoting minority license ownership as a longstanding FCC policy priority developed in the context of analysis of media ownership rules. “Although the statute does not specifically identify minority or female ownership as a criterion the FCC must consider in applying Section 202(h), the agency has traditionally treated this form of broadcast diversity as an element in its multi-factor public-interest analysis,” the Government's brief recognized.²⁵⁴

Ms. Walker, the lawyer for Industry Petitioners in *FCC v. Prometheus*, argued the Court should overrule the Third Circuit's decision in *Prometheus IV* on the grounds that analyzing minority and female ownership was required neither by the APA nor by § 202(h).²⁵⁵ Ms. Walker's argument ignored the fact that the FCC has consistently made consideration of minority and female ownership a policy priority when reviewing media ownership rules. The FCC did so in the thirteen years prior to the Telecommunications Act and in each media ownership review under § 202(h).

In 1983, the FCC initiated Gen. Docket No. 83–1009 to evaluate whether to change its 7-7-7 media ownership rule in place since 1955. That rulemaking considered the effect of the FCC's media ownership rules on minority groups' access to FCC licenses. It sought to foster license ownership diversity, service to the public, and the public interest. The FCC's 1984 decision in Gen. Docket

252. *FCC v. Prometheus, Oral Argument Transcript, supra* note 233, at 42:40; Brief of Petitioner, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021).

253. *FCC v. Prometheus, Oral Argument Transcript, supra* note 233, at 11:50.

254. Brief of Petitioner, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021).

255. *FCC v. Prometheus, Oral Argument Transcript, supra* note 233, at 21:57–22:32.

No. 83–1009 noted “that the Commission has long been dedicated to expanding minority participation in broadcasting.”²⁵⁶

In 1984, the FCC’s review of attribution rules which determine when ownership limits apply sought to allow expansion of license holdings while simultaneously promoting minority ownership opportunities. The FCC determined in 1985 that relaxing the attribution-rule benchmark “might serve the public interest by . . . promoting the entry of new participants, particularly minorities, by increasing the availability of start-up capital to these entities.”²⁵⁷

In 1985, the FCC issued an order recognizing “that our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership.”²⁵⁸ This order adopted incentives known as the “Mickey Leland rule,” which permitted a group owner to increase its television license holding above the 12-12-12 cap to thirteen or fourteen if the additional stations in which the group owner invested were minority controlled.²⁵⁹ The FCC determined that a “group owner having cognizable interests in minority-controlled television stations should be allowed to reach a maximum of thirty percent of the national audience, provided that at least five percent of the aggregate reach of its stations is contributed by minority controlled stations.”²⁶⁰

In 1993, the FCC extended its multiple ownership incentive rules to promote minority ownership of cable systems by including an exception “whereby an individual or entity may reach an additional five percent of the nation through cable systems that are minority-controlled.”²⁶¹ To “promote the presentation of a diversity of viewpoints on cable” the FCC also allowed “carriage of vertically integrated video programming services, on two additional channels or up to 45% of a cable system’s channel capacity, whichever is greater, provided such additional video programming services are minority-controlled.”²⁶²

256. *In re* Amendment of Section 73.3555, (Formerly Sections 73.35, 73.240, & 73.636) of the Commission’s Rules Relating to Multiple Ownership of Am, Fm & Television Broad. Stations, 100 F.C.C.2d 17, 46–49 (Gen. Docket No. 83–1009) (1984).

257. *1984 Multiple Ownership Rule Review*, *supra* note 64, at 1002.

258. *1985 Multiple Ownership Rule Review*, *supra* note 67, at 94–95.

259. 47 C.F.R. § 73.3555(d)(1)(i)–(ii) (2022).

260. *1985 Multiple Ownership Rule Review*, *supra* note 67, at 94–95.

261. *In re* Policies & Rules Regarding Minority & Female Ownership of Mass Media Facilities, 10 FCC Rcd. 2788, 2789 n. 9 (1995) (citing Second Report and Order, MM Docket No. 92–264, 8 FCC Rcd. 8565, 8578 (1993)) [hereinafter *1995 Minority & Female Ownership Broadcast Ownership Policies*].

262. *Second Report and Order*, MM Docket No. 92–264, 8 FCC Rcd. at 8596.

In 1994, the FCC modified its national radio ownership rules to permit a group owner to take “a non-controlling but attributable interest in an additional five AM and five FM stations if those stations are controlled by minorities and small businesses.”²⁶³ In 1995, the year before Congress passed the ’96 Act, the FCC considered the consequences for minority ownership that might arise from changing multiple ownership rules for television station ownership.²⁶⁴ The FCC’s Further Notice of Proposed Rulemaking (FNPRM) expressed the FCC’s concern that relaxing local ownership limits could increase the price of broadcast television stations and “may pose a concern with respect to the ability of minorities and other new entrants to acquire TV stations.”²⁶⁵ It proposed a framework to consider competition and diversity issues, including the effect on minorities, raised by increasing the national television ownership limit.²⁶⁶

Concomitantly, the FCC adopted Rulemaking MM Docket 94–150 to examine issues facing “minorities and women in obtaining access to capital,” recognizing that the FCC’s multiple ownership rule changes might lead station license prices to rise and exacerbate this barrier.²⁶⁷ This proposal followed rulemaking MM Docket 92–51 initiated in 1992 to examine reforms to multiple ownership attribution rules with the goal of promoting minority, female, and new entrant license access and investment in broadcasting.²⁶⁸

The FCC’s 1995 Notice of Proposed Rulemaking (Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities) declared: “We believe that the public interest is served by increasing economic opportunities for minorities and women to own communications facilities.”²⁶⁹ That 1995 rulemaking proposed to create an incubator program to “enable a broadcast licensee or other entity to own and control an additional facility in return for incubating an unrelated facility (or a number of unrelated

263. *In re* Revision of Radio Rules & Policies, 9 FCC Rcd. 7183 (1994).

264. *In re* Review of the Commission’s Regulations Governing Television Broad., 10 FCC Rcd. 3524 (1995).

265. *Id.* (“The increased prices of broadcast TV stations may pose a concern with respect to the ability of minorities and other new entrants to acquire TV stations.”)

266. *Id.* at 3531 (providing “a statement of frameworks for the economic and diversity analyses of these rules within which we solicit additional comment.”)

267. *In re* Review of the Commission’s Regulations Governing Attribution of Broad. Interests; Review of the Commission’s Regulations & Policies Affecting Inv. in the Broad. Industry; Reexamination of the Commission’s Cross-Interest Policy, 10 FCC Rcd. 3606 (1995).

268. Capital Formation Notice, 7 FCC Rcd. 2654 (1992).

269. *1995 Minority & Female Ownership Broadcast Ownership Policies*, *supra* note 261, at 2788–89.

facilities).²⁷⁰ In considering alternative attribution rules and the creation of an incubator program, the FCC observed that its “existing minority and small business ownership incentive . . . has not been particularly effective.”²⁷¹

This record demonstrates that for more than thirteen years before the ’96 Act, the FCC considered minority access to FCC licenses an important diversity and public interest goal and factor in evaluating and adopting its structural media ownership rules—including its attribution rules that determine when ownership limits apply. Since 1983, the FCC has consistently made the nexus between female and minority ownership and media ownership rules an important aspect of its media ownership proceedings. A federal agency cannot fail “to consider an important aspect of the problem” or offer “an explanation for its decision that runs counter to the evidence before it.”²⁷²

The FCC continued to embrace its longstanding policy of promoting minority ownership after the passage of the ’96 Act when it added promoting female license access as a policy priority. Contrary to Petitioners’ arguments, the record shows the nexus of these critical issues, requiring the FCC to analyze this longstanding and continuous policy goal to satisfy the APA.

The records of these post-’96 Act media ownership proceedings are available electronically. Meanwhile, many Comparative Hearing and other licensing records from this time remain in paper records in FCC archives. The FCC’s poor data jurisprudence stymies access to information about FCC licensees, contested license proceedings, and FCC policy.

VII. THE CONSOLIDATION ERA DURING THE INTERNET’S EXPANSION, 1995–PRESENT

A. THE JURISPRUDENTIAL TIDE SHIFTS FROM INTERMEDIATE TO STRICT SCRUTINY FOR PROGRAMS THAT CONSIDER RACE OR ETHNICITY

Jurisprudential standards shifted in the seventeen years between the FCC’s 1978 Minority Ownership Policy Statement, the Supreme Court’s 1990 *Metro Broadcasting* decision, and the 1995 *Adarand v. Peña* decision—the last of which raised the level of scrutiny for programs which take race into account to strict scrutiny.²⁷³ Shortly after *Adarand*, the FCC froze its programs that took race into account, citing the need to determine if the Commission could meet the strict scrutiny standard adopted in *Adarand* for programs or policies that take

270. *Id.* at 2792.

271. *Id.*

272. *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015) (quoting *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

273. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

race into account.²⁷⁴ The strict scrutiny standard under *Adarand* requires the FCC to analyze data and show through a “*Croson*” or *Adarand* study that it could meet that standard.²⁷⁵ *Adarand*, the Telecom Act’s Section 202(h) requirements for quadrennial FCC media ownership rule reviews, and the ’96 Act’s directives for the FCC to promote license holding diversity increase the importance of gathering and analyzing data to support evidence-based decision-making.

“[O]ver the past 25 years, the FCC has failed to commission an *Adarand* study, despite four remands from the Third Circuit ordering it to analyze the effects of its media ownership policies on minority and female ownership.”²⁷⁶ “The lack of an *Adarand* study has undermined the FCC’s ability to comply with the four remands in the *Prometheus* proceeding. This is a problem of the FCC’s own making.”²⁷⁷

Neither has the FCC gathered or made publicly accessible the FCC data necessary for such a report. Much of that data concerns the first three eras of FCC licensing jurisprudence prior to 1996, and those records are largely kept as paper archives. The data initiatives this Article recommends would inform an *Adarand* study, the FCC’s analysis of media ownership rules under Sec. 202(h), and other dockets before the FCC.

B. IDENTIFYING AND ELIMINATING MARKET ENTRY BARRIERS AND PROMOTING LICENSE ACCESS FOR DIVERSE AMERICANS DURING THE CONSOLIDATION ERA

Less than a year after *Adarand* was decided, the ’96 Act amended the Communications Act of 1934 and spurred consolidation in FCC broadcast licensing. The ’96 Act also added the requirement that the FCC carry out its mission “without discrimination on the basis of race, color, religion, national origin, or sex.” As amended, 47 USC § 151 established the FCC:

274. *In re* Section 257 Proceeding to Identify & Eliminate Mkt. Entry Barriers for Small Businesses, Report, 12 FCC Rcd. 16802, 16809 (1997) [hereinafter *1997 Section 257 Report*] (“we must fully evaluate the Section 257 record according to the constitutional requirements that govern action by the federal government based on race (strict scrutiny) or gender (intermediate scrutiny)”); *FCC Diversity Order*, *supra* note 115, at 5950 ¶ 83. (“Race-based classifications subject to strict scrutiny may be upheld ‘only if they are narrowly tailored measures that further compelling governmental interests.’”); FCC, *2016 Media Ownership Review Order*, *supra* note 77, at 9986, ¶ 291.

275. *2016 Media Ownership Review Order*, *supra* note 77 at 132 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989), “Less evidence is required for gender-based measures, although an ‘exceedingly persuasive justification’ is still necessary.”).

276. *Sandoval Congressional Testimony*, *supra* note 184, at 20.

277. *Id.*

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the “Federal Communications Commission,” which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Honig emphasized that the Telecom Act’s “non-discrimination provision is not self-executing,”²⁷⁸

Section 257 of the Telecom Act adds requirements that go beyond the ’96’s Act’s non-discrimination mandate. § 257 required the FCC to promote access to FCC licenses by “favoring diversity of media voices.” It directed the FCC to identify and take steps to eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.”²⁷⁹

The FCC initiated studies between 1997 and 2000 to support its first Section 257 reports to Congress.²⁸⁰ As former Director of the FCC’s Office of Communications Business Opportunities (OCBO), the author led development of the scope of work for six studies conducted between 1997–2000 that gathered and analyzed FCC and other data on minority and small business ownership for the FCC’s first report to Congress required by § 257 of the ’96 Act.²⁸¹ To inform the § 257 studies, the FCC sent researchers from

278. Honig, *supra* note 137, at 47.

279. *1997 Section 257 Report*, *supra* note 274, at 16804.

280. *Id.* at 16809.

281. See Kofi Ofori & The Civil Rights Forum on Communications Policy, *When Being Number One Is Not Enough, The Impact of Advertising Practices On Minority-Owned & Minority-Formed Broadcast Stations*, FCC (Jan. 1999), https://transition.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/; Ivy Group, *supra* note 10; Bachen, Hammond, Mason & Craft, *supra* note 125; William D. Bradford, *Capital Markets Study Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes*, FCC (Dec. 2000); KPMG *Utilization Rates*, *supra* note 22; Ernst & Young LLP, *FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority-and Women-Owned Companies in FCC Wireless Spectrum*

KPMG to the national archives to gather FCC data on minority ownership and use that sample to analyze minority underutilization in FCC license awards.²⁸²

In May 1997, the FCC issued its first report to Congress on its efforts to eliminate identify and market entry barriers as required by § 257(c).²⁸³ The FCC's 1997 report on § 257 market entry barriers informed Congress that the FCC's studies were designed to facilitate examination of "the role of small businesses and businesses owned by minorities or women in the telecommunications industry and the impact of our policies on access to the industry for such businesses."²⁸⁴

Those studies, were also intended to inform the FCC analysis of its media ownership rules under § 202(h), the first of which was conducted in 1998.²⁸⁵ The FCC's 1997 § 257 report stated that the FCC expected to examine through its § 202(h) review "issues related to the changes and consolidation that have resulted in the market since the passage of the 1996 Act, including the impact on small businesses and small businesses owned by minorities or women, resulting from the industry and regulatory changes during the past several years."²⁸⁶

Five of the § 257 studies were issued on the eve of the change in administration from President Clinton to President Bush.²⁸⁷ "The FCC did not initiate a request for comments or a rulemaking concerning the studies' evidence and findings."²⁸⁸

It was not until 2008 that the FCC acted on some of the findings in the FCC-commissioned study published in January 1999: *When Being Number One Is Not Enough, The Impact of Advertising Practices On Minority-*

Auctions, FCC (Dec. 2000) https://transition.fcc.gov/opportunity/meb_study/auction_utilization_study.pdf.

282. *1997 Section 257 Report*, *supra* note 274, at 16804 (citing 47 U.S.C. § 257(a) (2018)); *KPMG Utilization Rates*, *supra* note 22, at 11–12.

283. *See generally 1997 Section 257 Report*, *supra* note 274.

284. *Id.* at 16934.

285. *Id.* at 16908.

286. *Id.*

287. *See FCC Sec. 257 studies*, *supra* note 175; *Ivy Group*, *supra* note 10; *Bachen, Hammond, Mason & Craft*, *supra* note 125; *Bradford*, *supra* note 281; *KPMG Utilization Rates*, *supra* note 22; *Ernst & Young LLP*, *supra* note 281.

288. Catherine J.K. Sandoval, *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity, and Service in the Public Interest*, in COMMUNICATIONS RESEARCH IN ACTION: SCHOLAR-ACTIVIST COLLABORATIONS FOR A DEMOCRATIC PUBLIC SPHERE 19–20 (Minna Aslama & Philip M. Napoli, eds., Fordham University Press, 2010) [hereinafter *Sandoval, Minority Commercial Radio Ownership in 2009*].

Owned & Minority-Formatted Broadcast Stations.²⁸⁹ The FCC’s 2008 media ownership rule review observed that “[f]or over 20 years, the Commission has been aware of the insidious practices of certain advertisers, rep firms and advertising agencies of imposing written or unwritten “no urban/no Spanish” dictates.”²⁹⁰

Twenty years after the FCC became aware of these practices and nine years after the 1999 study shed light on their harmful effects as market entry barriers for minority-owned and minority-serving broadcasters—the FCC’s 2008 order required broadcasters to certify when applying to renew their licenses “that their advertising sales contracts do not contain discriminatory clauses.”²⁹¹ The FCC also required broadcasters to certify that “they did not discriminate on the basis of race, color, religion, national origin, or sex in the sale of their station.”²⁹² These requirements particularize the Communications Act’s directives for the FCC to promote wireless and wireline communications to all Americans without discrimination on the basis of race, color, religion, national origin, or sex.²⁹³

To inform its twenty-first century media ownership reviews, the FCC has occasionally funded small, relatively short studies on various issues regarding minority or female ownership.²⁹⁴ The FCC has not replicated the scale, scope, depth, archival, qualitative, or quantitative research of the § 257 studies.

Congress eliminated the § 257(c) triennial reporting requirement in 2018 during the Trump Administration.²⁹⁵ That amendment left in place §§ 257(a)-(b), which directed the FCC to complete a proceeding to identify and eliminate market entry barriers for entrepreneurs and small businesses within 18 months of the ’96 Act’s passage and in so doing consider media ownership “policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”²⁹⁶ Section 309(j)(3)(b) of the ’96

289. Ofori & the Civil Rights Forum on Communications Policy, *supra* note 281.

290. *FCC Diversity Order*, *supra* note 115, at 5950 ¶ 49.

291. *Id.* at Appendix A, ¶ 1 (adding to 47 C.F.R. Part 73 § 73.2090 (2022), “Ban on discrimination in broadcast transactions. No qualified person or entity shall be discriminated against on the basis of race, color, religion, national origin or sex in the sale of commercially operated AM, FM, TV, Class A TV or international broadcast stations.”)

292. *Id.*

293. Nondiscrimination Principle, Pub. L. No. 104, § 104, 110 Stat. 86 (1996).

294. FCC, 2010 MEDIA OWNERSHIP STUDIES, <https://www.fcc.gov/general/2010-media-ownership-studies> (Oct. 7, 2021); FCC, MEDIA OWNERSHIP 2006 RESEARCH STUDIES ARCHIVE, <https://www.fcc.gov/media/media-ownership-2006-research-studies-archive> (Jun. 19, 2020).

295. 132 Stat. 1089 (2018).

296. 47 U.S.C. § 257 (c) (2018), *amended by* Pub. L. No. 115–41 (2018).

Act echoes those policies, as do §§ 309(a) and 310's requirements that licenses be issued in the public interest.

The six studies the FCC initiated between 1997 and 2000 remain the most searching review of FCC archival data on minority media ownership policies prior to the '96 Act. To inform its § 202(h) media ownership rule reviews, other FCC reports, and meet the Telecom Act's public interest mandates, this Article recommends the FCC gather and publish its data, including analog records lingering for decades in boxes at the national archives.

C. PROMOTING MINORITY AND FEMALE FCC LICENSE ACCESS REMAINS AND AVOWED POLICY PRIORITY

The FCC made promotion of minority and female access to FCC licenses a priority in each § 202(h) rulemaking since the '96 Act's passage.²⁹⁷ "Encouraging minority and female ownership historically has been an important Commission objective, and we reaffirm that goal here," declared the FCC's 2003 media ownership review decision.²⁹⁸

The FCC media ownership review initiated in 2006, concluded that its "media ownership rules are designed to foster the Commission's longstanding policies of competition, diversity, and localism" as set out in its *2002 Biennial Review Order*, which made minority and female ownership an important goal that served the public interest.²⁹⁹ The 2006 media ownership review order reaffirmed those goals.³⁰⁰ In 2008, the FCC adopted several "measures modifying certain of our rules and policies to encourage

297. See, e.g., *In re 1998 Biennial Regulatory Review—Review of Commission's Broad Ownership Rules*, 15 FCC Rcd. 11058, 11073 (2000).

298. See, e.g., *In re 2002 Biennial Regulatory Review—Review of the Commission's Broad Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, 13634 (2003) [hereinafter *2003 Media Ownership Review*] (citing *Minority Ownership Policy Statement*, *supra* note 10); *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 10 FCC Rcd. 2788 (1995); *1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Report and Order, (1998) (adopting competitive bidding rules consistent with 47 U.S.C. § 309(j)(3)(B)); *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 11 FCC Rcd. 6280 (1996); *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, 12 FCC Rcd. 16802 (1997).

299. *In re 2006 Quadrennial Regulatory Review—Review of the Commission's Broad Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 23 FCC Rcd. 2010, 2016–17 (2008).

300. *Id.*

ownership diversity and new entry in broadcasting”³⁰¹ including changes to attribution rules, and invited comment on proposals to promote those goals.³⁰²

Notwithstanding its long-professed policy priority to promote minority and female access to FCC licenses, control of FCC radio licenses by minorities was lower in 2017 than in 2009. The FCC’s most recent media licensing report published in 2017 stated that non-minority and non-Hispanic individuals controlled over 94% of FCC full-power television licenses and 92% of commercial radio licenses.³⁰³ Most FCC radio and television licensees at that time were men.³⁰⁴

The FCC’s analysis of its 2017 Form 323s reported that racial minorities and Hispanics controlled 789 commercial AM and FM radio station licenses in 2017, approximately 8% of the 8,806 AM and FM radio licenses.³⁰⁵ The FCC report does not clarify if some Hispanics were also classified as racial minorities. Accordingly, the total number of stations controlled by minorities including Hispanics in 2017 may be smaller than the FCC’s Fourth Report and Order indicates. This Article recommends the FCC report its data to clarify any overlap such as Hispanics who are also a racial minority.

D. BROADCASTING IN THE INTERNET AGE

The paucity of licenses the FCC awarded to minorities or women prior to 1978 continues to shape the media environment and analysis of FCC regulation in the twenty-first century. PEW’s 2010 study of the news ecosystem in Baltimore found that most local news was generated by newspapers, television, and radio, while the internet primarily recycled news produced from local broadcasters and newspapers.³⁰⁶ Broadcasting, cable, traditional print sources such as newspapers, and the internet complement each other, and often retransmit news originated in a different format.

More than two decades after the twenty-first century dawned, broadcasting remains an important source of information, especially for local news and public affairs. Even as the internet increasingly mediates access to resources—from COVID-19 vaccination appointments to education, work, and services—’96 Act broadcast television and radio remain critical sources of news twenty-five years after the ’96 Act.

301. *FCC Diversity Order*, *supra* note 115, at 5924.

302. *Id.* at 5937.

303. FCC, *Fourth Report on Ownership of Broadcast Stations*, *supra* note 11, at 2–4.

304. *Id.* (reporting that in 2017 men controlled the voting interests for 53.7% of full power commercial television stations and over 80.9% of AM and FM radio licenses).

305. *Id.*, at 4–5.

306. *How News Happens, A Study of the News Ecosystem of One American City*, PEW RSCH. CTR. (Jan. 11, 2020), <https://www.journalism.org/2010/01/11/how-news-happens/>.

In 2018, Americans watched almost six hours of video a day, primarily through “live or time-shifted traditional television viewing.”³⁰⁷ “Similarly, more than 90 percent of Americans still listen to the radio each week.”³⁰⁸ PEW research reported in 2019 that “local TV stations are the top type of source for local news. About four-in-ten Americans (38%) say they often get news from local TV stations (86% ever do so). Radio stations (from which 20% often get news) and daily newspapers (17%) serve as the next most popular providers of local news.”³⁰⁹ “[T]elevision remains a common place for Americans to get their news and some evidence suggests that broadcast television outlets produce a significant portion of the video news content published on websites and social media platforms,” the FCC’s 2018 media ownership review order recognized.³¹⁰

During the COVID-19 pandemic’s first year, 37% of adults got their political news primarily through radio and television, the largest news source among adults surveyed.³¹¹ Cable television, which primarily covers national news, was the primary political news source for 16% of adults PEW surveyed. 43% of adults surveyed cited internet sources as their primary news source.³¹² Local Broadcasting remained the primary source for local political news.³¹³

Consideration of the link between media ownership rules and public safety, including the safety of diverse communities, is a statutory requirement. *Mozilla v. FCC* emphasized that when, as here, “Congress has given an agency the responsibility to regulate a market such as the telecommunications industry that it has repeatedly deemed important to protecting public safety,” agency decisions “must take into account its duty to protect the public.”³¹⁴ The “Commission is ‘required to consider public safety by * * * its enabling act.’”³¹⁵

307. *In re* 2018 Quadrennial Regulatory Review of the Commission’s Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 33 FCC Rcd. 12111 (2018) [hereinafter *2018 Media Ownership Review Order*].

308. *Id.* at ¶ 3.

309. *Nearly as many Americans prefer to get their local news online as prefer the TV set*, PEW RSCH. CTR. (Mar. 26, 2019), <https://www.journalism.org/2019/03/26/nearly-as-many-americans-prefer-to-get-their-local-news-online-as-prefer-the-tv-set/#local-tv-stations-remain-the-most-relied-on-individual-source-despite-having-little-online-presence>.

310. *2018 Media Ownership Review Order*, *supra* note 307.

311. Amy Mitchell, Mark Jurkowitz, J. Baxter Oliphant & Elisa Shearer, *Americans Who Mainly Get Their News on Social Media Are Less Engaged, Less Knowledgeable*, PEW RSCH. CTR. (July 30, 2020), <https://www.journalism.org/2020/07/30/americans-who-mainly-get-their-news-on-social-media-are-less-engaged-less-knowledgeable/>.

312. *Id.*

313. *Id.*

314. *Mozilla Corp. v. FCC*, 940 F.3d 1, 60 (D.C. Cir. 2019) (citing *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006)).

315. *Id.*

The statutory mandate for the FCC to promote “safety of life and property through the use of wire and radio communication”³¹⁶ applies to *all* the people of the United States. The FCC’s 2002 media ownership review determined “that one benefit of outlet diversity is the promotion of public safety . . . by ensuring that multiple owners control the broadcasting outlets in any market.”³¹⁷ That safety nexus has seldom been addressed in FCC media ownership reviews and consideration of minority and female licensing initiatives.³¹⁸ Under the APA, failure to rationally consider a statutory requirement is arbitrary and capricious.³¹⁹

Broadcasting becomes even more crucial during emergencies when cell phone networks may fail due to power loss, maintenance, or other issues. Serving public information needs is critical to public safety, particularly during hazards such as wildfires, floods, hurricanes, blizzards, power blackouts, chemical incidents, and severe weather. In California, broadcasting remained an information lifeline during elevated wildfire risk periods, preemptive power shutoffs, and communications network outages.³²⁰ “Understanding

316. See *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006) (discussing the FCC’s statutory duty to promote public safety); *Mozilla*, 940 F.3d at 60, 61, 63. The *Mozilla* court cites Professor, and former California Public Utilities Commission (CPUC) Commissioner, Sandoval’s comments—about the Internet’s role in public safety, energy reliability and safety, natural gas leak detection, and critical infrastructure protection—as well as the CPUC and the County of Santa Clara, which urge the court to remand the FCC’s net neutrality repeal order to consider public safety issues; see also Wireless Communication and Public Safety Act of 1999, 47 U.S.C. § 615 (2018) (requiring the FCC to promote safety through its regulation of wireless communications).

317. See, e.g., *2003 Media Ownership Review*, *supra* note 298, at 13634 (“In an emergency, the separation of broadcast facilities and personnel among multiple independent broadcast companies in a given market will avoid any possibility that the failure of one broadcast company to transmit critical public safety information will not leave that area without other broadcast owners to perform that service.”).

318. FCC, *2016 Media Ownership Review Order*, *supra* note 77, at 116 n.839 (noting comments that “some Native communities depend on radio to provide not only cultural information but also news and public safety and health announcements.”)

319. *Nuvio Corp.*, 473 F.3d at 307.

320. Catherine J.K. Sandoval & Patrick Lanthier, *Connect the Whole Community; Leadership Gaps Drive Disaster Vulnerability and the Digital Divide in TECHNOLOGY VS GOVERNMENT: THE IRRESISTIBLE FORCE MEETS THE IMMOVABLE OBJECT* (Lloyd Levine, ed., Emerald Publishing forthcoming, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766610 (“In 2020 the CPUC adopted a ‘72-hour backup power requirement for the wireless providers’ facilities, to ensure minimum service coverage is maintained during disasters or commercial grid outages.”) (citing CPUC, D. 20-07-011, *Decision Adopting Wireless Provider Resiliency Strategies*, Rulemaking 18-03-011 (July 16, 2020)).

community information needs and gearing emergency alerts to platforms communities use (in languages appropriate to the locality) will save lives.”³²¹

The author and Patrick Lanthier discussed in *Connect the Whole Community: Leadership Gaps Drive the Digital Divide and Fuel Disaster and Social Vulnerabilities* the failure of leaders to provide timely safety information accessible through platforms used by communities in danger. The 2017 San Jose flood overtopped the Anderson Dam above the city and led to the evacuation of more than 14,000 people and extensive flooding.³²² That urban flood afflicted a mix of low-income, predominantly Latinx and Vietnamese, communities and affluent predominantly white communities.³²³ Despite the diversity of the communities at risk, “local officials sent out alerts to an imagined community, highly connected to the internet, and capable of filtering warnings from the detritus of Twitter feeds, Facebook posts, and Nextdoor notices. In the process, officials failed to inform the community they served of the coming danger.”³²⁴

“Regulatory decision-making can exacerbate or mitigate community and infrastructure vulnerability as we face climate change, pandemics, and other disasters.”³²⁵ While the world battles the coronavirus pandemic and other diseases, climate change accelerates threats to communities including severe weather swings, drought, floods, and fire.³²⁶ Many communities of color, tribal, rural, and disadvantaged communities, as well as the disabled, elderly, and low-income community members, are highly vulnerable to safety risks including the coronavirus pandemic, violence, racism, climate change, toxins, flooding, and fire.³²⁷

321. *Id.* at 17. See Steven Waldman, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, FCC (July 2011) (“Several studies have indicated that mainstream media do not adequately cover African-American and other minority communities.”); Brief for the District of Columbia and Several States as Amicus Curiae Supporting Respondents at 5, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2020) (“Credible coverage of issues affecting diverse communities is also crucial to good governance.”)

322. Sandoval & Lanthier, *supra* note 320, at 2, 16.

323. *Id.* at 9.

324. *Id.* at 16.

325. *Id.* at 2.

326. *Id.*

327. N’dea Yancey-Bragg & Rick Jervis, *Texas’ winter storm could make life worse for Black and Latino families hit hard by power outages*, USA TODAY, Feb. 20, 2021, <https://www.usatoday.com/story/news/nation/2021/02/20/texas-ice-storm-blackouts-minorities-hardest-hit-recovery/4507638001/>; *Media Statement from CDC Director Michelle Walensky, MD, MPH, on Racism and Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 8, 2021), <https://www.cdc.gov/media/releases/2021/s0408-racism-health.html> (“racism is a serious public health threat that directly affects the well-being of millions of Americans.”).

The Communications Sector is deemed critical infrastructure due to its vital interest to the U.S. economy and national security.³²⁸ The Critical Infrastructure Protection Act (CIPA) of 2001 defines critical infrastructure as those “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”³²⁹ CIPA “defines critical infrastructure *not* with reference to the identity of the target, but by the consequences of an attack on it.”³³⁰

In 2013, President Obama issued Presidential Policy Directive-Critical Infrastructure Security and Resilience (PPD-21) which designated 16 sectors as critical infrastructure including the Communications Sector.³³¹ PPD-21 identifies “energy and communications systems as uniquely critical due to the enabling functions they provide across all critical infrastructure sectors.”³³² “Energy and communications systems are key drivers for the U.S. economy, democracy, and national security, underlying the operations of nearly all businesses, public safety organizations, healthcare providers, education, and government.”³³³ The 2015 Communications Sector Specific Plan required for Critical Infrastructure recognizes that “[b]roadcasting has been the principal means of providing emergency alert services to the public for six decades.”³³⁴

Despite the Communications Act’s statutory mandate requiring the FCC to consider public safety in its regulatory decisions, the FCC has not analyzed the link between media ownership diversity and public safety. The FCC’s duties under the Communications Act require development of rules in public interest. Publishing FCC data too long kept in analog darkness will promote public safety, serve the public interest, and facilitate fulfillment of the FCC’s Communications Act duties.

328. See The White House, *Presidential Policy Directive-Critical Infrastructure Security and Resilience* (Feb. 12, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil>; Dept. of Homeland Security, *Critical Infrastructure Sectors*, <https://www.dhs.gov/critical-infrastructure-sectors> (last visited Nov. 5, 2022).

329. Catherine J.K. Sandoval, *Net Neutrality Powers Energy and Forestalls Climate Change*, 9 SAN DIEGO J. CLIMATE & ENERGY L. 1, 81 (2018) (citing 42 U.S.C. § 5195c(e) (2018)).

330. *Id.*

331. The White House, *supra* note 328; Dept. of Homeland Security, *supra* note 328.

332. The White House, *supra* note 328.

333. Sandoval, *supra* note 329, at 8.

334. *Communications Sector-Specific Plan*, U.S. DEP’T. HOMELAND SEC. (2015), <https://www.cisa.gov/publication/nipp-ssp-communications-2015>.

VIII. THE MODERN PROMETHEUS: BRING DATA DEMOCRACY TO THE FCC

A. DATA DARKNESS STALKS FCC DECISION-MAKING

FCC data jurisprudence undermines realization of the FCC's longstanding policy commitments to promote minority and female FCC ownership. The mismatch between the FCC's professed priorities and its limited data gathering and analysis reveals fault lines that feed the Promethean cycle of analytical and policy failure. This process disservices democracy and the public interest.

The *Library Of Missing Datasets* “lists datasets not collected because of bias, lack of social and political will, and structural disregard.”³³⁵ Curator Mimi Onuoha observed “(t)hat which we ignore reveals more than what we give our attention to. It’s in these things that we find cultural and colloquial hints of what is deemed important. Spots that we’ve left blank reveal our hidden social biases and indifferences.”³³⁶

Catherine D’Ignazio and Lauren F. Klein in *Data Feminism* observe a risk “incurred when people from dominant groups create most of our data products—is not only that datasets are biased or unrepresentative, but that they never get collected at all.”³³⁷ “Identifying information as data,” rather than as evidence or fact “convert[s] otherwise debatable information into the solid basis for subsequent claims.”³³⁸

Etymologically, data is “a fact given or granted,” derived from the Latin word datum “[thing] given,” or “something given.”³³⁹ Caryn Devins, *et. al* observe that “data are not given once and for all; rather, they are not only interpreted but *constructed* by the coding process and inherently symbolic nature of some underlying reality.”³⁴⁰ Failure to collect data or make it practically available for analysis—to transform analog files into searchable, digital databases that support longitudinal and comparative analysis—fortifies constructed realities and limits opportunities. The FCC’s faulty data jurisprudence undermines development of a factual basis for its media

335. CATHERINE D’IGNAZIO & LAUREN F. KLEIN, *DATA FEMINISM* 33, Figure 1.4 (2020) (discussing the Library of Missing Datasets in the context of “data science for whom.”); *Id.* (noting the risk “incurred when people from dominant groups create most of our data products—is not only that datasets are biased or unrepresentative, but that they never get collected at all.”).

336. Onuoha, *supra* note 27.

337. *Id.* at 11, Figure 1.4.

338. D’IGNAZIO & KLEIN, *supra* note 335.

339. *data*, ONLINE ETYMOLOGY DICTIONARY, <http://www.etymonline.com/index.php?term=data> (last visited Feb. 5, 2022).

340. Caryn Devins, Teppo Felin, Stuart Kauffman & Roger Koppl, *The Law and Big Data*, 27 CORNELL J.L. & PUB. POL’Y 357, 379 (2017).

ownership reviews and achievement of its longstanding stated priority of promoting license ownership diversity.

The FCC's electronic databases largely do not include the licensing, application, and program data from the first three eras of FCC licensing regulation from its inception through the '96 Act. The Library of Missing Datasets should have filing cabinets labeled for FCC licensing decisions involving minority or female applicants, from 1934 to 2000. Another filing cabinet should be marked for unreliable data about FCC licensing decisions involving minorities or women, 2000–present.

Current “FCC datasets create barriers to analysis, particularly for longitudinal studies or efforts to analyze trends within or between large groups of broadcasters,” and were “so cumbersome that the Commission itself does not rely on the agency’s databases for rulemaking, turning instead to private sources that put that same data in a format.”³⁴¹ Professors Terry and Ring Carlson argue that “[a]t least part of the FCC’s struggle to resolve minority ownership policy can be explained with a simple reality: Like much of the FCC’s flawed approach to media ownership regulation, quality empirical evidence to support a minority ownership policy has been in short supply.”³⁴² “Researchers using the FCC’s ownership data have suggested that data on minority and female ownership, ‘is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.’”³⁴³

Prometheus noted that the FCC’s 2006, 2010, and 2016 media ownership reviews solicit[ed] evidence on minority and female ownership.³⁴⁴ The FCC knew from its previous attempts to analyze FCC records that it was asking the public to provide for free to the government on short timelines, evidence and studies requiring analysis of hundreds of thousands (if not millions) of FCC records that are difficult to access, let alone analyze. The FCC also knew that gaps pervade the system it developed to collect data on minority and female

341. *Sandoval, Minority Commercial Radio Ownership in 2009*, *supra* note 288; *see also* FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021).

342. Terry & Ring Carlson, *supra* note 124, at 420–21.

343. *Id.* (citing Aric Beresteanu & Paul B. Ellickson, *Minority and Female Ownership in Media Enterprises* (June 2007), <http://hraunfoss.fcc.gov/edocspublic/attachmatch/DA-07-3470A8.pdf>).

344. *Id.* (citing *In re* 2006 Quadrennial Regulatory Review—Further Notice of Proposed Rulemaking, 21 FCC Rcd. 8834, 8837 (2006); *In re* 2010 Quadrennial Regulatory Review—Notice of Inquiry, 25 FCC Rcd., at 6106, 6108–09 (2010); *In re* 2014 Quadrennial Regulatory Review—Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd. 4371, 4460, 4470, n.595 (2014)).

license ownership following the '96 Act. Third parties, including scholars, cannot alone solve the FCC's poor record-keeping and data analysis.

The FCC's attempts from 2001 to 2009 to collect data on the race or ethnicity of broadcast licensees through FCC Form 323 yielded incomplete and unreliable data.³⁴⁵ The FCC's poor data gathering frustrated attempts of researchers the FCC hired and funded to analyze questions relevant to the FCC's media ownership reviews.³⁴⁶ Respondents merits brief for *Prometheus* observed that the "Commission had itself in 2009 recognized major flaws in data drawn from Form 323, the agency's mandatory licensee reporting form."³⁴⁷

The FCC's poor data practices persist despite more than two decades of scholarly, public interest organization, and Congressional calls for the FCC to improve its record-keeping to enable analysis and serve the public interest.³⁴⁸

345. Philip M. Napoli & Joe Karaganis, *Toward A Federal Data Agenda For Communications Policymaking*, 16 COMMLAW CONSPECTUS 53, 86 (2007) (citing C. Anthony Bush, *Minority and Women Broadcast Ownership Data*, in OWNERSHIP STRUCTURE AND ROBUSTNESS OF MEDIA: FCC MEDIA OWNERSHIP STUDY #2 13 (2007), http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A3.pdf); *Prometheus Radio Project v. FCC*, 824 F.3d 33, 44 (3d Cir. 2016) (*Prometheus III*) ("Prior to 2009, full-power commercial AM, FM, and television broadcast stations typically had to file Form 323 biennially, but many other types of entities were exempt. The 2009 initiative ended the exemption for sole proprietorships, partnerships comprised of natural persons, and low-power television stations . . . The FCC also directed that the format for filing Form 323 be changed so that a database could be created.") (internal citations omitted).

346. Arie Beresteanu & Paul B. Ellickson, *Minority and Female Ownership in Media Enterprises* 2–3 (June 2007), http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A8.pdf ("[D]ata currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.").

347. *Respondents Brief*, *supra* note 101, at 86 (citing *Promoting Diversification of Ownership in the Broadcasting Services*, 24 FCC Rcd. 5896, 5897–98 (2009)).

348. See, e.g., Rob Frieden, *Case Studies in Abandoned Empiricism and The Lack of Peer Review at The Federal Communications Commission*, 8 J. TELECOMM. & HIGH TECH. L. 277, 286 (2010) ("The FCC must engage in transparent and fair-minded data collection, because many of the issues the Commission addresses have a quantitative component that can provide evidence supporting compliance with legislative mandates."); Sandoval, *Minority Commercial Radio Ownership in 2009*, *supra* note 288 ("The FCC's highly inefficient, incomplete and burdensome system frustrates analysis and monitoring of important trends. Critical issues such as the link between licensing and consolidation policies and minority broadcast entry, as well as the fate of small and minority broadcasters during the recession, are hidden in the FCC's labyrinthine databases."); Napoli & Karaganis, *supra* note 348, at 86 ("[M]any of the basic questions that policymakers, courts, and stakeholders pose regarding communications policy cannot be answered due to the poor quality, scope, and accessibility of policy-relevant data. The result is the frustrating scenario in which the studies that are conducted are subjected to withering methodological critiques—and thus frequently discredited—while little effort is made either to produce better data or to ensure easier access to existing datasets. This situation undermines the extent to which research can effectively inform public policymaking.").

Gaps in FCC data about minority and female license ownership and the effect of FCC consolidation and program rules on access, entry, expansion and service have grown in the twenty-five years since the '96 Act. Those data gaps will continue to expand until the FCC invests in data gathering, digitization, database creation and publication.

Excavating the FCC's motives behind its failure to prioritize the funding and completion of research on minority and female licensing is beyond this Article's scope. That topic may be better left to memoirs of FCC Chairmen who followed FCC Chairman Hundt and Chairman Kennard and their fellow Commissioners who authorized FCC staff to initiate archival research, as well as quantitative and qualitative studies, for the FCC's Section 257 market entry barrier analysis.

Whatever the FCC's motives for leaving its archival data largely untouched for decades, the result has been decision-making stagnation about a policy priority the FCC has touted for more than forty years. The FCC's systematic failure to keep, organize, or analyze its data brings into relief the link between poor data jurisprudence and policy failure.

This Article seeks to transform long ignored FCC data into machine-readable digital data. This Article recommends Congress adopt legislation requiring the FCC to digitize and publish its data including its twentieth century analog licensing, regulatory, and programmatic records. While such legislation is pending, the Administration should also adopt an Executive Order directing NTIA to develop methodologies to analyze FCC licensing and programmatic data.

B. DATA DEMOCRACY: INTO THE LIGHT

“Open data can be a powerful force for public accountability—it can make existing information easier to analyze, process, and combine than ever before, allowing a new level of public scrutiny.”³⁴⁹ Digital democracy promotes democratic engagement and government accountability. Tiago Peixoto argues “[i]t is the combination of (publicized) transparency and institutions that promote governmental responsiveness and empower citizens to partake in public decision-making that leads to substantive accountability.”³⁵⁰

The FCC recognizes the importance of sound, open, and transparent data to its rulemakings. “Data underpins every activity at the Federal Communications Commission. By better involving data in open and

349. Yu & Robinson, *supra* note 25, at 182.

350. Peixoto, *supra* note 25, at 207.

transparent rulemaking, the FCC can better serve the public while enabling public innovation,” the FCC’s Data page proclaims.³⁵¹

The FCC’s data jurisprudence must adapt to twenty-first century needs and technology. Digitizing FCC archival data and making FCC public data publicly accessible will foster data democracy, analytical integrity, and accountability. Doing so will inform FCC media ownership reviews and other rulemakings and licensing decisions.

Prometheus did not create a legal impediment to FCC data gathering, research, and analysis. Instead, it left it to the FCC’s discretion to develop a record to support its quadrennial regulatory review of media ownership rules, absent Congressional direction to do otherwise.

FCC proceedings do not need to remain in data darkness or dimness. We have the tools to fill this gap and need the will and commitment to do so. “This data is obtainable. It is available to the FCC. The FCC has opted not to make it effectively to the public or even to its own staff.”³⁵² “Just as Dorothy had the power to go home all along, the FCC had the power during its twenty-two years of media ownership reviews to draw data from its archives to establish the baseline of minority and female license ownership reflected in its programs records that took those factors into account.”³⁵³ It is long past time for the FCC to bring light to data darkness.

Scanning, digitizing, and making documents available on a database at the FCC’s scale is feasible with modern technology. More than sixteen years ago, Google’s “Library Project” (which was initiated in 2004) scanned, digitized, and made available on the internet “books in the collections of the New York Public Library, the Library of Congress, and a number of university libraries.”³⁵⁴ The FCC could arrange a contract for reputable and knowledgeable entities to support its employees in this project. The FCC should create a free, public-facing, machine-readable database that facilitates longitudinal analysis, qualitative, and quantitative research.

Data in FCC archives is static. The challenge is that there are decades of data kept in paper, largely in boxes, and there’s a lot of it. This is not, however “big data,” which refers to “large amounts of different types of data produced

351. *Data*, FCC, <https://www.fcc.gov/reports-research/data> (last visited April 30, 2021).

352. *Amicus Brief, Professors of Communications Law*, *supra* note 129, at 15 (citing *Fox Television*, 556 U.S. at 519) (“It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained...It is something else to insist upon obtaining the unobtainable.”).

353. *Id.*

354. *Authors Guild, Inc. v. Google Inc.*, 954 F.Supp.2d 282, 285 (S.D.N.Y. 2013), *aff’d sub nom.* *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

at high speed from multiple sources, whose handling and analysis require new and more powerful processors and algorithms.”³⁵⁵ Technology is readily available for a large-scale static data scan. Building a database will require substantial work, but static data does not update in the way big data proliferates. We have the technology, talent, and models to complete this work within eighteen months to two years of its initiation. Only the will to begin and complete this project is required.

Creating a free, public-facing digital FCC database should reverse the FCC’s practice of relying “heavily on the datasets developed by commercial data providers for their clients and the investment community,” while “neglect[ing] their own substantial data collection capabilities and responsibilities.”³⁵⁶ Philip Napoli and Joe Karaganis argue the FCC’s reliance on third-party, commercial databases “has created problems in both the scope and quality of policy inputs—scope insofar as commercially collected data are expensive to access and are not always structured in ways that illuminate public policy concerns.”³⁵⁷

Relying on individual researchers to examine analog data introduces methodology and variability issues. Shifting to individuals or non-governmental organizations the initiative to scan and digitize such data would perpetuate data privatization. Privatization of public data undermines transparency, administrative decision-making, and the public interest.

Citizen data gathering or a mass “scanathon” at the National Archives is not the solution to the FCC’s data problem. Digitizing the FCC’s data and publishing it on free and accessible databases should be the FCC’s responsibility, consistent with the Communications Act and the principles of the Foundations for Evidence-Based Policymaking Act (“Evidence Act”).

The Evidence Act, enacted on January 14, 2019, applies to executive departments and certain named agencies, but does not apply to the FCC.³⁵⁸ The Evidence Act requires data from designated agencies to be accessible, and mandates planning to develop statistical evidence to support policymaking.³⁵⁹

355. Alex Ingrams, *Public Values in the Age of Big Data: A Public Information Perspective*, 11 POLICY & INTERNET 128, 129 (June 2019) (citing B. van der Sloot & S. van Schendel, *Ten Questions for Future Regulation of Big Data: A Comparative and Empirical Legal Study*, 7 J. INTELL. PROP., INFO. TECH. & E-COMMERCE L. 110, 113 (2016)).

356. Napoli & Karaganis, *supra* note 348, at 86.

357. *Id.*

358. Foundations for Evidence-Based Policymaking Act, Pub. L. No. 115–435, 132 Stat. 5530; *see also* Federal Data Strategy, *Data Governance Playbook* n.1 (July 2020), [fds-data-governance-playbook.pdf](#).

359. 5 U.S.C. § 101, Pub. L. No. 111–435 (2019).

The FCC chartered a Data Governance Council in 2020 to guide its data management consistent with the Evidence Act and the Federal Data Strategy.³⁶⁰ FCC media ownership reviews have yet to address the Evidence Act or Federal Data Strategy.

The Open, Public, Electronic, and Necessary (OPEN) Government Data Act, Title II of the Evidence Act, requires independent agencies such as the FCC and executive branch agencies to publish public government data assets as machine-readable data.³⁶¹ OPEN requires agency heads to conduct information resource management activities to promote productivity, efficiency, and effectiveness per 44 U.S.C. § 3506.³⁶²

The FCC IT Strategic Plan FY 2021–2023 published on January 6, 2021, lists a goal of informing FCC rulemakings consistent with the OPEN Act.³⁶³ That IT Strategic Plan did not include any initiatives to digitize and publish FCC analog media ownership and licensing information. The “Open Government at the FCC” webpage heralds the Commission’s broadband mapping work as its flagship data initiative.³⁶⁴ Mapping broadband access is critical, but it does not substitute for media ownership data publication.

The OPEN Act mandates that government data should be open by default and mandates open format data publication for data collected after the Act’s effective date.³⁶⁵ That Act requires agencies to develop a data inventory that accounts for any “data asset created, collected, under the control or direction of, or maintained by the agency.”³⁶⁶ Older government agency data kept in analog format should be included in the data inventory, although the Act does not appear to require an open format for data collected in the past.

Commissioner Stark emphasized that FCC data practices must comply with the OPEN Act. His dissent in the 2019 FCC inquiry into broadband and advanced telecommunications capability argued the “FCC should also ensure that its Form 477 data set [reporting on broadband internet access] complies

360. FCC, *Enterprise Data Management Council, Governance* (Jan. 2020), <https://www.fcc.gov/sites/default/files/fcc-data-governance-council-charter-january-2020.pdf>.

361. OPEN Act, Pub. L. No. 115–435, *enacting* 44 U.S.C.A. § 3520A (amending 44 U.S.C.A. §§ 3502, 3504, 3506, 3511, 3520, and enacting provisions set out as notes under 44 U.S.C.A. §§ 101, 3506, 5 U.S.C.A. § 306 (West 2022)).

362. OPEN Act, *supra* note 361, at 3561(a) referencing 44 U.S.C. § 3502.

363. *See* FCC, *FCC IT Strategic Plan FY2021–2023* (Jan. 6, 2021), <https://www.fcc.gov/sites/default/files/fcc-it-strategic-plan-fy2021-2023.pdf> (listing as a strategic goal: “Provide information about the status of matters pending before the FCC by developing and posting information online and communicating with stakeholders.”).

364. FCC, *Open Government at the FCC*, <https://www.fcc.gov/managing-director/privacy-transparency/open-government-fcc> (last visited Jan. 31, 2022).

365. 44 U.S.C. § 202 (C)(2)(b)(i)(I) (2018).

366. 44 U.S.C. § 3511(a)(1) (2018).

with the Open Government Data Act which requires it to publish much of its non-confidential data in machine-readable format.³⁶⁷ Commissioner Stark's rationale applies with equal force to the FCC's broadcast licensing data.

The FCC's data strategy should support sound longitudinal analysis. The Commission's previous attempt to compare FCC Form 323 data and NTIA data gathered before 2000 created an apples-to oranges-mismatch. The Supreme Court's *Prometheus* decision allowed the FCC to insert predictive analysis into that data gap. Consistent with the principles of the Open Data Act adopted after the FCC's 2016–2018 media ownership reviews analyzed in *Prometheus*, the FCC should do more than tolerate information gaps created by the FCC's faulty data jurisprudence.

This Article does not advocate replicating a “before-after comparison” of pre- and post-2009 data. A “before-after comparison” assumes that the data from before a point in time are comparable to the data that would have been collected after that point—but for the occurrence of a specific change.”³⁶⁸ The American Statistical society criticized in its *Prometheus* Amicus brief in support of respondents the FCC's attempt to construct incompatible before and after datasets comparing FCC and NTIA data using different methodologies.³⁶⁹ The FCC and NTIA research suggested herein should do more than report minority ownership data before the '96 Act, and female ownership data as it became available, and compare it to the twenty-five years following the '96 Act.

NTIA and FCC analysis should examine market entry data including FCC and congressional programs and policies which facilitated the *first* FCC license acquisition by a diverse broadcaster. 53% of minority radio licensees in 2009 obtained their first FCC licenses prior to the '96 Act.³⁷⁰ This entry point is significant as the '96 Act “ended the restrictions on the number of stations a corporation could control nationally and dramatically raised the number of stations that could be under common control in a local market.”³⁷¹

This Article renews the author's call for the FCC and NTIA to study opportunities for first FCC license acquisition in the context of FCC rules, and their consequences for market entry and expansion opportunities. The author's study of minority commercial radio licensees in 2009 found that most

367. *In re Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion*, 34 FCC Rcd. 3857 (2019) (Commr. Starks, dissenting).

368. *Id.* at 4–5.

369. Brief for the American Statistical Society as Amicus Curiae Supporting Respondents at 2, 4–5, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021).

370. *Sandoval, Minority Commercial Radio Ownership in 2009*, *supra* note 288, at 19–20.

371. *Id.*

minority licensees then existing acquired their first FCC license prior to 1996 when the market was less consolidated and FCC policy promoted minority license acquisition under an intermediate scrutiny standard.³⁷² Research on this topic has gone unexamined by the FCC, NTIA, and other scholars. Access to FCC archival data is necessary to analyze this issue. Understanding more about minority entry through the Tax Certificate program, for example, would inform Congressional consideration of the reauthorization of the Tax Certificate and FCC media ownership rule reviews.³⁷³

IX. RECOMMENDATIONS AND CONCLUSION: CONGRESSIONAL LEGISLATION TO REQUIRE NTIA AND THE FCC TO STUDY OF MINORITY AND FEMALE LICENSE OWNERSHIP

Prometheus, we have heard thy call.

Aeschylus, *Prometheus Bound*, 430 BCE³⁷⁴

Broadcast media forms a critical infrastructure service vital to America's economy, safety, and deliberative democracy. The public interest counsels declining the *Prometheus* decision's invitation to remain in data darkness. Unless we do so, the Promethean cycle of underinformed decision-making based on acknowledged FCC data gaps will continue. Those gaps perpetuate low levels of minority and female access to FCC licenses rooted in FCC data and licensing jurisprudence. We should not have to lament the continued consequences of poor FCC data jurisprudence when commemorating the centennial of the Communications Act of 1934.

To end the Promethean cycle of FCC analytical failure that diserves both community information needs and the overall public interest, this Article urges Congress to order the FCC to digitize its archival data and create a free, public-facing, machine-readable database that supports longitudinal analysis. Applying modern data management methods to FCC data will build government and public analytical capacity, empower democracy, and foster government accountability. The FCC's database development should also improve the transparency and consistency of its Form 323 reporting. These digitization and data openness initiatives also fulfill OPEN Act requirements

372. *Id.* at 297.

373. *Sandonal Congressional Testimony*, *supra* note 184 (urging support for Congressional passage of bills to reauthorize the FCC tax certificate program); *See* Expanding Broadcast Ownership Opportunities Act of 2021, H.R. 4871, 117th Cong. (2021) (introduced by Congressman Butterfield and proposing to reauthorize the FCC Tax Certificate program).

374. AESCHYLUS, *supra* note 1.

to enhance public access to government data and improve accountable public decision-making.

Digitizing and publishing in a machine-readable database FCC broadcast records from its inception through the present will create a foundation to examine proposals to promote minority and female licensing opportunities under the strict and intermediate scrutiny standard, respectively. This data would inform an *Adarand* study and examination of the nexus of FCC policy and license entry windows for minorities, women, and small businesses. It would inform FCC media ownership rules under § 202(h) and other FCC dockets. Digital publication of FCC records will also reveal whether there is a basis for remedial action to address the FCC's licensing and data jurisprudence that created and perpetuated the paucity of broadcast licenses held by minorities and women.

The FCC should be ordered to report to Congress on the data transparency and analytical initiatives recommended herein (with opportunities for public comment). NTIA should also develop a methodology to document minority and female FCC license control prior and subsequent to the '96 Act.

FCC data analysis is a foundational requirement for consideration of initiatives to promote access to licenses for a diverse range of Americans including minorities and women. Congressional and Executive mandates for FCC and NTIA data and research initiatives recommended herein must be accompanied by sufficient funding to support this investment in decision-making integrity, government accountability, and participatory democracy.

Investing in FCC data access will empower citizens, academics, government agencies, businesses, public interest organizations, and others to engage in analysis that informs communications policy and first amendment values. Addressing and solving this data gap invests in democratic capacity and the future.

The FCC's data gaps are not a technology problem. Technology is readily available to scan and digitize FCC data and create public-facing, machine readable databases within two years or less. The FCC has the legal authority under the Communications Act's public interest, public safety, and media ownership diversity requirements to order the digitization and publication of its record. Doing so would be consistent with the OPEN Act's default to open and digitally available data. The decision to shift from data darkness to data democracy is the missing predicate to solving this problem.

Mark Lloyd and Lewis Friedland argue that there "is a communications crisis in America" not caused by lack of technology or opportunities to harness

profit in the market, but due to poor public policy.³⁷⁵ “Our communication ecology is not meeting the critical information needs of the public because our public policies are badly made and misinformed.”³⁷⁶ Ensuring FCC regulatory policy serves the needs of the diverse American public is vital to our safety, equity, and future.

Lewis Friedland emphasized “Americans need information to govern themselves, to participate effectively in society, and to be safe.”³⁷⁷ America’s democracy, economy, and safety depend on a vibrant, diverse, and inclusive media ecosystem, and public policy that achieves those aims. Ending the FCC’s tolerance of data darkness will inform public policy, enable service to all Americans, foster opportunity, and spur equity in the public interest.

375. Mark Lloyd & Lewis A. Friedland, *Solving America’s Communications Crisis*, in *THE COMMUNICATION CRISIS IN AMERICA, AND HOW TO FIX IT*, xxix (Mark Lloyd and Lewis A. Friedland, eds., Palgrave Macmillan, 2016).

376. *Id.*

377. Lewis A. Friedland, *America’s Critical Community Information Needs*, in *THE COMMUNICATION CRISIS IN AMERICA, AND HOW TO FIX IT* 3 (Mark Lloyd & Lewis A. Friedland, eds., Palgrave Macmillan 2016).

RETHINKING *ADARAND* AFTER PROMETHEUS: A RATIONAL (BASIS) SOLUTION TO FCC MINORITY OWNERSHIP POLICY

Christopher Terry[†] & Caitlin Ring Carlson[‡]

ABSTRACT

For the last several decades, the FCC has been in a stalemate with media activist organizations about the lack of diversity in broadcast media ownership. Women own less than 10 percent of broadcast television and AM/FM radio stations, and racial minorities own less than six percent. We argue that this inequity is due to the Commission's misperception that policies that put stations in the hands of historically underrepresented groups must pass strict scrutiny. In 1990, the Supreme Court ruled in *Adarand Contractors, Inc. v. Peña* that any laws or regulations that showed preferential treatment to people based solely on their race would subsequently need to withstand strict scrutiny. This prompted the FCC to avoid embedding race (or gender) based preferences into media ownership regulations, despite repeated instructions from the Third Circuit Court of appeals to address the racial and gender imbalance in broadcast ownership. In *FCC v. Prometheus Radio* (2021), the Supreme Court had an opportunity to address the question of whether strict scrutiny was an appropriate level of review for broadcast regulatory decisions. Rather than tackling the issue of ownership head-on, the Court concentrated its decision on how much discretion administrative agencies have regarding changes to their initiatives. Had the Court focused exclusively on the ownership question, we believe it would have come to the same conclusion that we do here: a rational

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basis of review should be used for regulatory decisions. We believe this shift is needed to break the nearly two decades-long legal, policy, and regulatory deadlock over media ownership policy.

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I. INTRODUCTION

Although charged with serving in the public's interest, the FCC has struggled to put forth a coherent media ownership policy that promotes ownership by women or minorities.¹ The agency's efforts have been plagued by a range of procedural issues and a lack of empirical evidence which became a central issue in decisions in which the Third Circuit Court of Appeals remanded media ownership decisions to the FCC four times between 2004 and 2019.² When the Supreme Court examined media ownership in early 2021, the Court largely avoided much of the history of media ownership policy, and in a unanimous but narrow opinion, ruled that the FCC had not acted outside

1. *See, e.g.*, 47 U.S.C. §§ 302(a), 307(d), 309(a), 316(a) (1934). In both the 1927 Radio Act and the 1934 Communications Act, Congress indicated that the public interest supersedes a station's interest. Both laws say that federal regulation is to be guided by "public interest, convenience, and necessity." Despite the market-driven model of current U.S. media, these laws indicate that public interest must be considered. As half of the public, this means women's interests must be considered.

2. *See* *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) [hereinafter *Prometheus I*]; *Prometheus Radio Project v. FCC*, 652 F.3d 431, 483 (3d Cir. 2011) [hereinafter *Prometheus II*]; *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) [hereinafter *Prometheus III*]; *FCC v. Prometheus Radio Project*, 939 F.3d 567 (3d Cir. 2019) [hereinafter *Prometheus IV*].

a zone of reasonableness because of a lack of empirical evidence on minority ownership. Despite the ruling, the question of how to deal with an actual lack of diversity among broadcast owners and the impact that has on the public remains unanswered and is problematic.

The FCC's implementation of the ownership limits contained in the Telecommunications Act and the repeated failure of the agency to develop a functional minority ownership policy has resulted in trivial control and ownership of media properties by women and minorities. According to the 2017 data released by the FCC in 2020, women own less than ten percent of all television and AM/FM radio stations and racial minorities own less than six percent.³ Empirical evidence suggests that smaller media organizations in the control of minority owners are more likely to create content that directly targets minorities, however the agency continues to allow for greater convergence, minimizing opportunities for women and people of color.⁴ By allowing the media ownership environment to degrade to this point, the FCC has limited the political participation of these groups, one of which—women—represents more than half of the U.S. population.

Throughout this process, the FCC had failed, even at the most basic of levels, to meaningfully address the lack of empirical evidence on minority ownership policy.⁵ Prior to the 1996 Telecommunications Act, however, the FCC had been responsive to the “nexus” principle that minority voices should have access to the airwaves.⁶ Prompted, at least in part, by the changes brought about by the Civil Rights movement, in 1965, the FCC said that its two objectives when awarding its highly coveted broadcast television and radio licenses were to provide the best possible service to the public and to promote diversity in control of the mass media.⁷ Under this framework, race, and, later, gender could be considered in comparative hearings, and preferential treatment was given to diverse applicants. In order to promote the public

3. INDUS. ANALYSIS DIV., FCC, FOURTH REPORT ON OWNERSHIP OF BROADCAST STATIONS 6 (2017) [hereinafter FOURTH REPORT ON OWNERSHIP]. See FCC, FCC FORM 323: INSTRUCTIONS FOR OWNERSHIP REPORT FOR COMMERCIAL BROADCAST STATIONS (2017) [hereinafter 2017 323 REPORT].

4. Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC's Incubator Program*, 24 COMM. L. & POL'Y 403, 407 (2019).

5. *Id.*

6. David Honig, *How the FCC Suppressed Minority Broadcast Ownership, and How the FCC Can Undo the Damage It Caused*, 12 S.J. POL'Y & JUST. 44 (2018).

7. 1965 FCC Pol'y Statement on Comparative Broad. Hearings, *Public Notice*, 1 F.C.C. 2d 393, 394 (1965).

interest, the FCC developed policies designed, at least nominally, to expand minority ownership.⁸

Over the ensuing decades, media organizations repeatedly challenged these rules as part of a larger agenda that promoted the consolidation of ownership of broadcast stations. In response, the U.S. Supreme Court established in 1990 in *Metro Broadcasting v. FCC* that racial preferences for awarding broadcast licenses must withstand intermediate scrutiny.⁹

However, just five years later, the Supreme Court held in *Adarand Constructors, Inc. v. Peña* that the presumption of a disadvantage based on race alone as a justification for preferred treatment was discriminatory and violated the Due Process Clause of the Fifth Amendment.¹⁰ Thus, any laws or regulations that showed preferred treatment to people based solely on their race would subsequently need to withstand strict scrutiny.¹¹

Arguing that any initiative it developed could not meet the requirements of strict scrutiny, the FCC has avoided embedding preferences based on race (or gender) into regulations of media ownership since the *Adarand* decision. During the running legal battle with Prometheus Radio Project and the citizen petitioners, the agency even argued that the *Adarand* decision makes the entire process of assessing minority ownership, much less developing a policy to enhance it, functionally impossible.¹² As a result, the number of women and people of color who own broadcast media outlets remains abysmally small according to data released by the FCC.¹³ Over the last two decades, the FCC was unable (and largely unwilling) to meet the Third Circuit's remands to better address the efficacy of their minority ownership policies, in large part because the agency's approach to the problem has arguably been based on flawed reasoning. Rather than being paralyzed by the strict scrutiny requirement put forth by *Adarand*,¹⁴ the FCC should be arguing that broadcast regulations have traditionally been subject only to a rational basis review, a position the

8. Honig, *supra* note 6, at 51.

9. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 606 (1990).

10. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

11. *Id.* at 227.

12. The FCC adopted the Small Business Administration's revenue-based definition of eligible entities and defended it as a legally supportable means of promoting minority and female ownership because the requirements were content neutral. 2014 Quadrennial Regul. Rev.—Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Second Report and Order*, 31 FCC Rcd 9864 (2016) [hereinafter *2016 Second Report and Order*].

13. 2017 323 REPORT, *supra* note 3.

14. *Adarand Constructors*, 515 U.S. at 227.

Supreme Court upheld in *FCC v. Pacifica Foundation* in 1978.¹⁵ There is significant historical precedent for treating licensed broadcasters differently in regulatory terms. In *NBC v. United States*, the Supreme Court said the FCC was more than a traffic officer, and that it had an obligation to determine the nature of the traffic on the airwaves.¹⁶ Likewise, in *Red Lion v. FCC*, the Court unanimously declared that the FCC did not infringe on the First Amendment rights of broadcasters by keeping the airwaves open through regulation, and that the rights of the listeners were paramount.¹⁷

Not only does increasing ownership diversity (and the likelihood for a corresponding increase in content) benefit would-be station owners, this type of regulation does not infringe on broadcasters First Amendment Rights.¹⁸ Moreover, broadcast regulations designed to put more stations in the hands of women and people of color also directly serves the interests of listeners and viewers, which has been the traditional standard used to judge the outcomes of the FCC's broadcast policy. The law has required that the FCC act in the public's interest for nearly ninety years. However, the agency has failed to do so legally, functionally, and empirically, even using its own metrics meet this goal.¹⁹

This article will explore the role of minority ownership policy within the larger context of media ownership regulation, focusing on the implications of the Adarand decision. Adarand has become the FCC's most useful scapegoat for the agency's failed attempts to resolve the four remands from the Third Circuit Court of Appeals; Adarand also could have played an important role in the Supreme Court's decision, had the Court chosen to address the issue of minority ownership head-on rather than focusing their decision on issues surrounding administrative agencies' discretion regarding their actions and initiatives.²⁰ The article then argues that the historical application of rational basis review of broadcast regulations should be employed as an option to break the nearly two decade long legal, policy, and regulatory deadlock over media ownership policy. In anticipation of the FCC's future ownership review

15. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (stating that “of all forms of communications, it is broadcasting that has received the most limited First Amendment protection.”).

16. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 215–16 (1943).

17. *Red Lion Broad. v. FCC*, 395 U.S. at 375, 390 (1969) (holding that the “fairness doctrine” as applied to the RTNDA “enhance[d] rather than abridg[ed]” First Amendment liberties).

18. *Id.* at 390.

19. 47 U.S.C. §§ 302a(a), 309(a), 316(a).

20. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1152 (2021).

proceedings, the article concludes with a simple proposal to increase racial and gender diversity among media owners.

II. THE FCC, MEDIA OWNERSHIP, AND THE ISSUE OF MINORITY OWNERSHIP

Some scholars have argued that the media ownership policy dispute goes back to the 1920s,²¹ and others have argued that the implementation of the 1996 Telecommunications Act was the defining moment for media ownership policy.²² In reality, however, the inception point for modern media ownership theory was the six-year long FCC proceeding between 1969 and 1975, which resulted in the agency's ban on Newspaper-Broadcast Cross Ownership.²³ During the lengthy review, the FCC developed a rule that restricted the ability of a single entity to own and operate broadcast stations and a daily newspaper in the same market.²⁴

Since the agency's passage of the newspaper-broadcast cross ownership ban in 1975,²⁵ the FCC has relied on a regulatory premise that conceptually ties the ownership of stations to the level of content diversity available to citizens at the market level.²⁶ While the conceptual premise that ownership and content are directly related has become the "touchstone premise" of FCC regulation of broadcaster ownership for more than fifty years,²⁷ the body of empirical evidence supporting this regulatory premise has been inconsistent at best.²⁸ At the base level, the debate over media ownership represents a policy conflict between increasing the economic efficiency of media companies and the

21. See ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928–1935* 13 (1993).

22. See Bruce E. Drushel, *The Telecommunications Act of 1996 and Radio Market Structure*, 11 J. Media Econ. 3 (1998).

23. See Christopher Terry, *Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act*, 71 FED. COMM. L.J. 327, 334–35 (2019).

24. Multiple Ownership of Standard, FM, & TV Broad. Stations, *Second Report and Order*, 50 F.C.C. 2d 1046, 1084 (1975).

25. *Id.*

26. The FCC has employed a range of methodologies ranging from voice counts to Congressional mandated ownership limits, but defends the use of quantitative limits as a proxy protection for diversity. See *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 154 (D.C. Cir. 2002).

27. 2002 Biennial Regul. Rev., Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, para. 6 (2003) [hereinafter *2002 Biennial Review*].

28. Adam Candebub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547, 1603 (2008).

traditional societal goals associated with citizen access to diverse information.²⁹ Despite the lack of support for the conceptual relationship this approach is based on, the FCC has repeatedly attempted to implement media ownership policy through numerical ownership limits (as the policy implementation) as a proxy for assessing the diversity of media content (the agency's stated policy goal).³⁰

While relying heavily on a regulatory philosophy which promotes economic competition and a corresponding policy implementation that favors quantitative assessments of diversity using proxy measurements, the FCC continues to recognize that access to a wide range of "diverse and antagonistic" viewpoints is essential.³¹ While there is little debate that substantial viewpoint diversity exists in the modern media environment, the problem for regulators requires developing policy that results in public access to viewpoint diversity at the same time that it allows for an assessment of competition.³² In the context of minority ownership's policy objectives, the access to viewpoints from underrepresented groups includes not just racial or ethnic minorities, but also women.³³

In defense of the FCC's efforts, as well as its failures, media ownership policy is a complex issue that incorporates a range of economic, regulatory and social objectives, many of which are in direct conflict with one another. But the agency has done itself no favors in a continuing effort to simultaneously regulate media based on three policy objectives: competition, localism, and diversity. Favoring competition through the implementation of structural limits on numerical broadcast station ownership,³⁴ the FCC launched a

29. See MCCHESENEY, *supra* note 21, at 16.

30. See, e.g., 2014 Quadrennial Regul. Rev. – Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCC Rcd 9802, para. 15 (2017) [hereinafter *2017 Ownership NPRM*] (These changes eliminated the newspaper/ broadcast cross-ownership rule, the radio / television cross-ownership rule, and the eight-voices test). *2016 Second Report and Order*, *supra* note 12, at para. 7 (This report contained no data regarding the diversity of broadcast media content.).

31. *2016 Second Report and Order*, *supra* note 12, at para. 207.

32. See Terry, *supra* note 23, at 329–30.

33. Phillip Napoli proposes that providing diversity is worthless without exposure. Content, especially informational content is a necessity, but consumption of the content is also required. Philip M. Napoli, *Deconstructing the Diversity Principle*, 49 J. COMM. 7, 9 (1999).

34. Rev. of the Comm'n's Reguls. Governing TV Broad., *Further Notice of Proposed Rulemaking*, 10 FCC Rcd 3524, para. 60 (1995) ("The principal means by which the Commission has fostered diversity of viewpoints is through the imposition of ownership restrictions.... [D]iversity of ownership as a means to achieving viewpoint diversity has been found to serve a legitimate government interest, and has, in the past, been upheld under rational-basis review."). See also Rev. of the Comm'n's Broad. Ownership Rules and Other

localism and broadcasting initiative which involved a formal notice and comment proceeding on broadcasting and localism.³⁵ Additionally, in a vain effort to ensure diversity which the FCC repeatedly claims to be important,³⁶ the Commission has struggled to follow a consistent regulatory path when developing and reviewing its media ownership rules.³⁷

Within the larger structure of media ownership policy is a related issue: the ownership of broadcast stations by women and minorities. Minority ownership has proven to be a problematic aspect of the FCC's broadcast licensing efforts for some time.³⁸ The FCC granted licenses exclusively to non-minority applicants for radio stations until 1949 and for television stations until 1973.³⁹ This process continued beyond these origination dates as the agency tended to favor applicants with existing broadcast industry experience in cases where there were competitive and comparative hearings for licenses.⁴⁰ Consequently, as late as 1971, minorities owned only ten of the nearly 7500 radio stations in the U.S.⁴¹

The FCC established a Minority Ownership Task Force with the intent of researching options to increase not only minority ownership, but minority employment in the broadcasting industry as well, arguing, "representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience."⁴² In 1978, the task force released a report that concluded that the best option to increase minority representation was to increase the number of minority owners, arguing that both minority populations and the general public were being deprived the access of minority viewpoints.⁴³

Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Notice of Proposed Rule Making*, 17 FCC Rcd 18503, paras. 36–55 (2002) [hereinafter *2002 Ownership Rules*].

35. The FCC's localism task force was created in 2003, but it has taken only limited actions in the eight years since its inception, and it has taken no formal action since April of 2008. See FCC, BROADCASTING AND LOCALISM, https://transition.fcc.gov/localism/Localism_Fact_Sheet.pdf [<https://perma.cc/ZSN8-6P3A>].

36. *2002 Biennial Review*, *supra* note 27, at paras. 18-53.

37. Christopher R. Terry, *Minority Ownership: An Undeniable Failure of FCC Media Ownership Policy*, WIDENER J.L., ECON. & RACE, 2013, at 18, 32 (2011).

38. See Caitlin Ring Carlson, *Half the Spectrum: A Title IX Approach to Broadcast Ownership Regulation*, 23 COMM. L. & POL'Y 221, 227-28 (2018).

39. W. LaNelle Owens, *Inequities on the Air: The FCC Media Ownership Rules - Encouraging Economic Efficiency and Disregarding the Needs of Minorities*, 47 HOW. L.J. 1037, 1055 (2004).

40. *Id.* at 1045.

41. *Id.* at 1044.

42. Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 144 n.132 (1990) (quoting Statement of Policy on Minority Ownership of Broadcasting Facilities, *Public Notice*, 68 F.C.C. 2d 979, 981 (1978)).

43. See *id.* at 134, 151.

In a critical case, *TV 9, Inc. v. FCC*, the idea that a nexus between minority ownership and increased viewpoint diversity was established and quickly became the conceptual basis for minority ownership policy, which the FCC expanded on in the Newspaper Broadcast-Cross Ownership proceeding.⁴⁴ In the *TV 9* case, the FCC had chosen not to award a minority, but corporate, candidate merit in a comparative hearing for a license.⁴⁵ The D.C. Circuit Court overturned the FCC, arguing “[m]inority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded.”⁴⁶

In 1978, following *TV 9*, the FCC adopted two new policies designed to expand minority representation on the airwaves. The first was a tax certificate program to help new entrants.⁴⁷ Likewise, the second policy, a distressed station sale program, was adopted to help direct station licenses towards minority applicants by giving broadcast licensees the opportunity to sell a station to a minority-owned entity at a reduced price of 75 percent of fair market value.⁴⁸

The FCC’s 1978 minority ownership enhancement policies were challenged and were initially upheld in *Metro Broadcasting Inc. v. FCC*.⁴⁹ Metro Broadcasting was involved in a comparative bidding proceeding for the rights to construct and operate a new UHF television station in Orlando, Florida.⁵⁰ The FCC awarded the license and construction permit to a competitor, Rainbow Broadcasting. The FCC had given a substantial enhancement to Rainbow because its ownership was 90%Hispanic, while Metro had only one minority partner.⁵¹ The FCC ruled that the minority enhancement awarded to Rainbow outweighed the local residence and civic participation advantage that Metro had demonstrated in the proceeding.⁵²

In a related case, Shurberg Broadcasting challenged the FCC’s distress sale policy after filing a construction permit to build a station in Hartford, Connecticut.⁵³ At the time, the permit was mutually exclusive with a station already on the air, which the owner, Faith Center, was trying to sell under the

44. *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973); Multiple Ownership of Standard, FM, and TV Broad. Stations, *Second Report and Order*, 50 F.C.C. 2d 1046, 1074 (1975).

45. *TV 9*, 495 F.2d at 938.

46. *Id.*

47. Owens, *supra* note 39, at 1045-46.

48. *Id.*

49. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

50. *Id.* at 558.

51. *Id.* at 559.

52. *Id.*

53. *Id.* at 562-63.

distress sale policy.⁵⁴ The FCC approved the transfer of the station under the distress sale policy in 1980, but the applicant faced financing problems that caused the transfer to be abandoned.⁵⁵ In June of 1984, the FCC approved a second transfer of the station's license under the distress sale policy to minority applicant Astroline Communications.⁵⁶ Shurberg then petitioned the FCC to hold a comparative license hearing to examine the mutually exclusive applications.⁵⁷ The FCC denied the hearing request, rejected Shurberg's challenge as without merit, and awarded the license to Astroline.⁵⁸

At the Circuit level, both the *Metro* and *Shurberg* challenges were focused on an argument that the FCC's 1978 policies violated the equal protection clause.⁵⁹ On review, the D.C. Circuit upheld the FCC's decision regarding Metro Broadcasting but overturned the agency's sale to Astroline, ruling in favor of Shurberg.⁶⁰ In the *Shurberg* decision, the circuit court ruled that the distress sale policy was not, "... narrowly tailored to remedy past discrimination or to promote programming diversity."⁶¹ The cases were consolidated for review in front of the Supreme Court.⁶²

In reviewing the dispute in *Metro*, the Supreme Court examined a number of empirical studies that supported the conceptual "nexus" between minority ownership and viewpoint diversity.⁶³ Of the research examined, the conclusions contained in a Congressional Research Service study, "Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?" proved important.⁶⁴ The research concluded, based on FCC survey data, that increasing minority ownership in a market led to an increase in diversity of the available programming content.⁶⁵

54. *Id.*

55. *Id.*

56. *Id.* at 562 (citing App'n of Faith Ctr., Inc., *Memorandum Opinion and Order*, 99 F.C.C. 2d 1164, 1171 (1984)).

57. *Id.* at 562.

58. *Id.* See also App'n of Faith Ctr., Inc., *Memorandum Opinion and Order*, 99 F.C.C. 2d 1164, 1171 (1984).

59. See *Shurberg Broad. of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989); *Winter Park Comm., Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989).

60. *Metro Broad.*, 497 U.S. at 562; *Shurberg Broad. of Hartford*, 876 F.2d at 907-08.

61. *Metro Broad.*, 497 U.S. at 563.

62. *Id.* at 552.

63. *Id.* at 569-70.

64. *Id.* at 578-79; see also Allen S. Hammond, IV, *Measuring the Nexus: The Relationship Between Minority Ownership and Broadcast Diversity After Metro Broadcasting*, 51 FED. COMM. L.J. 627 (1999).

65. Hammond, *supra* note 64.

In the *Metro v. FCC* decision, the Supreme Court held that both of the FCC's minority enhancement policies could withstand "intermediate" scrutiny of the Fifth Amendment's equal protection clause.⁶⁶ The decision proposed five significant reasons for reducing the level of protection from strict to intermediate scrutiny in this area.⁶⁷ First, the minority ownership policies at issue in *Metro* served an important government objective, as all audiences, not just those made up of minorities are served by an increase in the diversity of viewpoints minority owners were likely to provide.⁶⁸ On a second, related point, the Court added that the policies were directly related to the long standing goal of content diversity.⁶⁹ Justice Brennan argued that the robust exchange of ideas that minorities were able to engage in as a result of the minority enhancement policies resulted in positive influence for news production while promoting diversity in the hiring practices of existing media outlets.⁷⁰ Justice Brennan also said that the FCC's previous policies to promote minority access, including community ascertainment, had failed to provide adequate minority content to listeners.⁷¹ Therefore, the policies under review in *Metro* served an important governmental objective, but were also substantially related to the government's interest.

Importantly, Justice Brennan also noted the "overriding significance" of the fact that the FCC's enhancement and distress sale policies had been specifically mandated and approved by Congress.⁷² In light of these factors, the Court ruled that the substantial government interest in promoting diversity outweighed any equal protection violations, adding that the petitioners were free to bid on any other stations that became available.⁷³ In practical terms, the majority employed an intermediate standard of review in *Metro* relying on a "substantial" rather than "compelling" interest.

III. ADARAND, STRICT SCRUTINY AND MINORITY OWNERSHIP

Despite the decision in *Metro*, in 1995, the protections for the FCC's licensing enhancement and distress sale programs were overturned in a non-broadcast case, *Adarand Constructors Inc. v. Pena*.⁷⁴ In *Adarand*, the four dissenters

66. *Metro Broad.*, 497 U.S. at 566.

67. *Id.*

68. *Id.* at 567.

69. *Id.* at 567-68.

70. *Id.* at 569-70.

71. *Id.* at 586-87.

72. *Id.* at 563.

73. *Id.* at 596.

74. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

in the *Metro* Court and the newly appointed Justice Clarence Thomas, who had ruled against a gender-based enhancement in *Lamprecht v. FCC* while on the D.C. Circuit,⁷⁵ struck down a federal program granting preferences to minorities bidding on public works projects.⁷⁶ In *Adarand*, the majority found that the Court should have applied a strict scrutiny test to the policies at issue in *Metro*.⁷⁷

A dispute over preference given to a minority business as part of a Small Business Administration (SBA) minority preference program for contractors was at the center of the dispute in the case.⁷⁸ *Adarand Constructors* challenged the preference policy after failing to win a government bidding process for a contract to construct highway rail guards in Colorado.⁷⁹ *Adarand* was otherwise qualified complete the work and had even submitted the lowest bid on the project.⁸⁰ The Court held that *Adarand* had standing to bring its suit, and that all programs for federal, state, and local entities should be reviewed under a strict scrutiny standard, thus resolving the difference between the federal and state reviews upheld in *Metro* and *City of Richmond v. J.A. Croson Co.*⁸¹

As part of this newer, more tailored approach to judicial review of government preference programs, the majority decision proposed that strict scrutiny was not “. . . strict in theory and fatal in fact,”⁸² and applied three principles to a review: First, race-based criterion should always be treated with skepticism.⁸³ Second, equal protection should be consistently applied and not depend on race for the group benefitting or being burdened by the program.⁸⁴

75. *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992).

76. *Adarand Constructors*, 515 U.S. at 227.

77. *Id.* (“[W]e hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled”).

78. *Id.*

79. *Id.*

80. *Id.*

81. Justice O’Connor’s opinion in *Croson* also applied strict scrutiny to a quota based system, and in overturning the City’s provision requiring 30% of city building contracts went to Minority Business Entity subcontractors, explained that rules designed as a remedy for past discrimination did not reach a compelling government interest. “The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989).

82. *Adarand Constructors*, 515 U.S. at 237.

83. *Id.*

84. *Id.*

Finally, an analysis of equal protection demanded “congruence” under both the Fifth and Fourteenth Amendments.⁸⁵

As a result of *Adarand*, all minority preferences, including programs designed to correct “benign discrimination,” required narrow tailoring to meet a compelling governmental interest.⁸⁶ The decision explicitly overturned the holding in *Metro* that the FCC’s “benign” minority ownership policies need only meet intermediate scrutiny.⁸⁷ Arguably, the Court’s majority no longer supported diversity as sufficient to justify race-based classifications in public contracting.⁸⁸ Functionally, after *Adarand*, a preferential government program requires empirical statistical evidence to (1) demonstrate previous discrimination, and, (2) show that the program under review meets a narrow tailoring test which assesses if the policy will correct that discrimination.⁸⁹

After *Adarand*, the mandate imposing stringent justifications for preferential programs led the FCC to discontinue the distress sale policy: first, by refusing to extend the policy to women, and then by refusing to extend a preferential policy during spectrum auctions.⁹⁰ But *Adarand* would bring even more complications to the FCC’s policymaking process and regulatory objectives following the passage of the 1996 Telecommunications Act, which lingered in the background until the Third Circuit Court of Appeals decision in *Prometheus Radio Project v. FCC (Prometheus I)* in 2004.

IV. **LAMPRECHT, INTERMEDIATE SCRUTINY, AND WOMEN’S OWNERSHIP**

Initially, minority and female ownership were viewed as separate issues. However, in the *Mid-Florida Television Corp.* case (1978), the Second Circuit Court of Appeals held that merit for female broadcast ownership and participation is warranted upon essentially the same basis as the merit given for black participation and ownership.⁹¹ The court said that the need for diversity and sensitivity reflected in the structure of a broadcast station is “not so pressing with respect to women as it is to black people because women have

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. While awaiting a decision from the Supreme Court in the *Shurberg* and *Metro* cases, the Commission closed down a rulemaking proceeding that could have expanded the Distress Sale policy to new categories of participants, including women. See Distress Sale Pol’y of Broad. Licensees, *Order*, 5 FCC Rcd 397, para. 2 (1990).

91. App’ns of Mid-Fla. TV Corp., *Decision*, 69 F.C.C. 2d 607, 652 (1978), *set aside on other grounds*, 87 F.C.C. 2d 203 (1981).

not been excluded from mainstream society as have black people.”⁹² At a subsequent comparative hearing the board said it was “obliged to consider minority (and presumably, female) ownership and participation as qualitative attributes of and management.”⁹³ Thus, female preference grew out of a presumption.⁹⁴

Like with minority preferences, the FCC’s efforts to demonstrate favorable treatment for women in the distribution of broadcast licenses was also challenged. The first of these challenges was brought by a male applicant who was denied a license in favor of a woman, despite having substantial industry experience.⁹⁵ The D.C. Circuit Court found that the FCC’s rationale for the claim that gender preferences in comparative hearings and the subsequent ownership of media by women fostered a diversity of viewpoints was unconfirmed.⁹⁶ The court held that the premise had not been critically examined in this case and also ran counter to the constitutional principle that race, sex, and national origin are not valid factors on which to base government policy.⁹⁷ Judge Patricia Wald, who was the only woman on the court and the only dissenting judge in the case, wrote that ownership diversity was the only way the FCC could influence diverse content as it was prohibited from mandating the broadcast of particular moral, social, or political viewpoints.⁹⁸ Moreover, “[w]omen having ownership interest and policy making roles in the media are likely to enhance the probability that varying perspectives and viewpoints of women will be fairly represented by the broadcast media.”⁹⁹

The D.C. Circuit Court took up the relationship between viewpoint diversity and promoting women (and minority) ownership again in *Lamprecht v. FCC*.¹⁰⁰ Here, the court held that the FCC “cited nothing that might support its predictive judgment that women owners will broadcast women’s or minority or any other underrepresented type of programming at any different rate than men will”;¹⁰¹ the court was right. Very little research existed to examine whether and how women’s broadcast ownership led to diverse programming. Once again, the court relied on the 1988 study, “Minority

92. *Id.*

93. Lorna Veraldi & Stuart A. Shorenstein, *Gender Preferences*, 45 FED. COMM. L.J. 219, 223 (1993).

94. *See id.*

95. *Steele v. FCC*, 770 F.2d 1192, 1192 (D.C. Cir. 1985).

96. *Id.* at 1199.

97. *Id.*

98. *Id.* at 1202 (Wald, J., dissenting).

99. *Id.* at 1209.

100. *Lamprecht v. FCC*, 958 F.2d 382, 399 (D.C. Cir. 1992).

101. *Id.*

Broadcast Station Ownership and Broadcast Programming: Is there a Nexus?”¹⁰² The court wrote that because the study did not establish a statistically meaningful link between women’s broadcast ownership and “women’s programming,” the FCC could not prove that the regulation was substantially related to achieving their important objective of viewpoint diversity.¹⁰³ This time, the FCC’s gender preference did not meet the requirements of intermediate scrutiny and was struck down.¹⁰⁴ Perhaps most notably, the D.C. Circuit reaffirmed that the standard of review for gender-based preferences was intermediate scrutiny while strict scrutiny continued to be used for race-based preferences.¹⁰⁵

V. THE THIRD CIRCUIT AND PROMETHEUS RADIO PROJECT

The FCC launched the first of the mandated biennial reviews for media ownership rules under section 202(h) on March 12, 1998.¹⁰⁶ At the time, the agency was adjudicating many proposed mergers and license transfers made possible by ownership rules contained in the Telecom Act. Anticipating that the biennial review process would result in additional changes to those rules, the FCC had already granted a series of conditional waivers to various owners.¹⁰⁷ By continuing to grant waivers, even conditionally, the FCC openly

102. *Id.* at 396.

103. *Id.* at 398.

104. *Id.* at 396.

105. *Id.* at 390.

106. The FCC already began the process of reviewing two ownership rules. The first, the television duopoly rule prevented a party from owning, operating, or controlling two or more broadcast television stations with overlapping “Grade B” signal contours, essentially preventing the ownership of more than one television station in a market. Additionally, the FCC launched a review of the “one-to-a-market” rule, which prohibited the common ownership of a television and a radio station in the same market. 1998 Biennial Regul. Rev.—Rev. of the Comm’n’s Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, *Notice of Inquiry*, 13 FCC Rcd 11276, paras. 1, 9 (1998) [hereinafter *1998 Notice of Inquiry*].

107. *App’n of Concrete River Assocs., Memorandum Opinion and Order*, 12 FCC Rcd 6614, paras. 108-10 (1997), assigning a license to QueenB Radio and granting QueenB’s request for waiver, “Because the present case also proposes a commonly owned television station, we must next determine whether to waive our one-to-a-market rule. In considering the current request for a permanent waiver we will follow the policy established in recent one-to-a-market waiver cases where the radio component to a proposed combination exceeds those permitted prior to the adoption of the Telecommunications Act of 1996. . . . In such cases, the [FCC] declined to grant permanent waivers of the one-to-a-market rule, and instead granted temporary waivers conditioned on the outcome of related issues raised in the television ownership rulemaking proceeding. . . . Similarly, we conclude that a permanent, unconditional

encouraged further ownership consolidation to occur at a rate faster than the agency could empirically assess the results of its freshly approved mergers.¹⁰⁸

At the conclusion of the first biennial review in August of 1999, the FCC chose to use the required 2000 Biennial Review to build a framework to “form the basis for further action.”¹⁰⁹ Mergers were occurring at a rapid pace, and the FCC argued that it needed more time to understand the effects the rules were having.¹¹⁰

At the launch of the biennial review in 2000, the FCC proposed building a working framework for future reviews under section 202 (h), most notably for the review scheduled to begin in 2002.¹¹¹ As a result of the agency-wide review commenced in 2000, the FCC proposed retaining, but modifying, three of its media ownership rules while eliminating a fourth.¹¹² The FCC then launched rulemaking inquiries to amend the dual network rule,¹¹³ the definition of local radio markets,¹¹⁴ and the newspaper-broadcast cross-ownership rule.¹¹⁵ The agency also proposed to eliminate its restriction on multiple ownership of experimental broadcast stations.¹¹⁶ Ultimately, each of these individual proceedings would become elements of the next required review under section 202(h), the 2002 Biennial Review.

The FCC’s lengthy legal struggles on media ownership policy began with the judicial review of the its media ownership decision released in June of 2003.¹¹⁷ In *Prometheus Radio Project v. FCC*, the FCC suffered the first in a long of a series of setbacks that have continued to limit its ability to alter media ownership policy.¹¹⁸ Groups of both “citizen petitioners”¹¹⁹ and “deregulatory

waiver would not be appropriate here. QueenB has, however, demonstrated sufficient grounds for us to grant a temporary waiver conditioned on the outcome of the rulemaking proceeding.”
108. *Id.*

109. 2000 Biennial Regul. Rev., *Report*, 15 FCC Rcd 1207, para. 13 (2001) [hereinafter *2000 Biennial Review*]. While the review was of existing regulations agency wide, media ownership rules were reviewed by the Media Bureau staff during the 2000 proceeding. *See* Biennial Reg. Rev. 2000 Staff Rpt., *Public Notice*, 15 FCC Rcd 21142, para. 43 (2000) [hereinafter *2000 Staff Report*].

110. *Id.* at para. 127.

111. *Id.* at paras. 14-17.

112. *Id.* at para. 30.

113. *Id.* at para. 127.

114. *Id.* at paras. 118-19.

115. *Id.* at paras. 122-24.

116. *Id.* at para. 128.

117. *Prometheus I*, 373 F.3d 372, 381 (3d Cir. 2004).

118. *Id.* at 381-82.

119. In the *Prometheus* ruling, the court assigned the various petitioners to two groups. The first was referred to as the “Citizen Petitioners.” “Prometheus Radio Project, Media Alliance, National Council of the Churches of Christ in the United States, Fairness and Accuracy in

petitioners”¹²⁰ challenged the FCC’s 2003 Order on media ownership in multiple federal circuit courts, and the Judicial Panel on Multidistrict Litigation consolidated the petitions.¹²¹ Unlike *Sinclair Broadcasting Group, Inc. v. FCC* and *Fox TV Stations, Inc. v. FCC*, two earlier cases that dealt with ownership reviews undertaken by the agency which were reviewed by the D.C. Circuit Court of Appeals,¹²² the multidistrict panel sent the case to the Third Circuit Court of Appeals, consolidating the challenges under lead plaintiff in that circuit, Prometheus Radio Project.¹²³ After a preliminary hearing, the Third Circuit stayed implementation of the FCC’s 2003 rules pending review.¹²⁴

The Third Circuit remanded most of the FCC’s 2003 Order.¹²⁵ Among the primary reasons for remand was the FCC’s arbitrary and capricious decision-making process and the lack of supporting evidence for its decisions in the record.

[W]e have identified several provisions in which the [FCC] falls short of its obligation to justify its decisions to retain, repeal, or modify its media ownership regulations with reasoned analysis. The [FCC]’s derivation of new Cross-Media Limits, and its modification of the numerical limits on both television and radio station ownership in local markets, all have the same essential flaw: an unjustified

Reporting, Center for Digital Democracy, Consumer Union and Consumer Federation of America, Minority Media and Telecommunications Council (representing numerous trade, consumer, professional, and civic organizations concerned with telecommunications policy as it relates to racial minorities and women), and Office of Communication of the United Church of Christ (“UCC”) (intervenor). The Network Affiliated Stations Alliance, representing the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the ABC Television Affiliates, and Capitol Broadcasting Company, Inc. (intervenor) also raised anti-deregulatory challenges to the national television ownership rule.” *Prometheus I*, 373 F.3d at 381 n.1.

120. *See id.* at 381-82 n.2 (stating that the “Deregulatory Petitioners,” included: “Clear Channel Communications, Inc.; Emmis Communications Corporation; Fox Entertainment Group, Inc.; Fox Television Stations, Inc.; Media General Inc.; National Association of Broadcasters; National Broadcasting Company, Inc.; Paxson Communications Corporation; Sinclair Broadcast Group; Telemundo Communications Group, Inc.; Tribune Company; Viacom Inc.; Belo Corporation (intervenor); Gannett Corporation (intervenor); Morris Communications Company (intervenor); Millcreek Broadcasting LLC (intervenor); Nassau Broadcasting Holdings (intervenor); Nassau Broadcasting II, LLC (intervenor); Newspaper Association of America (intervenor); and Univision Communications, Inc. (intervenor).”) *Id.*

121. *Id.* at 382.

122. *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002); *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1033, 1048 (D.C. Cir. 2002).

123. *Prometheus I*, 373 F.3d at 382.

124. *Id.* at 389.

125. *Id.* at 435; *See also 2002 Biennial Review, supra* note 27, at para. 327 (describing the cross-ownership rulemaking by the FCC — with foregoing explanation — with which the Third Circuit found fault).

assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets. We thus remand for the [FCC] to justify or modify its approach to setting numerical limits.¹²⁶

The Third Circuit was extremely skeptical of the FCC's new approach to regulating media ownership using the Diversity Index.¹²⁷ The court's opinion suggested that the FCC's assumption of equal market shares was inconsistent with the intended approach of the agency's new metric.¹²⁸ This inconsistency generated a set of unrealistic assumptions about the relative contributions of media outlets to viewpoint diversity within local markets. Local news production, which the FCC functionally applied as a quantitative assessment of its localism objective, factored heavily into the majority decision, which stated the record lacked basic evidence to support the agency's premise of independent news websites producing local news.¹²⁹

After the Third Circuit issued the remand in 2004, the FCC took minimal action on media ownership policy beyond adjudicating merger actions that were permitted by existing ownership limits.¹³⁰ A new FCC chairman, Kevin Martin, took charge in March 2005,¹³¹ and the agency launched into the first now quadrennial review scheduled for 2006 under the amended section 202(h) of the Telecommunications Act.¹³² At the launch of the review process, the FCC suggested it had designed the assessment to resolve any procedural issues from the *Prometheus I* remand.¹³³

The late release of data developed during the 2002 Biennial Review surfaced in a hearing in front of Congress, and the FCC was now unable to put the genie back in the bottle concerning the consolidation of the radio industry which had occurred between 1998–2005; the FCC acted to conclude

126. *Prometheus I*, 373 F.3d at 435.

127. *See id.* at 411.

128. *Id.* at 420.

129. *Id.* at 406.

130. *See* App'ns of AT&T Wireless Servs., Inc. & Cingular Wireless Corp., *Memorandum Opinion and Order*, 19 FCC Rcd 21522 (2004); *see, e.g.*, App'ns for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Comm. Act from NextWave Personal Comm., Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 2570 para. 1 (2004).

131. Neda Ulaby, *Kevin Martin's Contentious Turn at Helm of FCC*, NPR (Feb. 5, 2009), <https://www.npr.org/templates/story/story.php?storyId=18711487> [<https://perma.cc/47MX-SCMH>].

132. 2006 Quadrennial Regul. Rev. – Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Further Notice of Proposed Rulemaking*, 21 FCC Rcd 8834, paras. 1, 7-8 n.10 (2006) [hereinafter *2006 Further Notice of Proposed Rulemaking*].

133. *See id.*

its 2006 Quadrennial Review in late 2007, and it proposed modest rule alterations.¹³⁴ The FCC proposed revising only one ownership rule, a partial repeal of the 1975 prohibition on newspaper-broadcast cross-ownership, but only in the top 20 media markets.¹³⁵ Although minority ownership represented an insignificant aspect of the FCC's stated diversity assessments since the implementation of the Telecommunications Act,¹³⁶ the FCC also released a new minority ownership policy developed in a parallel proceeding to the 2006 Quadrennial Review in response to the remand on the issue in *Prometheus I*.¹³⁷

In the December 2007 proposal, the FCC adopted Small Business Administration financial standards based on gross sales revenue for a radio or television company creating a class of license applicants called "Eligible Entities."¹³⁸ The Eligible Entity policy was implemented as part of a larger FCC effort to increase the number of small independent owners of media properties, but did not provide any mechanism to directly promote ownership by women or minorities.¹³⁹ Relying instead on the central premise of the FCC's belief in a relationship between ownership and content diversity,¹⁴⁰ the Commission argued that increasing the number of small media owners (owners who operate either a single or small group of stations), would result in an increase in the diversity of programming content, including programming content targeted at minorities.¹⁴¹

Despite the agency's stated goal of diversity enhancement, FCC Commissioner Adelstein argued that after *Adarand*, the type of minority

134. Press Release, Mary Diamond, Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule 2 (Nov. 13, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf [<https://perma.cc/3PEX-582T>]; see also 2006 Quadrennial Regul. Rev.—Rev. of the Comm'n's Broad. Ownership Rules and other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Report and Order on Reconsideration*, 23 FCC Rcd 2010, para. 13 (2007).

135. *Id.*

136. Prior to the Eligible Entity proposal, the FCC had not put forward a direct minority ownership proposal since the decision in *Metro*.

137. Promoting Diversification of Ownership in the Broad. Servs., *Report and Order and Third Further Notice of Proposed Rule Making*, 23 FCC Rcd 5922, para. 3 (2008) [hereinafter 2007 *Minority Ownership Order*].

138. *Id.* para. 6 ("The eligible entity must hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.").

139. *Id.*

140. See 2002 *Ownership Rules*, *supra* note 34, at para. 8.

141. See 2007 *Minority Ownership Order*, *supra* note 137, at para. 41.

enhancements at issue in *Metro* must now be subjected to strict scrutiny.¹⁴² Therefore, for a new minority ownership policy to bypass any constitutional barriers, the policy must be implemented as “race neutral.”¹⁴³ Rather than providing ownership enhancements to minorities directly, as the policies at issue in *Metro* had done, the FCC argued that the policy could (eventually) include women and minorities as Eligible Entities.¹⁴⁴ In crafting the new policy, the FCC relied on the empirically unsupported contention at the cornerstone of media ownership theory, that internal and external competition between stations will increase diversity.¹⁴⁵ As such, the Eligible Entity policy was promoted as a mechanism that could increase the number of independently owned media outlets. The FCC claims that independently owned outlets are more likely to have ties to a local community, and, by extension, are better able to meet the needs of the local audience.¹⁴⁶

The Eligible Entity designation was adopted from a previous FCC definition of a station (or stations) with minority ownership.¹⁴⁷ The FCC had previously defined minority ownership of a broadcast outlet as a situation in which the ownership reports identify one or more minorities which, in aggregate, have a greater than 50% voting interest in the broadcast licensee entity.¹⁴⁸ To become an Eligible Entity, an applicant had to meet SBA standards as defined by total annual sales of an organization or its parent company. For radio, the qualifying limit was \$6.5 million and for television it was \$13 million.¹⁴⁹ In addition, an Eligible Entity must hold:

30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or (2) 15 percent or more of the

142. *Id.* at paras. 5-6.

143. The FCC believed that by implementing the new policy on a race-neutral basis, and avoiding constitutional scrutiny on equal protection grounds, the policy can be implemented, and have demonstrable results much quicker. *Id.* at para. 9.

144. The Commission was seeking comment on whether a special category of “eligible entity” should be created to assist minorities and women with the acquisition of media outlets, but for now the diversity policy will remain race and gender neutral. *Id.* at para. 39.

145. The FCC believes that competition that creates diversity does not always come from external competitors. As more local stations are commonly owned, there is also an incentive for diverse programming to reduce “internal competition.” This premise does not account for an economic reality that media companies will target the most valuable audience demographics even if forced to compete for that audience, a process known as rivalrous imitation. *Id.* at para. 17; see John Dimmick & Daniel G. McDonald, *Network Radio Oligopoly 1926-1956: Rivalrous Imitation and Program Diversity*, 14 J. MEDIA ECON. 197, 201 (2001).

146. See 2007 *Minority Ownership Order*, *supra* note 137, at para. 7.

147. *Id.* at para. 6.

148. *Id.*

149. *Id.*

stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.¹⁵⁰

A legal battle over jurisdiction delayed the judicial review of the FCC's 2006 and 2007 proposals.¹⁵¹ The Third Circuit claimed that it retained jurisdiction over the FCC's response to the remand issued in *Prometheus I*, while both the FCC and members of the deregulatory petitioner group attempted to move the review to the D.C. Circuit.¹⁵² The petitions failed, and oral arguments occurred in front of the Third Circuit panel on February 11, 2011, ultimately resulting in another significant legal setback for the FCC in a decision released in July.¹⁵³ Judge Ambro's opinion included another remand which undermined the FCC's 2007 decisions on media ownership, citing the agency's continuing series of procedural and evidentiary problems.¹⁵⁴ The majority also incorporated the FCC's Eligible Entry program when examining the largely unresolved remand of the minority ownership issue in *Prometheus I*.¹⁵⁵ Suggesting that the agency had "in large part punted" on the minority ownership issue,¹⁵⁶ the second *Prometheus* decision provided a clearly stated

150. *See id.*

151. 2006 Quadrennial Regul. Rev., *Consolidation Order*, 73 Fed. Reg. 9481, 1-2 (2008).

152. Order at 1-2, *Media All. v. FCC*, No. 6695769 (9th Cir. Nov. 4, 2008), ECF No. 43; *see* Final Brief of Petitioners Tribune Co. & Fox Television Stations, Inc. at *14 n.8, *Prometheus Radio Project v. FCC*, 2010 WL 1133326 (3d Cir. Mar. 23, 2010) (No. 08-3078), 2010 WL 3866781.

153. Petition for Review at 1-2, *Prometheus Radio Project v. FCC*, No. 003147340 (3d Cir. Feb. 26, 2008).

154. *Prometheus II*, *supra* note 2, at 437 (3d Cir. 2011) ("[T]he [FCC] failed to meet the notice and comment requirements of the Administrative Procedure Act. We also remand those provisions of the Diversity Order that rely on the revenue-based 'eligible entity' definition, and the FCC's decision to defer consideration of other proposed definitions (such as for a socially and economically disadvantaged business, so that it may adequately justify or modify its approach to advancing broadcast ownership by minorities and women.)."

155. The Third Circuit overturned the FCC's 2003 Order in *Prometheus I*. *See Prometheus I*, *supra* note 2, at 435.

156. "Despite our prior remand requiring the [FCC] to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the [FCC] has in large part punted yet again on this important issue. While the measures adopted that take a strong stance against discrimination are no doubt positive, the [FCC] has not shown that they will enhance significantly minority and female ownership, which was a stated goal of this rulemaking proceeding. This is troubling, as the [FCC] relied on the Diversity Order to justify side-stepping, for the most part, that goal in its 2008 Order." *Prometheus II*, *supra* note 2, at 471-72.

mandate to the FCC: address the issue of minority ownership policy before the completion of the agency's already in-progress 2010 Quadrennial Review.¹⁵⁷

The eligible entity definition adopted in the Diversity Order lacks a sufficient analytical connection to the primary issue that Order intended to address. The [FCC] has offered no data attempting to show a connection between the definition chosen and the goal of the measures adopted—increasing ownership of minorities and women. As such, the eligible entity definition adopted is arbitrary and capricious, and we remand those portions of the Diversity Order that rely on it. We conclude once more that the FCC did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions and remand for it to do so before it completes its 2010 Quadrennial Review.¹⁵⁸

The ruling also signaled that the FCC had strained the majority's patience with another failure to develop a rational minority ownership policy. The panel suggested that the FCC should stop stalling, and instructed the agency to resolve the minority ownership issue, regardless of the challenges presented by the precedent from the *Adarand* decision.¹⁵⁹

Stating that the task is difficult in light of *Adarand* does not constitute considering proposals using an SDB definition. The FCC's own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider the proposals presented over many years. If the [FCC] requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor.¹⁶⁰

In the wake of *Prometheus II*, the FCC nominally continued to conduct the ongoing 2010 Quadrennial Review required under section 202(h).¹⁶¹ However, the FCC's 2010 Quadrennial Review process quickly became bogged down as it was expanded to incorporate the Third Circuit's directive on minority

157. *Id.*

158. *Id.*

159. *Id.* at 483.

160. *Id.* at 484, n.42.

161. See 2014 Quadrennial Reg. Rev.—Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, *Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd. 4371, para. 1 (2014) [hereinafter *2014 Further Notice of Proposed Rulemaking and Report and Order*].

ownership.¹⁶² The FCC's efforts to conclude the review process or to propose a new minority ownership policy were essentially non-existent.¹⁶³ Eventually, the agency was able to run out the clock on the 2010 Quadrennial Review without making another decision.¹⁶⁴ Instead, the FCC incorporated the uncompleted 2010 review process – the agency's response to the remands issued by the Third Circuit in both 2004 and 2011 – into the launch of the 2014 Quadrennial Review.¹⁶⁵ But even after the restart, the agency's public commitment to the new proceeding was minimalist (at best), and after a period of apparent inaction by the agency, collectively the deregulatory petitioners, the citizen petitioners, and the FCC returned to the Third Circuit for *Prometheus III* in April 2016.¹⁶⁶ During a hostile oral argument, the judges on the panel pressed the FCC for a straight answer as to when the agency would conclude the open proceedings by taking some type of formal action.¹⁶⁷ Although the FCC was reluctant to commit to a timeline for final agency action, agency lawyers told the court that a draft of new rules would be circulated among FCC commissioners before the end of June 2016.¹⁶⁸

In response, the Third Circuit panel in *Prometheus III* supported the action promised by agency counsel to conclude the 2010 and 2014 proceedings and reminded the FCC they were under obligation to deliver a new minority ownership policy.¹⁶⁹ The court argued that the FCC's ongoing delays "keeps five broadcast ownership rules in limbo."¹⁷⁰ The court also observed that the FCC's delay "hamper[ed] judicial review because there is no final agency action to challenge."¹⁷¹ The FCC's ongoing failure to develop a policy to increase the ownership of stations by women and minorities had also clearly tested the Third Circuit's patience.

The FCC presents two arguments for why we should not order relief. Both fail. The first is that it is not yet in violation of *Prometheus II*

162. Christopher Terry, Stephen Schmitz & Eliezer (Lee) Joseph Silberberg, *The Score is 4-0: FCC Media Ownership Policy, Prometheus Radio Project, and Judicial Review*, 73 FED. COMM. L. J. 99, 128 (2021).

163. *Prometheus II*, *supra* note 2, at 465.

164. See 2014 Further Notice of Proposed Rulemaking and Report and Order, *supra* note 161, para. 74 in which the FCC explains it disagreed with the Third Circuit's holdings that the agency's rulemaking procedures and outcomes on media ownership were insufficient.

165. See 2014 Further Notice of Proposed Rulemaking and Report and Order, *supra* note 161, paras. 1, 7.

166. *Prometheus III*, *supra* note 2, at 37.

167. See *id.* at 51.

168. See *id.* at 53-54.

169. See *id.* at 53-54, 60.

170. *Id.* at 51.

171. *Id.* at 40.

because we instructed it to address the eligible entity definition during the 2010 Quadrennial Review, which is still ongoing. This contention improperly attempts to use one delay (the Quadrennial Review) to excuse another (the eligible entity definition). By this logic, the [FCC] could delay another decade or more without running afoul of our remand. Simply put, it cannot evade our remand merely by keeping the 2010 review open indefinitely.¹⁷²

In response, in August 2016, the FCC released an Order that concluded the open 2010 and 2014 Quadrennial Reviews while serving as the agency's formal response to the *Prometheus III* and *Prometheus II* remands.¹⁷³ Most notably, after more than six years without a decision, the FCC decided to do nothing.¹⁷⁴ The agency proposed maintaining all of the existing media ownership rules without any revisions or adjustments.¹⁷⁵ "We affirm our tentative conclusion that the current rule remains consistent with the Commission's goal to promote minority and female ownership of broadcast radio stations."¹⁷⁶ Additionally, the FCC's August 2016 order ignored the directions of the decision in *Prometheus II* and the decision in *Prometheus III* to develop a rational minority ownership policy. Instead, the FCC attempted to recycle the Eligible Entity program proposed in 2007.

[W]e disagree with arguments that the *Prometheus II* decision requires that we adopt a race- or gender-conscious eligible entity standard in this quadrennial review proceeding or that we continue this proceeding until the [FCC] has completed whatever studies or analyses that will enable it to take race- or gender-conscious action in the future consistent with current standards of constitutional law.¹⁷⁷

Unsurprisingly, a host of legal challenges to the FCC's non-action quickly followed. But before those challenges reached oral argument, the 2016 presidential election changed the FCC's leadership structure.¹⁷⁸ Under the new leadership of Ajit Pai, in November of 2017, the FCC released a new media ownership policy as an Order on Reconsideration.¹⁷⁹ The Order on Reconsideration, unlike the Second Report and Order from August 2016, did

172. *Id.* at 48-49.

173. 2017 *Ownership NPRM*, *supra* note 30, at para. 15. *See also* 2016 *Second Report and Order*, *supra* note 12, at paras. 2-4.

174. 2017 *Ownership NPRM*, *supra* note 30, at para. 15.

175. *Id.*

176. *Id.* at para. 125.

177. *Id.* at para. 313.

178. *See* Jim Puzzaghera, *Trump Names New FCC Chairman*, L.A. TIMES (Jan. 23, 2017) <https://www.latimes.com/business/la-fi-pai-fcc-chairman-20170123-story.html>.

179. 2017 *Ownership NPRM*, *supra* note 30.

not address the Third Circuit's mandate to develop a viable minority ownership policy.¹⁸⁰

While consolidated cases challenging the original 2016 Order and 2017 Order on Reconsideration were pending in *Prometheus IV*, the FCC released its initial proposal for a new minority ownership policy, called the "Incubator" program.¹⁸¹ The Incubator program provided for additional ownership consolidation, including opportunities to exceed the limits set by Congress in the Telecommunications Act for companies that would be willing to "incubate" a startup through assistance for new entrant radio broadcasters.¹⁸² Under the Incubator program, existing operators would provide a range of financial, operational, and technical guidance to new entities and in return, would be granted a waiver of the existing ownership limits which could be applied to station acquisitions in other media markets.¹⁸³ The Incubator program was released in August 2018 just ahead of the Third Circuit's order to the FCC to respond to the challenges to the 2016 and 2017 decisions.¹⁸⁴

The program we implement today will apply in the radio market, as radio has traditionally been the more accessible entry point for new entrants and small businesses seeking to enter the broadcasting industry, and a waiver of the local radio rules provides an appropriate reward for incubation. Owning and operating a radio station requires a lower capital investment and less technical expertise than owning and operating a television station, and it also requires less overhead to operate. In addition, we believe that the [FCC]'s existing ownership limitations on local radio markets provide a sufficient incentive for incumbent broadcasters to participate in an incubator program with the promise of obtaining a waiver to acquire an additional station in a market.¹⁸⁵

To be eligible to participate in the "Incubator" program, an entity was required to meet two criteria. First, eligibility was tied to an update of the FCC's entrant bidding credit standard.¹⁸⁶ To meet this new standard, the incubating entity could not own or have an attributable interest in more than

180. *See id.* at para. 7 (noting the Prometheus Radio Project line of cases involve, "various diversity-related decisions, certain media ownership rules and the decision not to attribute SSAs" without mentioning the majority's remand on a functional minority ownership rule).

181. *See id.* at para. 126.

182. *See id.* at para 121.

183. *See id.* at paras. 121-45.

184. Rules & Pol'ys to Promote New Entry & Ownership Diversity in the Broad. Servs., *Report and Order*, 33 FCC Rcd 7911 (2018).

185. *Id.* at para. 7.

186. *See Prometheus IV*, *supra* note 2, at 576.

three full-service AM or FM radio stations, and it could not have any attributable interest in any broadcast television stations.¹⁸⁷

The second requirement for an “Incubator” designation required the entity to meet the criteria for the FCC’s 2007 and 2016 Eligible Entity proposals, despite the Third Circuit’s explicit remand of that designation in *Prometheus II*.¹⁸⁸ Notably, both the FCC’s August 2016 Second Report and Order¹⁸⁹ and the November 2017 proposal for the “Incubator” program¹⁹⁰ used the exact same language and criteria first proposed by the FCC in 2007.¹⁹¹

Beyond the potential issue in recycling the already remanded Eligible Entity designation, the FCC’s new “Incubator” proposal included two significant and potentially fatal omissions.¹⁹² The FCC made no allocation of additional spectrum for more radio stations, nor did the agency mandate license transfers.¹⁹³ As a result, the Incubator program would require that existing radio stations be “donated” from their current owners.¹⁹⁴ Second, and perhaps more importantly, the FCC’s Incubator proposal did not resolve the central dilemma of minority ownership policy: the need to explain how the agency would ensure new start-ups end up in the hands of underrepresented groups like minorities and women.¹⁹⁵

A consolidated challenge to all of the 2016, 2017, and 2018 Orders on media ownership returned to the Third Circuit for oral arguments in June of 2019. During oral arguments, the panel again appeared skeptical of the FCC’s decision making. One of the attorneys representing a group of the deregulatory petitioners even used her available time to argue for limiting the scope of a potential remand rather than supporting the FCC’s proposals.¹⁹⁶ In late September of 2019, the Third Circuit handed down the fourth *Prometheus*

187. *Id.*

188. *Prometheus III*, *supra* note 2, at 454.

189. *2016 Second Report and Order*, *supra* note 12.

190. *2017 Ownership NPRM*, *supra* note 30, at para. 121.

191. *2007 Minority Ownership Order*, *supra* note 137, at para. 68.

192. *See 2017 Ownership NPRM*, *supra* note 30, at paras. 121-45.

193. *See id.*

194. *See id.*

195. The SDB standard is based on the definition employed by the SBA. To qualify for this program, a small business must be at least 51 percent owned and controlled by a socially and economically disadvantaged individual or individuals. *See Small Disadvantaged Businesses*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/contracting/government-contracting-programs/small-disadvantaged-businesses> [<https://perma.cc/65CY-KCSZ>].

196. Oral Argument at 16:45, 37:19, 1:05:25, *Prometheus IV*, *supra* note 2 (Nos. 17-1107 17-1109 17-1110, 17-1111 18-1092 18-1669 18-1670 18-1671 18-2943 & 18-3335) <https://www2.ca3.uscourts.gov/oralargument/audio/17-1107PrometheusRadioProjectv.FCC,etal.mp3>.

decision. In another 2-1 decision penned by Judge Ambro, the panel undermined the FCC's regulatory decisions on media ownership for the entire period between 2011 to 2019 including the 2016 Report and Order, the 2017 Order on Reconsideration, and the 2018 Incubator program.¹⁹⁷

Here we are again. After our last encounter with the periodic review by the [FCC] of its broadcast ownership rules and diversity initiatives, the [FCC] has taken a series of actions that, cumulatively, have substantially changed its approach to regulation of broadcast media ownership. First, it issued an order that retained almost all of its existing rules in their current form, effectively abandoning its long-running efforts to change those rules going back to the first round of this litigation. Then it changed course, granting petitions for rehearing and repealing or otherwise scaling back most of those same rules. It also created a new "incubator" program designed to help new entrants into the broadcast industry. The [FCC], in short, has been busy.¹⁹⁸

The majority ruled the FCC had still failed to resolve the two core issues it had remanded to the agency in the previous cases: the need to provide empirical evidence to support a rational policy decision and propose a policy that would increase ownership by women and minorities.

We do . . . agree with the last group of petitioners, who argue that the [FCC] did not adequately consider the effect its sweeping rule changes will have on ownership of broadcast media by women and racial minorities. Although it did ostensibly comply with our prior requirement to consider this issue on remand, its analysis is so insubstantial that we cannot say it provides a reliable foundation for the [FCC's] conclusions. Accordingly, we vacate and remand the bulk of its actions in this area over the last three years.¹⁹⁹

Judge Ambro's decisions argued that by any rational analysis, the FCC's effort to support its choices was inadequate.²⁰⁰ The majority suggested the FCC's decisions would not stand even if they were provided a more deferential review.²⁰¹ Most importantly, the decision in *Prometheus IV* suggests that the FCC had failed to even attempt to argue that it followed the Third Circuit's

197. See *Prometheus IV*, *supra* note 2, at 589 ("We do conclude... that the [FCC] has not shown yet that it adequately considered the effect its actions since *Prometheus III* will have on diversity in broadcast media ownership. We therefore vacate and remand the Reconsideration and Incubator Orders in their entirety, as well as the "eligible entity" definition from the 2016 Report & Order").

198. See *id.* at 572-73.

199. See *id.* at 573.

200. See *id.*

201. See *id.* at 584.

previous instructions.²⁰² Judge Ambro's decision vacated and remanded the 2017 Reconsideration Order and the incubator program to the FCC. It also vacated and remanded the definition of "eligible entities" in the 2016 Report and Order²⁰³ while retaining jurisdiction over the remanded issues and all other petitions for review.²⁰⁴

The only 'consideration' the FCC gave to the question of how its rules would affect female ownership was the conclusion there would be no effect. That was not sufficient, and this alone is enough to justify remand. . . . Even just focusing on the evidence with regard to ownership by racial minorities, however, the FCC's analysis is so insubstantial that it would receive a failing grade in any introductory statistics class.²⁰⁵

The FCC and the National Association of Broadcasters (NAB) each requested a rehearing and en banc review on November 7, 2019.²⁰⁶ Less than two weeks later, on November 20, 2019, Judge Ambro authored another decision denying a review by the full panel.²⁰⁷ On November 29, 2019, the panel issued a mandate formally implementing the remand.²⁰⁸ On December 20, 2019, the FCC's Media Bureau responded to the mandate with an order

202. *Id.* at 585 ("Problems abound with the FCC's analysis. Most glaring is that, although we instructed it to consider the effect of any rule changes on female as well as minority ownership, the [FCC] cited no evidence whatsoever regarding gender diversity. It does not contest this.").

203. *Id.* at 587-88.

204. *Id.* ("Accordingly, we vacate the Reconsideration Order and the Incubator Order in their entirety, as well as the 'eligible entity' definition from the 2016 Report & Order. On remand the [FCC] must ascertain on record evidence the likely effect of any rule changes it proposes and whatever 'eligible entity' definition it adopts on ownership by women and minorities, whether through new empirical research or an in-depth theoretical analysis. If it finds that a proposed rule change would likely have an adverse effect on ownership diversity but nonetheless believes that rule in the public interest all things considered, it must say so and explain its reasoning. If it finds that its proposed definition for eligible entities will not meaningfully advance ownership diversity, it must explain why it could not adopt an alternate definition that would do so. Once again we do not prejudge the outcome of any of this, but the [FCC] must provide a substantial basis and justification for its actions whatever it ultimately decides.").

205. *Id.* at 585-86.

206. Petition of FCC and United States of America for Rehearing en banc at 7-8, Prometheus Radio Project v. FCC, Nos. 17-1107 17-1109 17-1110, 17-1111 18-1092 18-1669 18-1670 18-1671 18-2943 & 18-3335 (3d Cir. Nov. 7, 2019); Petition for Rehearing of Industry Intervenors in Support of Respondents, Prometheus Radio Project v. FCC, No. 003113399507 (3d Cir. Nov. 7, 2019).

207. Opinion of the Court, Prometheus Radio Project v. FCC, No. 03113354897 (3d Cir. Sept. 23, 2019).

208. Amended Judgment, Prometheus Radio Project v. FCC, No. 003113419677 (3d Cir. Nov. 29, 2019).

which concluded the 2014 Quadrennial Review, the 2010 Quadrennial Review, and the Incubator Program.²⁰⁹ The Media Bureau's Order re-implemented the long-standing newspaper-broadcast cross-ownership ban, radio-television cross-ownership rule, local television ownership rule, local radio ownership rule, and television JSA attribution rules.²¹⁰ The FCC marked the 2017 Order on Reconsideration and the incubator program as repealed.²¹¹ Finally, the 2016 Order's reinstatement of the eligible entity designation was also repealed in line with the Third Circuit's remand in *Prometheus IV*,²¹² functionally leaving most media ownership rules where they have been since the decision in *Prometheus I* in 2004, and arguably since the implementation of the Telecommunications Act of 1996.

After parallel requests for review were filed by the FCC and the industry petitioners, the Supreme Court granted certiorari and heard oral arguments on the last day of Ajit Pai's chairmanship of the agency, January 19, 2021. At oral arguments, there were functionally three sides: the agency, the industry petitioners led by the NAB, and the citizen petitioners, functionally led by Prometheus.²¹³

The FCC argued for relief from the long process and from lengthy obligations from the standing remands from the Third Circuit.²¹⁴ The industry petitioners made a more direct argument, proposing that the Third Circuit had replaced its own judgement for that of the agency.²¹⁵ The citizen petitioner group built its case primarily on the premise that the agency's lack of evidence was a long standing procedural problem.²¹⁶ Of the three sides, the arguments for and against the inclusion of minority ownership only played a significant role in the industry petitioner arguments that minority ownership concerns were not part of the statutory mandates of section 202(h).²¹⁷

A unanimous Court released a narrow opinion written by Justice Kavanaugh, stating that perfect empirical or statistical data to support an

209. 2010 Quadrennial Reg. Rev.– Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Notice of Inquiry*, 25 FCC Rcd 6086 (2010); 2007 *Minority Ownership Order*, *supra* note 137; Rules and Policies Concerning Attribution of Joint Sales Agreements In Local TV Markets, *Order*, 19 FCC Rcd 18166 (2004); Rules and Policies To Promote New Entry and Ownership Diversity in the Broadcasting Services, 83 Fed. Reg. 43,773, 43,774 (Aug. 28, 2018).

210. *See id.*

211. *See id.*

212. *Id.*

213. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 n.3 (2021).

214. *Id.* at 1154.

215. *Id.* at 1155.

216. *Id.*

217. *Id.* at 1156.

agency's decision making is unusual in the first place. Justice Kavanaugh's opinion argued that the record, or rather the sparse record on minority and female ownership, meant that the FCC's inability to meet the Third Circuit's remands on the issue did not fall outside the zone of reasonableness for the purposes of the APA.²¹⁸

Pointing out that the FCC had attempted to explore the impacts on minority and female ownership, even seeking public comment on it during multiple 202(h) review processes, Justice Kavanaugh supported the agency's 2017 conclusion that changes to the rules were not likely to harm minority or female ownership.²¹⁹ Going further, the decision argues that the Prometheus Challenge to the FCC's 2017 Reconsideration Order targeted the FCC's assessment that altering the ownership rules was not likely to harm minority and female ownership rather than dispute the FCC's conclusion that the existing rules no longer serve the agency's public interest goals of competition, localism, and viewpoint diversity.²²⁰

Importantly, the court did not resolve an important, and lingering dispute throughout the process: what elements must be included in the review processes mandated by section 202(h). The decision's narrow holding that Third Circuit's judgment should be reversed was only completed by applying ordinary principles of arbitrary and capricious review. Although the agency, the industry petitioners, and the Prometheus-led citizen petitioner group each sought guidance on this unresolved issue from the Third Circuit's remands, in footnote 3, the decision stated:

We need not reach the industry petitioners' alternative argument that the text of Section 202(h) does not authorize (or at least does not require) the FCC to consider minority and female ownership when the Commission conducts its quadrennial reviews. We also need not consider the industry petitioners' related argument that the FCC, in its Section 202(h) review of an ownership rule, may not consider minority and female ownership unless promoting minority and female ownership was part of the FCC's original basis for that ownership rule.²²¹

In his concurring opinion, Justice Thomas argued that the FCC has never used its ownership rules to foster ownership diversity.²²² While Justice Thomas's opinion uses some selective quotes to support his contention, the

218. *Id.* at 1160.

219. *Id.* at 1157.

220. *Id.* at 1160.

221. *Id.* at 1160 n.3.

222. *Id.* at 1162.

FCC has built media ownership around a joint policy implementation on a relationship and diversity as far back as 1975.²²³

Justice Thomas also suggests that the FCC has been focused on consumers rather than on producers since the creation of the agency.²²⁴ While this was formerly true, the FCC expressly changed focus during the Mark Fowler-led deregulation era in the 1980's, who has argued in multiple cases that benefits to the ownership of stations, like economy of scale, will in turn lead to benefits for the consumer or listener. Justice Thomas's opinion borrows from an FCC opinion arguing that the agency has clearly stated "it would be inappropriate to retain multiple ownership regulations for the sole purpose of promoting minority ownership" before concluding with advice that the agency was not under further obligation to consider ownership by women or minorities in future reviews.²²⁵

Taken as a whole, the decision in *FCC v. Prometheus Radio Project* doesn't address or resolve the minority ownership issue. Instead, Justice Kavanaugh argues that that the 2017 decision to remove cross ownership rules was not arbitrary or capricious, and moving forward, the agency can employ its own judgement in future reviews mandated by section 202(h).²²⁶ The decision does not resolve the standing issue concerning how women and people of color continue to be underrepresented and in control of just a small fraction of broadcast outlets. Both Justice Kavanaugh and Justice Thomas failed to recognize that it is impossible to achieve viewpoint diversity and serve the public if the longstanding imbalance in ownership persists.

There is also the reality that by taking a narrow approach, and focusing only on the FCC's 2017 action, the decision leaves the FCC in a bit of a time crunch. Under section 202(h), the agency must complete an ownership review originally launched in 2018 during the calendar year of 2021 ahead of beginning a new review process scheduled and required for 2022. If the FCC continues to focus on the public interest goals through competition, localism, and viewpoint diversity, more data will be needed to demonstrate the link between ownership and diversity of content, and to provide the agency a structural model for moving forward.

223. Multiple Ownership of Standard, FM, and TV Broad. Stations, *Second Report and Order*, 50 F.C.C. 2d 1046, 1074 (1975), *reconsidered* 53 FCC 2d 589 (1975), *aff'd sub nom.* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978).

224. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1123, 1162-63 (2021).

225. *Id.* at 1163.

226. *Id.* at 1159.

VI. MINORITY OWNERSHIP AND THE DIVERSITY “NEXUS”: WHAT DOES THE EMPIRICAL RESEARCH SAY?

At least part of the FCC’s struggle to resolve minority ownership policy can be explained simply: like much of the FCC’s flawed approach to media ownership regulation since the late 1980’s, quality empirical evidence to support a minority ownership policy has been in short supply.²²⁷ Researchers using the FCC’s ownership data have suggested that the FCC’s data on minority and female ownership “is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.”²²⁸

Although the NTIA was heavily involved in assessing minority ownership after the implementation of the Telecommunications Act, the data produced was focused entirely on racial designations and did not include assessments of ownership by women.²²⁹ The first assessment of ownership that included gender was a study included by the FCC in its 2006 Media Ownership Rulemaking Inquiry. The research explored the quantity of minority and female ownership of traditional media outlets (broadcast radio and television, as well as newspapers).²³⁰ Relying on the FCC’s own ownership data for the years between 2002 and 2005, minorities, as a group, never reach 4% combined ownership of broadcast television and radio stations.²³¹ The authors concluded that minorities and females were both “clearly underrepresented,” in comparison to their populations.²³²

By any measure, minority ownership has long represented a small percentage of the overall ownership of broadcast stations across the United States, and, problematically, the changes in ownership structures which followed implementation of the 1996 Telecommunications Act compounded

227. Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy’s Future*, 41 U.C. DAVIS L. REV. 1547, 1600 (2008).

228. ARIE BERESTEANU & PAUL B. ELLICKSON, *MINORITY AND FEMALE OWNERSHIP IN MEDIA ENTERPRISES 2* (2007).

229. See NAT’L TELECOMMS. & INFO. ADMIN, U.S. DEP’T OF COM., *CHANGES, CHALLENGES, AND CHARTING NEW COURSES: MINORITY COMMERCIAL BROADCAST OWNERSHIP IN THE UNITED STATES* 36-46, 50, 54, 56-57 (2000), <https://www.ntia.doc.gov/files/ntia/publications/mtdpreportv2.pdf> [<https://perma.cc/ES6L-ZWE6>].

230. BERESTEANU & ELLICKSON, *supra* note 228, at 2.

231. The FCC relies on self-reported data for ownership assessments, collected on a biannual basis using forms 323 and 323E. See generally *Promoting Diversification of Ownership in the Broad. Servs., Report and Order, Second Report and Order, and Order on Reconsideration*, 31 FCC Rcd 398, paras. 47-50 (2016).

232. BERESTEANU & ELLICKSON, *supra* note 228, at 2.

an existing market regulation failure.²³³ Ownership data collected by communication policy scholars in 2003 painted a much bleaker picture of minority ownership after the first major round of ownership mergers.²³⁴ Minority ownership of radio stations was reported to make up 335 of the 13,499 (2.48%) radio stations on the air.²³⁵ Of the 1,748 commercial and educational television stations on the air, only 15 claimed to be owned by racial minorities (0.8%).²³⁶ The FCC compiled similar data from ownership reports filed in 2004 and 2005. Of the 12,844 stations which filed FCC form 323 or 323-E,²³⁷ only 460 broadcast stations (3.6%) met the Commission's defined criteria for minority ownership.²³⁸

A decade later, in 2013, the FCC's assessments of minority ownership also provided a grim evaluation of media ownership policy.²³⁹ The data from the 2013 Form 323 filings indicated racial minorities collectively or individually held a majority of the voting interests in forty-one (3%) of full power commercial television stations, 225 (6%) of commercial AM radio stations, and 169 (3%) commercial FM radio stations.²⁴⁰ The FCC's 2013 data assessing ownership by gender was equally problematic. Women collectively or individually held a majority of the voting interests in just eighty-seven (6.3%) of full power commercial television stations, 310 (8.3%) of commercial AM radio stations, and 383 (6.7%) commercial FM radio stations.²⁴¹

The FCC's 2015 ownership report continued to demonstrate low levels of minority ownership.²⁴² Racial minorities collectively or individually held a majority of the voting interests in 402 broadcast stations, consisting of thirty-

233. Increasingly, scholars are arguing that in place of a full regulation scheme, selective use of regulations should be used to fix outcome gaps. *See* VICTOR PICKARD, *AMERICA'S BATTLE FOR MEDIA DEMOCRACY: THE TRIUMPH OF CORPORATE LIBERTARIANISM & THE FUTURE OF MEDIA REFORM* 221-23 (2015).

234. *See* BERESTEANU & ELICKSON, *supra* note 228, at 6-7.

235. *Id.*

236. *Id.*

237. FCC Form 323 Ownership Report for Commercial Broadcast Stations is an ownership report filed by stations every two years. FCC Form 323-E is filed by educational and noncommercial stations. Form 323-E does not collect information on Minority ownership. *See* 2017 323 REPORT, *supra* note 3.

238. FCC OWNERSHIP MINORITY REPORT FOR 2004-2005 179 (2006), https://www.fcc.gov/ownership/owner_minor_2004-2005.pdf [<https://perma.cc/ER9Z-QU2K>].

239. 2014 Quadrennial Reg. Rev. – Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommns. Act of 1996, *Report on Ownership of Commercial Broadcast Stations*, 29 FCC Rcd 7835 (2014).

240. *Id.* at 7838.

241. *Id.* at 7837-38.

242. 2017 323 REPORT, *supra* note 3, at 3-5.

six full power commercial television stations (2.6%); 204 commercial AM radio stations (5.8%) and 128 commercial FM radio stations (2.3%).²⁴³

The FCC's 2017 data on minority ownership, released by the agency in 2020 but ahead of the Supreme Court's grant to hear the FCC and NAB challenges to *Prometheus IV*, continued to illustrate the ongoing problem.²⁴⁴ Both women and minorities continued to be drastically underrepresented in terms of media control. Women held a majority of the voting interests in 73 of 1,368 full-power commercial television stations (5.3%); 19 of 330 Class A television stations (5.8%); 76 of 1,025 low-power television stations (7.4%); 316 of 3,407 commercial AM radio stations (9.3%); and 390 of 5,399 commercial FM radio stations (7.2%).²⁴⁵ Racial minorities collectively or individually held a majority of the voting interests in only 26 of 1,368 full power commercial television stations (1.9%); 8 of 330 Class A television stations (2.4%); 21 of 1,025 low-power television stations (2.0%); 202 of 3,407 commercial AM radio stations (5.9%); and 159 of 5,399 commercial FM radio stations (2.9%), for a total of 416 of 11,529 (3.6%) of all commercial broadcast stations.

With the recognition that minority-focused or formatted content does not come from minority ownership alone, other assessments of minority access have examined broadcast station content directly. Todd Chambers explored the ownership and programming patterns of Spanish language radio stations in the fifty metropolitan areas with the highest populations of Hispanics.²⁴⁶ Using industry definitions for Hispanic formats to identify stations in each individual market, Chambers concluded that just over 20% (314 of 1,545) of the stations in these markets carried a Spanish language format.²⁴⁷

The data also indicated that larger radio companies dominated the control of stations within these markets, with then Clear Channel Communications and Infinity controlling almost a third of all the stations in the markets at the time.²⁴⁸ According to Chambers, HBC (fifty of sixty-one stations) and Entravision (forty-one of fifty-five stations) were the radio ownership groups which provided the most service to Hispanic audiences.²⁴⁹ The results indicated that large radio groups had not diversified their holdings to include stations carrying primarily minority-targeted content, as the FCC had theorized

243. *Id.*

244. FOURTH REPORT ON OWNERSHIP, *supra* note 3, at 4-7.

245. *See id.* at 4-5.

246. Todd Chambers, *The State of Spanish-Language Radio*, 13 J. RADIO STUD. 34, 34 (2006).

247. *Id.* at 42.

248. *Id.* at 41-42.

249. *Id.*

would occur as a result of internal competition between co-owned stations.²⁵⁰ Instead, mid-size companies, also owned and operated by minorities, were the media organizations providing a large quantity of the minority content to audiences.²⁵¹

Another study designed to assess the structures providing minority content used industry data to examine 1,532 of the commercial radio stations operating in the top fifty media markets.²⁵² Sixty-eight different owners were operating 225 stations with minority formats across forty-two of the top fifty radio markets.²⁵³ The majority of owners operating a minority formatted station in the Top 50 markets were smaller media operations with six or fewer stations, and more than half of these operated only a single station.²⁵⁴

Collectively, content focused research supported the FCC's contention in 2007 that an increase in content diversity is more likely to come from smaller broadcast operations that have local ties to a community.²⁵⁵ While data strongly suggested that the Commission's focus on smaller broadcasters as way to increase content diversity in the Eligible Entity program represented a sound premise, these findings were tied to the top fifty markets.²⁵⁶ However, when combined with social science research that indicates that minorities are the group most likely to program formats targeted at specific minority groups,²⁵⁷ a model ownership structure for the production of diverse content appears to be a small owner with a woman or minority as the lead interest in the operation.

The methods used to achieve more diversity have, at times, been arguably counterproductive.²⁵⁸ The "Incubator" program launched by the FCC in August of 2018, offered already existing media outlets an opportunity to expand beyond the local ownership limits defined by the Telecommunications Act of 1996 in return for fostering start-up operations.²⁵⁹ In practical terms, this means that FCC's most recent plan for minority ownership policy was

250. *Id.* at 39.

251. *Id.*

252. Terry, *supra* note 37, at 32.

253. *Id.* at 24-27.

254. *Id.* at 25-28.

255. *Id.*

256. *Id.*

257. See Laurie Mason, Christine M. Bachen & Stephanie L. Craft, *Support for FCC Minority Ownership Policy: How Broadcast Station Owner Race or Ethnicity Affects News and Public Affairs Programming Diversity*, 6 COMM. L. & POLY 37, 71 (2001).

258. See David Pritchard et al., *One Owner, One Voice? Testing a Central Premise of Newspaper/Broadcast Cross-Ownership Policy*, 13 COMM. L. & POLY 1 (2008).

259. See Terry, *supra* note 4, at 406.

based on an empirically unsupportable conceptual premise that more diversity will be created through additional ownership consolidation.²⁶⁰

VII. RETHINKING THE ROLE OF STRICT SCRUTINY

In considering the role of strict scrutiny, one must start with a simple premise: strict scrutiny of government action exists to protect liberties which merit special protections.²⁶¹ By placing government actions under review focused on the necessity of the action, potential harm is avoided. Strict scrutiny also serves as a check on the government's power by ensuring that the action taken is not over or under inclusive as it relates to the need.²⁶²

To be necessary under strict scrutiny, government action must address an actual problem that has not been dealt with and for which alternative, less restrictive, actions to resolve that problem do not exist.²⁶³ Proper application of the strict scrutiny standard requires that the government's solution to the problem represents an important but also logical objective and that the action taken will achieve the objective.²⁶⁴

Although many of the agency's legal and policy setbacks can be tied directly to the FCC's overriding regulatory obsession with competition implemented through loosening structural regulation limits and providing mechanisms that incentivize repurposing content for use on more than one station, one cannot not simply ignore the roadblock installed by *Adarand* and the mandate for a strict scrutiny review. The preference programs upheld in *Metro* and then undermined by *Adarand*, were justified not only on the benefits of the program, but on the potential benefits additional viewpoint diversity offers at a societal level. Put another way, if a minority ownership policy must meet strict scrutiny's traditional compelling government interest standard, the assessment of the benefit should not be on the individuals that could obtain a station license, but rather on the citizens in the media market who will have access to additional diversity in their local programming options.²⁶⁵

260. *Id.* at 406, 429, 432.

261. Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 294-95 (2015).

262. *Id.* at 291-294.

263. *Id.* at 299-301.

264. *Id.* at 306.

265. This suggestion represents the larger point of this article, that the benefits of increasing diversity of content by increasing the diversity of ownership, especially by increasing the number of racial and ethnic minorities and women who own stations, creates a societal benefit for all, not just the new owners. If the FCC desires to act to promote diversity, it must take the focus off the benefits to the owners and refocus on the larger benefits to the public.

In terms of the narrow tailoring requirement, any program that provides preferential treatment must eradicate a form of prior discrimination.²⁶⁶ There can be few arguments that the policies upheld in *Metro* were designed to (partially) correct a prior discrimination, specifically, the discriminatory pattern of awarding of 90% of all broadcast licenses to white, male candidates.

In contemporary terms, there can be no question that the FCC's failure to address the four remands related to minority ownership from the *Prometheus* cases functionally extended the existing discrimination which resulted in underrepresentation. When historically marginalized groups are denied access to broadcast ownership, their viewpoints are not included in public discourse. In a democratic society, this is harmful.

VIII. A MODEST AND SIMPLE PROPOSAL:

There is no need to bend the legal standards of review to fit this problem, and arguably the deference the FCC was provided by the Supreme Court's opinion in *FCC v. Prometheus Radio Project* makes this proposal even easier to implement. There is a substantial quantity of empirical support for the premise that increasing representation by minorities and women will produce an increase in diversity in programming options as well as viewpoints.²⁶⁷ Likewise, there is also support for the premise that smaller, locally based broadcast ownership structures are most likely to succeed with minority focused programming options.²⁶⁸ The solutions are clear, the FCC just needs to choose to pursue them.

Developing a minority ownership policy to its logical conclusion is a straightforward exercise. The FCC must develop and implement a minority ownership policy that puts broadcast stations in the hands of (in-market) locally-based owners who are women and/or people of color. By focusing on just two aspects of the media ownership equation, localism and diversity, competition is likely to increase as new entrants are created. There is substantial empirical evidence available that would justify this approach, and unless the FCC intends to lose in court again, this path provides an answer ahead of the next round of media ownership rule review.²⁶⁹

Concerns about the costs to the individual in programs which provide preferences are not without merit, and the authors do not intend to make light of them. However, in the context of media ownership policy, any continuing

266. Spece, Jr. & Yokum, *supra* note 261, at 318-332.

267. See Terry, *supra* note 37; Terry, *supra* note 4.

268. Terry & Carlson, *supra* note 4, at 407-410.

269. See *Prometheus I*, *supra* note 2, at 435.

policy stalemate benefits no one. Citizens go without important viewpoints and information sources while the media industry is trapped by the agency's failure to develop a functional minority ownership program.

The narrow decision in *FCC v. Prometheus* has not changed the underlying metrics or obstacles on media ownership policy. The agency has a pair of reviews to complete, and regardless of the outcomes of those reviews, the FCC's decisions in those proceedings is certain to be challenged in court. If heading that way anyway, the agency should choose a different approach.

SHIPS PASSING IN THE NIGHT: THE COMMUNICATIONS ACT AND THE CONVERGENCE ON BROADBAND

Stuart Minor Benjamin[†]

ABSTRACT

The Communications Act of 1934 and its amendments (the “Act”), and the regulations implementing them, have been enormously important to traditional telephony, broadcasting, and multichannel video. Meanwhile, the internet is barely mentioned in the Act. It thus might seem reasonable to conclude that the Act stands as a colossus and that the argument for overhauling it has grown much stronger as the Telecommunications Act of 1996 (the “1996 Act”) becomes ever more outdated. In this Article I suggest otherwise. Specifically, I make three claims—one descriptive, one a bit speculative, and one normative. The descriptive claim is that significant portions of the Act and its attendant regulations are dormant, with no significant applications. The slightly speculative claim is that only a few provisions of the Act as applied were necessary (or even important) to the rise of broadband internet service to its current predominance—most significantly, provisions on pole attachments that allowed for deployment of broadband capacity and provisions allowing the FCC to allocate wireless frequencies, which gave the FCC power to create flexible licenses that allowed licensees to offer wireless broadband. Section 230 of the 1996 Act and the FCC’s net neutrality regulations may have played a role, but their centrality is (at best) uncertain. Provisions preempting state regulation and providing for federal non-regulation may well have played an important role, but that is not an argument for the importance of a particular regulation; it is an argument for the importance of the absence of regulation. This leads to my third claim. I think the arguments for overhauling the Act have become weaker, not stronger, over the last twenty-five years, because most of the Act’s elements are becoming less important as telecommunications moves toward the seemingly inevitable dominance of broadband internet service.

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I. INTRODUCTION

The Communications Act of 1934 and its amendments (the “Act”) cover a wide range of subjects, but their heartland is the regulation of traditional telephony, broadcasting, and multichannel video. Much of the regulation is aimed at limiting the ability of incumbent providers of telephony, broadcasting, and multichannel video services from utilizing their market power to harm competition.¹ The assumption underlying most of this regulation was that these services were sufficiently independent of each other that they merited their own regulatory regimes. Each service was separate, giving rise not only to concerns about market power within that service but also to a statutory scheme that is specific to each of the different services.

1. There is some irony in this regulation of market power, as government regulation often helped to create the market power in the first place. *See, e.g.*, STUART MINOR BENJAMIN & JAMES B. SPETA, INTERNET AND TELECOMMUNICATION LAW 222–24 (2018) (discussing the role of government policy in aiding the rise of Bell’s telephone monopoly in the early 20th century); James W. Olson & Lawrence J. Spiwak, *Can Short-Term Limits on Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance?*, 13 CARDOZO ARTS & ENT. L.J. 283, 287–88 (1995) (“[Cable’s] dominant position . . . is the result of government intervention in the form of cable franchises [which] started as nothing more than monopolies granted and protected by municipal authorities, and it was not until the 1992 Cable Act that local authorities were prohibited from unreasonably refusing to award competitive franchises to rivals . . .”). That said, insofar as some of these services were natural monopolies (telephone and cable television are the most obvious candidates), then the monopolies would have arisen anyway, and government regulation made sense. *See* BENJAMIN & SPETA, *supra*, at 7–12 (discussing natural monopolies).

The last major revision of the Act was the Telecommunications Act of 1996 (the “1996 Act”).² Within a few years of its passage, telephony, broadcasting, and multichannel video providers began calling for Congress to revise the Act. And yet here we are more than twenty-five years later, with no rewrite of the Act.

In this Article I will make three claims about the Act and regulations implementing it—one descriptive, one a bit speculative, and one normative. The descriptive claim is that significant portions of the Act and attendant regulations are zombies: the provisions still exist, but they are dormant, with no significant applications. There are four somewhat overlapping categories of dormant provisions and regulations: (1) those rendered difficult or impossible to implement because of courts’ application of First Amendment scrutiny; (2) those whose language (again, as interpreted by courts) is sufficiently constraining that there is little or no room for regulation; (3) those that the Federal Communications Commission (FCC) could have relied on but has chosen not to; and (4) those regulating activities that no longer occur. This last category is probably the biggest, and it relates to the most significant marketplace development in telecommunications services over the last twenty-five years—the rise of broadband internet service and the concomitant diminution in importance of what had been the central telecommunications services (telephony, broadcasting, and multichannel video).³

2. The 1996 Act amended the Act (thus the Act encompasses the 1996 Act), but it was an important piece of legislation in its own right, as it added many important provisions to the statutory scheme. See John C. Roberts, *The Sources of Statutory Meaning: An Archaeological Case Study of the 1996 Telecommunications Act*, 53 SMU L. REV. 143, 147–48 (2000) (noting that “[t]he 1996 Act amends the 1934 Act but is many times longer” and that the 1996 Act made dramatic changes to the statutory scheme).

3. Generally, “[t]he term broadband commonly refers to high-speed Internet access that is always on and faster than the traditional dial-up access.” *Types of Broadband Connections*, FCC (June 23, 2014), <https://www.fcc.gov/general/types-broadband-connections>. Over time, as networks have become faster and consumer expectations have changed, the FCC has increased the speeds that it treats as constituting “broadband.” In 1999, the FCC defined “broadband” as download/upload speeds for consumers of at least 200Kbps/200Kbps. The order explained that “[t]his rate is approximately four times faster than the Internet access received through a standard phone line at 56 kbps. We have initially chosen 200 kbps because it is enough to provide the most popular forms of broadband — to change web pages as fast as one can flip through the pages of a book and to transmit full-motion video.” *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, 14 FCC Rcd. 2398, 2406, ¶ 20 (1999). The FCC increased this definition in 2010 to 4Mbps/1Mbps, and again in 2015 to 25 Mbps/3Mbps. See 2015 Broadband Progress Report, 30 FCC Rcd. 1375, 1377, ¶ 3 (2015). Since then, many have argued that the baseline of 25Mbps/3Mbps is too slow. See, e.g., *Bennet, King, Portman, Manchin Urge Biden Administration to Create Modern, Unified Federal Broadband Standard*, MICHAEL BENNET U.S. SENATOR FOR COLO. (Mar. 4, 2021), <https://www.bennet.senate.gov/public/index.cfm/press-releases?id=2C769043-69ED->

My second, speculative claim is that most provisions of the Act are irrelevant to the ascendance of broadband internet service. What provisions of the Act (or regulations pursuant to the Act) played a major affirmative role in the ascent of broadband internet service? That is, what parts of the Act, as applied, were necessary (or even important) to the predominant role that broadband now plays in our world? The list is pretty short, I think: provisions on pole attachments that allow for deployment of broadband capacity;⁴ provisions allowing the FCC to allocate wireless frequencies, which gave the FCC power to create flexible licenses that allowed licensees to offer wireless broadband;⁵ perhaps § 230 of the 1996 Act;⁶ and perhaps net neutrality regulations.⁷ If we wanted to stretch, we might try to claim a small role for universal service subsidies on the theory that they helped the rollout in the United States. But any role would have to be small because until 2011 those subsidies were aimed at telephone service.⁸

Note what is not on the list of important provisions—almost all the vast panoply of statutory provisions regulating providers of telephony, broadcasting, and multichannel video. The central regulatory provisions of the Act that gave rise to major litigation—for example, the requirement that cable operators carry local broadcasters, the network elements that incumbent local exchange carriers were required to make available to competing carriers, and the prevention of cable operators or their affiliates from using unfair tactics to hurt competing satellite television providers—were of enormous significance for the particular services involved, but any affect they had on broadband

426B-B30A-57981A4BA333 (proposing minimum speeds of 100 Mbps for download and upload).

4. 47 U.S.C. § 224.

5. 47 U.S.C. §§ 301, 303.

6. 47 U.S.C. § 230.

7. See Pole Attachments Act, 47 U.S.C. § 224 (2002); Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002) (holding that the Pole Attachments Act allowed the FCC to set reasonable rates for cable companies' attachments not only for cable television but also for broadband internet access). The FCC has referred to net neutrality by various names over the years, including "open internet" and "utility style regulation," but they all refer to the same principle. See, e.g., Preserving the Open Internet, 25 FCC Rcd. 17,905, 17,907, ¶ 4 (2010) [hereinafter *Preserving the Open Internet (2010)*]; Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5603, ¶ 1 (2015) [hereinafter *Protecting and Promoting the Open Internet (2015)*]; Restoring Internet Freedom, 33 FCC Rcd. 311, 312, ¶ 1 (2018) [hereinafter *Restoring Internet Freedom (2018)*]. "Net neutrality" is the most common term, so this is what I will use in this Article.

8. See Connect America Fund, 26 FCC Rcd. 17,663, 17,668–69, ¶ 5 (2011) (reorienting universal service funding toward broadband services).

rollout was likely trivial.⁹ It is certainly possible that some of these provisions slightly slowed down or sped up the ascent of broadband internet service—maybe a different regulatory environment would have resulted in cable broadband being deployed a bit more quickly, or would have led to more municipal networks. But it is hard to see how the basic trajectory of broadband internet service’s rise to become the predominant platform would have been significantly affected by these statutory provisions. One can never prove what would have happened in an alternate universe, but, as I will discuss below, there is every reason to believe that the convergence on broadband internet service would have occurred in largely the same way if Congress had repealed the vast majority of the Act in 1996 instead of enacting the 1996 Act.

This leads to my third claim: although the Act seems increasingly outdated, the arguments for its overhauling have become weaker, not stronger, over time. As telephony, broadcasting, and multichannel video industries have receded in importance, so, too, have the specifics of their regulation. Although the regulation of these services is still important, not least to the many people and companies involved in their provision, they are becoming less important over time. There of course remain vibrant and impassioned arguments over aspects of the Act—net neutrality regulations and § 230 are probably the two most prominent examples. But resolving those questions does not require a rewrite of the Act. Indeed, each issue can be resolved with narrowly targeted legislation only a few pages long. Most of the Act’s elements, creaky as they are, are becoming less significant as telecommunications moves toward the seemingly inevitable dominance of broadband internet service.

9. See 47 U.S.C. §§ 534, 535 (requiring cable providers to carry local television broadcast stations); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (holding that the must-carry provisions did not violate the First Amendment); *infra* note 134 (on network elements); 47 U.S.C. § 548(b) (forbidding cable operators, their affiliated “satellite cable programming vendor[s],” and “satellite broadcast programming vendor[s]” from “engag[ing] in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.”); *Nat’l Cable & Telecomms. Ass’n v. FCC*, 567 F.3d 659, 671 (2009) (upholding FCC rulemaking, pursuant to 47 U.S.C. § 548(b), that prohibited exclusivity agreements between cable companies and apartment building owners). Effects on broadband rollout are possible, but very likely trivial. For instance, in theory these regulations of cable providers could have sufficiently reduced cable television operators’ income that they lacked the funds to upgrade their networks to provide broadband internet or to pass their cables by a significant number of homes. In reality, given that virtually every cable operator provides broadband internet and that by the early 2000s cable passed more than ninety-seven percent of homes, this seems farfetched.

II. AN ACT FILLED WITH ZOMBIES

Many of the Act's provisions have been enormously consequential, helping to shape (and reshape) markets and engendering of massive litigation along the way.¹⁰ But today many of those provisions are basically dormant—they no longer have any significant applications.

Some of the dormancy flows from judicial application of First Amendment constraints. For instance, the D.C. Circuit has applied First Amendment scrutiny to the regulation of cable television operators and programmers, with the result that not only have regulations been invalidated but also it would be difficult, if not impossible for a new regulation to pass muster.¹¹

Some of the dormancy flows from the language of the statutory provisions themselves (again, as interpreted by courts). The D.C. Circuit has been the leader here as well, interpreting some provisions in a manner that left the FCC with sufficiently little room that it never pursued them again (under Democratic and Republican administrations).¹²

Some of the dormancy is due to regulatory choices. Notably, under the Trump FCC, Title II of the Act might as well not have existed: the FCC concluded that broadband internet access service is not a telecommunications service and thus not covered by Title II,¹³ and the extensive and intricate regime created by Title II to regulate the massive market power of telecommunications providers was not a focus of significant regulation, litigation, or marketplace developments, because traditional voice telephony providers, far from having market power, are relatively small players who are diminishing in significance with each passing day.¹⁴

This relates to what is probably the biggest factor in the dormancy of many statutory provisions—the rise of broadband internet service and the

10. Notably, the interconnection and competition provisions of the 1996 Act (47 U.S.C. §§ 251–76) changed the telecommunications market and gave rise to seemingly endless litigation. *See infra* notes 134–137 and accompanying text.

11. For example, in *Time Warner Ent. Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001), the D.C. Circuit invalidated cable vertical concentration limits, and the FCC never again pursued them. *See infra* notes 21–23 and accompanying text.

12. For example, the D.C. Circuit twice rejected the FCC's implementation of statutorily mandated cable horizontal concentration limits. *See Time Warner Ent. Co. v. FCC*, 240 F.3d 1126, 1135 (D.C. Cir. 2001) (rejecting FCC's implementation of horizontal concentration limits); *Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009) (same); *infra* notes 24–26 and accompanying text.

13. *See Restoring Internet Freedom (2018)*, *supra* note 7, at 312, ¶ 2.

14. As of 2018, only 5.3% of U.S. households had a landline as their only form of phone. *See* Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2018*, NAT'L CTR. FOR HEALTH STATS. 5 tbl.1 (2018), <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201906.pdf>.

concomitant diminution in importance of traditional telecommunications services (telephony, broadcasting, and multichannel video).

First, as to First Amendment constraints: The recent history of the Supreme Court's First Amendment jurisprudence has been one of expansive application.¹⁵ A notable case in that regard is *Turner Broadcasting*, in which the Supreme Court held that:

Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," cable programmers and operators "see[k] to communicate messages on a wide variety of topics and in a wide variety of formats."¹⁶

Turner Broadcasting applies First Amendment scrutiny to all laws regulating the editing of substantive communications.¹⁷ Thus a broad range of telecommunications regulations are subject to intermediate scrutiny (for content-neutral regulations) or strict scrutiny (for content-based regulations). The treatment of § 553(b) of the Act, which prohibited local telephone companies from providing video programming directly to subscribers in their telephone service areas, is illustrative. Every court to consider a challenge to this provision not only applied First Amendment scrutiny but also invalidated the statute on First Amendment grounds.¹⁸ The D.C. Circuit has been

15. See Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1456–58 (2013).

16. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (alteration in original) (citation omitted) (quoting *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986)). As the internal quotation indicates, the Court put forward the same test in *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986).

17. See Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "the Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1696–99 (2011).

18. See *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993) (invalidating 47 U.S.C. § 533(b) on First Amendment grounds because it burdened more speech than necessary to serve the government's interests), *aff'd*, 42 F.3d 181 (4th Cir. 1994); *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash.) (same), *aff'd*, 48 F.3d 1092 (9th Cir. 1994); *Pacific Telesis Grp. v. United States*, 48 F. 3d 1106 (9th Cir. 1994) (same); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994) (same); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994) (same); *NYNEX Corp. v. U.S.*, No. 93-323-P-C (D. Me.) (Dec. 20, 1994) (same); *GTE South, Inc. v. United States*, No. 94-1588-A (E.D. Va. Jan. 13, 1995) (ditto); *U.S. Tel. Ass'n v. United States*, No. 1:94-CV-01961 (D.D.C. Feb. 14, 1995) (yep); *Sw. Bell Corp. v. United States*, No. 3:94-CV-0193-D (N.D. Tex. Mar. 27, 1995) (lo mismo); *S. New England Tel. Co. v. United States*, No. 3:94-CV-80 (D. Conn. Apr. 27, 1995) (you get the point). The Supreme Court granted certiorari and heard oral argument in the United States' challenge to the holding in the case involving Chesapeake & Potomac Telephone but the case was mooted by the passage of (wait for it...) the 1996 Act.

particularly aggressive in this regard, treating all regulation of cable operators as raising First Amendment issues, including regulations with no obvious connection to cable operators' exercise of editorial discretion, such as regulation of rates that cable companies could charge subscribers.¹⁹ This means that any form of multichannel video regulation is subject to rigorous scrutiny and may well be invalidated on those grounds.²⁰ The prospect of invalidation makes formulating a regulation that much less attractive in the first place. One example arises out of a 1992 amendment to the Act directing the FCC to impose vertical integration limits on cable operators.²¹ The FCC promulgated regulations limiting cable operators to carrying no more than forty percent of channels in which they had an attributable interest.²² The D.C. Circuit invalidated these rules on First Amendment grounds, finding that the FCC had failed to adequately justify its choice of forty percent.²³ And there the matter has rested. In the twenty years since, through many different FCC chairs from both political parties, the FCC has never promulgated new vertical integration limits under this provision. The hurdles posed by intermediate scrutiny have apparently been sufficient to dissuade the Commission from investing the time and energy to promulgate new regulations. The provision directing the FCC to impose vertical integration limits on cable operators remains in the U.S. Code, but it is dormant, with no application.

Turning to the second category of reasons for dormancy, courts (again led by the D.C. Circuit) have reached constraining results without relying on the First Amendment and instead focusing on the language of the relevant provision of the Act. For example, the 1992 legislation that mandated vertical cable integration limits also directed the FCC to promulgate horizontal

United States v. Chesapeake & Potomac Tel. Co., 516 U.S. 415 (1996) (remanding for consideration of mootness in light of the 1996 Act).

19. See *Time Warner Ent. Co. v. FCC*, 56 F.3d 151, 186 (D.C. Cir. 1995) (“[C]able rate regulations are subject to intermediate scrutiny under the First Amendment.”).

20. That is, intermediate scrutiny (for content-neutral regulations) or strict scrutiny (for content-based regulations).

21. See § 11(c)(2)(B) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, codified at 47 U.S.C. § 533(f)(1)(B) (providing that the FCC shall conduct a proceeding “to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest”).

22. 47 C.F.R. § 76.504(a) (“[N]o cable operator shall devote more than 40 percent of its activated channels to the carriage of national video programming services owned by the cable operator or in which the cable operator has an attributable interest.”).

23. See *Time Warner Ent. Co. v. FCC*, 240 F.3d 1126, 1139 (D.C. Cir. 2001) (“We find that the FCC has failed to justify its vertical limit as not burdening substantially more speech than necessary.”).

concentration limits.²⁴ In 2001 the D.C. Circuit rejected the FCC's implementation of horizontal limits under this statutory provision as exceeding the authority that the statute conferred on the FCC.²⁵ And in 2009 the D.C. Circuit rejected the FCC's second attempt at such horizontal limits on the grounds that the FCC had failed to show that its limit would serve the statutory goals of competition and diversity.²⁶ In response, as with the vertical integration limits, the FCC gave up: it has not promulgated new regulations under this provision.

We can argue about whether these cases were rightly decided. Perhaps these cases represent judicial overreach, with courts unreasonably demanding the impossible. Perhaps the cases reflect a congressional desire for the FCC to implement regulations that the FCC was not going to be able to justify in light of the relevant level of judicial scrutiny and the state of the market, such that the invalidation of the FCC's resulting efforts were unsurprising and even inevitable. What is clear, though, is that the impact of these cases has been to deprive the relevant statutory provisions of any meaningful application.

Then we get to the third reason for dormancy, involving regulatory choices. The best example arises from the centerpiece of the Act for most of the 20th century: Title II, the section of the Act that regulates common carriers. Under Title II, common carriers are subject to a range of regulations – of the rates that these common carriers charge, the services they offer, their obligations to serve customers, etc.²⁷ The main common carriers under Title

24. See § 11(c)(2)(A) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, codified at 47 U.S.C. § 533(f)(1)(A) (providing that the FCC shall conduct a proceeding “to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest”).

25. See *Time Warner Ent. Co. v. FCC*, 240 F.3d 1126, 1135 (“[W]e conclude that Congress has not given the Commission authority to impose, solely on the basis of the ‘diversity’ precept, a limit that does more than guarantee a programmer two possible outlets (each of them a market adequate for viability).”). The court found that the horizontal limits were subject to First Amendment scrutiny, but it did not reach the constitutional issue because it could decide the case on statutory grounds. See *id.* at 1129 (“The horizontal limit interferes with petitioners’ speech rights by restricting the number of viewers to whom they can speak.”).

26. See *Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009) (“In sum, the Commission has failed to demonstrate that allowing a cable operator to serve more than thirty percent of all cable subscribers would threaten to reduce either competition or diversity in programming.”).

27. See, e.g., 47 U.S.C. §§ 201, 203, 205 (on rate regulation); 47 U.S.C. §§ 214, 225(d) (on services common carriers offer); 47 U.S.C. §§ 214, 254 (on the obligations of common carriers to serve customers); Peter K. Pitsch & Arthur W. Bresnahan, *Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative*, 48 FED. COMM’NS L.J. 447, 448 (1996) (“The Federal Communications Commission has traditionally regulated telephone services under Title II of the Communications Act of 1934, requiring, among other things,

II have been local exchange providers (providers of landline local telephone service through a local loop).²⁸ They provide telecommunications service under Title II, and Title II treats such service as common carriage.²⁹

But there was an alternative: some companies wanted to provide “enhanced” services beyond “basic” telephone service.³⁰ This distinction came to be embodied in the Act as the difference between “information” and “telecommunications” services.³¹ The latter were subject to pervasive regulation under Title II, and the former were covered by Title I and subject to very little regulation. To be in Title I was to be free from pervasive regulation—or any significant regulation at all. At the outset, telecommunications services were the core, and information services were the periphery. That began to change in the late 20th century, but Title II was still essential because of its application to local telephony.

The big flashpoint in the 21st century has been the application of the distinction between telecommunications and information services to broadband internet access providers’ provision of service to their customers. As I discuss below, initially the FCC distinguished between internet access service provided by telephone companies (via DSL) and internet access service

that telephone companies as ‘common carriers’ make their services available to the general public at reasonable rates.”).

28. See FCC, STATISTICS OF COMMUNICATIONS COMMON CARRIERS, (2006/2007 eds. 2010) (presenting statistics on the prevalence of local exchange carriers among communications common carriers).

29. See 47 U.S.C. § 153(50) (“The term ‘telecommunications’ means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”); 47 U.S.C. § 153(51) (“The term ‘telecommunications carrier’ means any provider of telecommunications services A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.”); 47 U.S.C. § 153(53) (“The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”).

30. See Amendment of Section 64.702 of the Commission’s Rules and Regulations (*Computer II*), 77 F.C.C.2d 384, 417–423, ¶¶ 86–101 (1980) (distinguishing “basic” service (most notably, telephone service) from “enhanced” service (computer services offered over telephone lines)).

31. See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Serv., 545 U.S. 967, 977 (2005) (“The definitions of the terms ‘telecommunications service’ and ‘information service’ established by the 1996 Act are similar to the *Computer II* basic- and enhanced-service classifications.”); Fed.-State Joint Bd. On Universal Serv., 13 FCC Rcd. 11,501, 11,511, ¶ 21 (1998) (“[W]e find that Congress intended the categories of ‘telecommunications service’ and ‘information service’ to parallel the definitions of ‘basic service’ and ‘enhanced service’ developed in our *Computer II* proceeding.”).

provided by cable providers (via cable modem).³² The FCC moved away from Title II in the early 2000s even as it assumed that it still had the ability to require some forms of neutrality under Title I. After D.C. Circuit decisions held that the Commission had little ability to impose antidiscrimination and anti-blocking rules under Title I,³³ the Commission in 2015 reclassified broadband internet access as a telecommunications service under Title II.³⁴ A little less than three years later (under a new presidential administration), the Commission rejected that Order and reclassified broadband internet access as an information service under Title I.³⁵

What is striking is that Title II has been moved not merely from the center to the periphery, but from the center to the wilderness: it is not clear that Title II has any applications that more than a few landline telephone diehards really care about anymore. One of the arguments that net neutrality supporters made against the repeal of the 2015 net neutrality regulations and the reclassification of internet access as an information service was that the logic of such a decision would apply equally to standard telephone service.³⁶ In response, the 2018 net neutrality order stated that “We reject assertions that the analysis we adopt today would *necessarily* mean that standard telephone service is likewise an information service.”³⁷ The Commission did not, and was not asked to, specifically conclude that standard telephone service must be treated as a telecommunications service, and I am not expecting the Commission to revisit that question, for a simple reason: the question is of little consequence.

The fourth and perhaps the biggest reason for the dormancy of so many provisions is that many of the underlying activities no longer occur in any meaningful way. This is the central marketplace development in telecommunications over the last twenty-five years. Consider the most

32. See Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd. 24,012, 24,028–31, ¶¶ 34–37 (1998) [hereinafter *Advanced Telecommunications Capability*] (classifying DSL service as a telecommunications service under Title II); Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802, ¶ 7 (2002) [hereinafter *2002 Cable Modem Order*] (concluding that cable is an information service under Title I and not a telecommunications service under Title II).

33. See *Comcast Corp. v. FCC*, 600 F.3d 642, 660 (D.C. Cir. 2010) (holding that the FCC did not have the ancillary authority to regulate network management policies for companies that were not common carriers); *Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014) (vacating the antidiscrimination and anti-blocking rules).

34. *Protecting and Promoting the Open Internet (2015)*, *supra* note 7, at 5610, ¶ 29.

35. *Restoring Internet Freedom (2018)*, *supra* note 7, at 312, ¶ 2.

36. See *id.* at 346, ¶ 56 n.211 (quoting comments submitted to the FCC making this argument).

37. *Id.* at 346, ¶ 56 (emphasis added).

prominent (and lobbied over) provisions of the 1996 Act, which limited the power of incumbent local exchange telephone carriers and attempted to jumpstart meaningful competition in the local loop by assisting competing local exchange carriers.³⁸ Implementation of these provisions was the biggest telecommunications issue of the late 1990s. It gave rise to multiple massive lawsuits that seemed hugely important at the time.³⁹ But given the ascent of the internet and the rapid diminution of the importance of the local telephone service, these statutory provisions don't matter much anymore and have faded into the background.⁴⁰ The provisions are still on the books, but they have very little application.

Some of this dormancy might change. Most obviously, an FCC with a majority of Democratic commissioners will likely reclassify broadband internet access service as at least in part a telecommunications service under Title II, and Title II will likely no longer be dormant.⁴¹ But other forms of dormancy seem permanent. Notably, it is hard to imagine the circumstances under which the provisions governing the terms under which incumbent local exchange telephone carriers share their network elements with competitive local exchange carriers will once again be significant, because it is hard to imagine the realistic market circumstances in which any such transactions would occur.

III. THE FEW PROVISIONS NECESSARY, OR EVEN IMPORTANT, TO THE ASCENDANCE OF BROADBAND INTERNET SERVICE

The discussion above highlights that many provisions have become dormant, and that some of this dormancy flows from market developments. I

38. See 47 U.S.C. §§ 251–76.

39. See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467 (2002).

40. See FCC, LOCAL TELEPHONE COMPETITION: STATUS AS OF DECEMBER 31, 2013 2 fig.1 (2014), <https://docs.fcc.gov/public/attachments/DOC-329975A1.pdf> (finding that retail switched access lines (traditional wireline local telephone service) made up less than twenty percent of the market share by the end of 2013 and that such lines declined at ten percent a year for the previous three years).

41. Actually, a reclassification by the Biden FCC would be a re-re-re-reclassification for DSL. In 2005, DSL (which had been classified as a telecommunications service under Title II) was reclassified as an information service under Title I. In 2015, it was re-reclassified back to Title II as a telecommunications service. In 2018, it was re-re-reclassified back to Title I as an information service. So the next turn of the wheel (should it occur) would be a re-re-re-reclassification. See *infra* notes 95–113 and accompanying text (discussing the orders noted above). It is also possible that the Supreme Court will narrow *Turner Broadcasting* such that regulations like the vertical integration rules will not be subject to First Amendment scrutiny, but there is no reason to believe that the Court is inclined to do so.

now want to turn to a related, but much broader, argument: most provisions of the Act (and regulations pursuant to those provisions) have been bystanders to the broadband internet becoming the predominant service in the United States today. Provisions governing broadcasting, telephony, and multichannel video have been quite important to the development of those services. And the provisions helped lay the groundwork for the ascent of broadband internet service, insofar as they allowed for the buildout of networks (mainly cable television) that could be configured to allow for broadband internet access. But most provisions of the Act were basically irrelevant to the transformation of the internet in the years since the 1996 Act from one player among many to the predominant role it has today.

Internet access service for consumers began as an add-on service mainly provided by the companies providing local exchange telephony and cable television.⁴² The initial deployment of internet access thus depended on the existing telephone and cable television networks. And many different laws were relevant to the deployment of telephone and cable television wires. Some of those laws were completely separate from the Act. Notably, local franchising authorities were key regulatory authorities with respect to cable television, and they often pushed for or required widespread availability of cable television in their communities.⁴³

42. See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report, 12 FCC Rcd. 4358, 4416, ¶ 108 (1997) (“[M]any MVPDs [multichannel video program distributors] are beginning to combine their video service offerings with other services (e.g., local or long distance telephony, Internet access, cellular service, paging, music, etc.) in packages designed to win customers. Cable system operators and other MVPDs have shown considerable interest in deploying modems that permit subscribers to receive high-speed access to the Internet . . .”).

43. See, e.g., Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to Community Antenna Television System and Inquiry Into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, 36 F.C.C.2d 143, 207 (1972) (concluding that it would not attempt to replace the existing regime under which local franchising authorities regulated cable licensing and that “conventional licensing [of cable franchises] would place an unmanageable burden on the Commission”); BENJAMIN & SPETA, *supra* note 1, at 334 (noting that “local governments for a long time insisted that cable providers apply to them for permission to be a local ‘cable franchisee’ and local governments would often extract costly concessions from cable providers in exchange for granting those franchise rights”); George S. Ford, Thomas Koutsky & Lawrence J. Spiwak, *The Economics of Build-Out Rules in Cable Television*, 28 HASTINGS COMM. & ENT L.J. 207, 208 (2006) (“In order to provide multichannel delivered video programming, a new entrant must first obtain a franchise from the local and county governments in every market it wishes to serve. Very often, the franchise contract requires that the new entrant agree to geographic build-out requirements as a pre-condition to receiving a franchise . . .”).

But the Act as implemented also played a role in the deployment of telephone and cable television wires. When early cable providers wanted to provide cable service in a given locality, they not only had to reach agreements with local franchising authorities but also had to find a way to get their cables to users. Telephone and electric utility poles were “virtually the only practical physical medium for the installation of television cables.”⁴⁴ In the 1970s, cable companies presented evidence to Congress that telephone and electric companies were charging monopoly rents, and Congress responded in 1978 by enacting the Pole Attachments Act (codified as part of Title II of the Act).⁴⁵ The Pole Attachments Act directed the FCC to “regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.”⁴⁶ As the Supreme Court noted, “nothing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.”⁴⁷ But pursuant to the Pole Attachments Act the FCC did regulate the prices that pole owners could charge if they reached an agreement with cable operators on pole access, and this seems to have helped cable operators gain access to customers at reasonable pole-payment rates.⁴⁸

The Act also contained universal service provisions that pushed local exchange carriers to provide telephone service widely.⁴⁹ Admittedly, local

44. *FCC v. Fla. Power Corp.*, 480 U.S. 245, 247 (1987).

45. *See* Pole Attachments Act, 92 Stat. 35 (1978) (codified as amended at 47 U.S.C. § 224); S. Rep. No. 580, at 13 (1977) (“It has been alleged by representatives of the cable television industry that some utilities have abused their superior bargaining position by demanding exorbitant rental fees and other unfair terms in return for the right to lease pole space.”); Implementation of Section 703(e) of the Telecommunications Act of 1996, 16 FCC Rcd. 12,103, 12,109, ¶ 7 (2001) (stating that, in the Pole Attachments Act, “Congress sought to constrain the ability of utilities to extract monopoly profits from cable television system operators in need of pole, duct, conduit or right-of-way space for pole attachments.”).

46. 47 U.S.C. § 224(b).

47. *FCC v. Fla. Power Corp.*, 480 U.S. 245, 251 (1987); *see also id.* at 251–52 (“The Act authorizes the FCC . . . to review the rents charged by public utility landlords who have voluntarily entered into leases with cable company tenants renting space on utility poles.”). The absence of mandatory access was central to the Court’s reasoning, as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), had held mandatory access to be a per se taking. The Court found *Loretto* inapplicable because the Pole Attachments Act did not require access. *Fla. Power Corp.*, 480 U.S. at 252–53 (“The line which separates [this case] from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license.”).

48. *See* Regulating Cable Television Pole Attachments, 43 Fed. Reg. 36,086, 36,092, ¶ 42 (1978) (offering guidance on what constitutes a “just and reasonable” rate).

49. *See* 47 U.S.C. § 254(d) (“Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to

exchange carriers and cable operators had their own profit incentives to make their services available to virtually everyone in a given community, so it is possible that these networks would have been developed just as widely in the absence of any push from the government. But it seems reasonable to posit that the governmental push for universal coverage expanded the rollout of these services beyond what the companies would have done absent that push. In any event, the deployment numbers were fairly impressive. As of 1992, before the World Wide Web was in general usage, more than ninety-five percent of Americans had local telephone service⁵⁰ and cable television was available to more than ninety-six percent of houses with televisions.⁵¹

So the Act likely played a significant role in creating some of the preconditions for the initial rollout of internet access. But what about after that? Which provisions of the Act were necessary (or even important) to the rise of the internet from 1993 (when websites for general usage started becoming available) or 1996 (when the 1996 Act was enacted) to its current predominance? Not only is the list short, but it doesn't include the provisions that were the subject of most of the major regulatory and litigation battles of the last twenty-five years, most notably the telephony provisions that were the heart of the 1996 Act.⁵² Those litigation battles attracted most of the attention, and they were important to the development of the services involved. But the litigation and the underlying provisions were fairly inconsequential with respect to the central telecommunications development of the last twenty-five years—the rise of the internet to predominance.

Which provisions (or implementing regulations) were necessary, or at least important? That question, in turn, raises the question of what developments were necessary, or at least important, to the internet's move to predominance over the last twenty-five years. Perhaps the most obvious is the availability of broadband access, and particularly the ability to easily stream video over the internet. Video is the dominant mode of entertainment in American homes.⁵³ In a world of narrowband internet, cable and satellite television had a decisive

the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.”)

50. FEDERAL-STATE JOINT BOARD, MONITORING REPORT 22 tbl.1.2 (1993).

51. Annual Assessment on the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report, 16 FCC Rcd. 6005, app. at 6101 tbl. B-1 (2001) [hereinafter *Seventh Annual Report*].

52. See *infra* notes 134–137 and accompanying text.

53. See *American Time Use Survey—2020 Results*, BUREAU OF LABOR STATISTICS (2021), <https://www.bls.gov/news.release/atus.nr0.htm> (“Watching TV was the leisure activity that occupied the most time in 2020 (3.1 hours per day), up 19 minutes per day compared with 2019.”).

advantage. As of 2000, for example, cable and satellite television had a combined market share of more than eighty-three percent of households in large part because they offered streaming video and internet access did not.⁵⁴ As broadband internet access became more available, broadband internet became more important.⁵⁵ I thus turn next to the question of which provisions of the Act were central to the availability of broadband internet access.

A. WAS THE ACT CENTRAL TO DEVELOPING AND ROLLING OUT CAPACITY?

Many developments contributed to the availability of internet access at broadband speeds. Protocols, software, and standards played a major role in attaining higher speeds, but those developments were not led by the FCC and the Act was basically irrelevant to them. To pick a notable example, the development and rollout of DOCSIS 3.0 significantly increased cable modems' data rates and thereby had a dramatic impact, given the centrality of cable modems in providing broadband access.⁵⁶ CableLabs and a range of (mainly U.S.) cable operators privately developed the DOCSIS 3.0 standard. The main role that governments played in developing the standard was to bless it via the International Telecommunications Union (ITU), a United Nations agency that includes national governments, businesses, universities, and regional

54. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report, 16 FCC Rcd. 6005, 6054, ¶107, 6110 tbl. C-1 (2001) (“[D]espite the evidence of increased interest in Internet video deployment and use, the medium is still not seen as a direct competitor to traditional video services. Television-quality Internet video service requires a high-speed broadband connection of about 300 kbps or higher, which most current broadband providers cannot yet guarantee. In addition, deployment of broadband is not yet ubiquitous.”).

55. Compare Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans, 14 FCC Rcd. 2398, 2400–01, ¶¶ 2–3, 2442, ¶ 86 (1999) (noting the increased demand for broadband access and the potential for broadband to provide new and improved services to consumers when only an estimated 30 million homes had a narrowband internet subscription in 1998), with 2015 Broadband Progress Report, 30 FCC Rcd. 1375, 1377, ¶ 2, 1417, ¶ 79 (2015) (stating that eighty three percent of Americans had broadband access as of 2013 and that “today, Americans turn to broadband Internet access service for every facet of daily life”), and Connect America Fund, 26 FCC Rcd. 17,663, 17,667–68, ¶¶ 3–4 (2011) (suggesting that broadband internet access has had huge impacts, including that “broadband ha[s] become crucial to our nation’s economic growth, global competitiveness, and civic life.”).

56. See Eighth Broadband Progress Report, 27 FCC Rcd. 10,342, 10,385, ¶ 92 (2012) (discussing the role of DOCSIS 3.0 in increasing cable modem speeds); Series J: Cable Networks and Transmission Of Television, Sound Programme And Other Multimedia Signals, ITU-T Rec. J.291, 14 (/Nov. 2006) (“The near-term need to increase bandwidth, especially on the downstream, can be achieved via the implementation of DOCSIS 3.0 channel bonding.”); DOCSIS stands for Data Over Cable Service Interface Specification.

organizations.⁵⁷ The United States is a member of the ITU,⁵⁸ but its role as one of more than a thousand ITU members in the approval and rollout of DOCSIS 3.0 was small. Crediting the Act or the regulations implementing it for DOCSIS 3.0 would be a bit absurd. The same is true for the global domain name system (DNS) and the development of top-level domains. The Internet Corporation for Assigned Names and Numbers (ICANN) has had responsibility for both since 1998.⁵⁹ Although the Department of Commerce played a significant role in setting up ICANN,⁶⁰ the FCC and the Act were bystanders.

By contrast, the Act (and the FCC) did seem to be important to a different precondition for broadband access—the deployment of the physical capacity (bandwidth and electromagnetic frequencies) that supported broadband to the home. Providing higher speeds to homes was a huge problem to overcome.⁶¹ The most obvious possible providers were the companies that already had wires to homes—cable and telephone providers. But the last mile problem, as it was known, was a major hurdle to the development of broadband capacity.⁶² By the 1990s networks had laid enough wires to provide broadband access between cities and to nodes within those cities. But getting that access to individual homes required massive investment.⁶³ Cable providers and wireless

57. *About International Telecommunication Union (ITU)*, INT'L TELECOMM. UNION, <https://www.itu.int/en/about/Pages/default.aspx> (last visited Feb. 23, 2021) (“ITU’s global membership includes 193 Member States as well as some 900 companies, universities, and international and regional organizations.”).

58. *Member States*, INT'L TELECOMM. UNION, <https://www.itu.int/en/myitu/Membership/ITU-Members/Member-States> (last visited Feb. 23, 2021).

59. *What Does ICANN Do?*, INTERNET CORP. ASSIGNED NAMES NUMBERS, <https://www.icann.org/resources/pages/what-2012-02-25-en> (last visited Oct. 9, 2022) (describing ICANN’s role in managing the DNS and top-level domains).

60. *See Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers*, <https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en> (last visited Oct. 9, 2022) (agreement under which the Department of Commerce provided for ICANN management of the domain name system).

61. James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. REG. 39, 41 (2000) (“Traditional copper telephone lines . . . simply do not have enough transmission capacity . . . to deliver [high speed internet] services to individual consumers [Congress] had no idea how the limited capacity (or “narrowband”) local telephone lines could be upgraded to, or replaced with, systems that have greater capacity (“broadband” systems).”).

62. *Id.* at 45–48 (describing the last mile problem wherein the “last mile” of the telephone network causes a bottleneck because existing infrastructure can only support low speeds for data transmission based on the bandwidth of voice communications).

63. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, 14 FCC Rcd. 2398, 2414, ¶ 34 (1999) (“Before broadband

carriers were prepared to invest in higher capacity to homes, but there were elements that were beyond their control. This brings us back to pole attachments.

In 1991, the FCC interpreted the Pole Attachments Act to apply to pole attachments for non-video services, such that the regulated rate for cable television service also applied to attachments enabling internet access service, and the D.C. Circuit upheld the FCC's interpretation.⁶⁴ Congress effectively ratified this interpretation in the 1996 Act (which amended the Pole Attachments Act). In response to the 1996 Act, the FCC in 1998 not only reaffirmed its interpretation with respect to cable companies' internet service but also concluded that the Pole Attachments Act applied to attachments by wireless providers.⁶⁵ Thus the FCC prevented pole owners from charging unreasonable rates for wired and wireless access to their poles (and the Supreme Court upheld the FCC in *NCTA v. Gulf Power Company*).⁶⁶

It is impossible to know what would have happened in the absence of the Pole Attachments Act and its implementation, but there is reason to believe that the utility companies would have exercised their monopoly power to extract monopoly rents in the absence of that act, as they had before it was enacted in 1978.⁶⁷ The implementation of the Pole Attachments Act, in other words, seems to have made a significant difference in enabling (or, at least, speeding up) the rollout of wired and wireless broadband access.

capability can be made available to customers, communications companies must modify existing facilities or construct new ones, both of which can require substantial investment.”).

64. See *Heritage Cablevision Assocs. Of Dallas, L.P., & Tex. Cable TV Ass'n, Inc. Complainants*, 6 FCC Rcd. 7099, 7106, ¶ 32 (1991) (“TU Electric [the utility] lawfully may not charge TCI [the cable company] different pole attachment rates depending on the type of service being provided over the equipment attached to its poles, and we find that TU Electric’s imposition of a separate charge for so-called ‘non-cable television pole attachments’ is unjust and unreasonable under [the Pole Attachments Act].”); *Tex. Utils. Elec. Co. v. FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993) (finding the Pole Attachments Act ambiguous as to its application to attachments for nonvideo communications, and deferring to the FCC’s interpretation under *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

65. See *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, 13 FCC Rcd. 6777, 6798 (1998).

66. See *Nat’l Cable & Telecomm. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 342 (2002) (“The attachments at issue in this suit—ones which provide commingled cable and Internet service and ones which provide wireless telecommunications—fall within the heartland of the [Pole Attachments] Act. The agency’s decision, therefore, to assert jurisdiction over these attachments is reasonable and entitled to our deference.”).

67. See, e.g., S. Rep. No. 580, at 13 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109 (“[P]ublic utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents . . . in the form of unreasonably high pole attachment rates.”).

The Pole Attachments Act was not the only significant element of the Act that helped enable the rise of wireless broadband. Private use of the electromagnetic spectrum, which is controlled by the FCC, affected the rise of wireless broadband as well.⁶⁸ For companies to offer wireless broadband services, the FCC needs to allocate frequencies sufficient to allow for broadband service and to allocate those frequencies for services that encompass wireless broadband.⁶⁹ Historically, the FCC had allocated spectrum for specific uses (such as broadcast television), and with licenses too narrow for broadband.⁷⁰ Beginning in 1992, however, the Commission moved toward flexible licenses, with allocations (and assignments of licenses within those allocations) broad enough to allow for broadband services.⁷¹

By the turn of the century, flexible licenses and large allocations became the norm, with the result that carriers could begin to offer wireless broadband services. As with the Pole Attachments Act, this seems to have been quite

68. See 47 U.S.C. § 301 (providing that the federal government controls the spectrum and that the government will permit “the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority”). Congress could have kept the FCC out of spectrum management and instead relied entirely on private ordering subject to common law adjudication, or, after having initially provided for FCC control, at some later point removed FCC control and left future developments to private ordering. See, e.g., Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990) (arguing that common law adjudication would have been preferable to FCC control); PETER HUBER, *LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM* (1997) (the title summarizes the book). Indeed, Congress could have refrained from enacting any part of the Act (or, at some point after enacting it, repealed the Act in its entirety) and left everything to some form of private ordering. I cannot rule out the possibility that the absence of any government role over spectrum (or all of telecommunications) would have produced a rise of the internet similar to what has in fact occurred. The ramifications of the nonexistence of the entire Act (or the provisions giving the FCC control over spectrum) are not only particularly speculative but also beyond the scope of this Article’s focus on identifying which of the Act’s provisions were central to the rise of the internet, given that the Act in fact existed. A counterfactual world without the Act is an interesting one, but not one that I am addressing here.

69. See Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 Duke L.J. 1, 8 (2002) (describing how the FCC parcels use of the spectrum).

70. See, e.g., Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, Notice of Proposed Rulemaking, 7 FCC Rcd. 1542, 1542–43, ¶¶ 2–6 (1992) (describing previous allocations of spectrum for specific uses like cellular radio and broadcast television, and highlighting a need to allocate more and reallocate existing spectrum to support new and emerging technologies like broadband wireless telephony); Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd. 6886 (1992) [hereinafter *Redevelopment of Spectrum*] (allocating, for the first time, spectrum sufficient to support broadband wireless telephony).

71. See *Redevelopment of Spectrum*, *supra* note 70.

significant. Although decades later wireless broadband is still not an equal competitor to wired broadband, wireless broadband does offer a viable alternative to wired broadband in many places. Flexible licenses covering large swaths of spectrum enabled that competition. And the availability of wireless broadband (even if only as a complement rather than a substitute for wired broadband) made internet broadband more attractive and thus aided the rise of internet broadband access to its current predominant position.

What about the FCC's universal service regime? Was it necessary, or even important, to the ascent of broadband internet service to its current predominance? It's hard to see how the answer is yes. From its inception until 2011, the universal service regime subsidized narrowband telephone services for those who might have difficulty paying the full cost.⁷² Only in late 2011 did the FCC broaden the universal service regime to include broadband services.⁷³ But by 2011, broadband was already well on its way toward its current predominance.⁷⁴ And the post-2011 regime was not exactly transformational: the funding was only enough to cover a relatively small percentage of homes. Universal service programs likely produced a modest increase in the percentage of rural and low-income households with broadband access, and in that way may have sped up a bit the time it took for broadband to become predominant.⁷⁵ But there is no basis for claiming anything beyond that.

72. See Milton Mueller, *Telecommunications Access in the Age of Electronic Commerce: Toward A Third-Generation Universal Service Policy*, 49 FED. COMM. L.J. 655, 655–58 (1997) (describing the history of the FCC's Universal Service Regime); BENJAMIN & SPETA, *supra* note 1, at 665–74.

73. See Connect America Fund, 26 FCC Rcd. 17,663, 17,668–69, ¶ 5 (2011) (reorienting universal service funding toward broadband services).

74. See Eighth Broadband Progress Report, 27 FCC Rcd. 10,342, 10,374, ¶ 60, 10387 tbl.17 (2012) (finding that, as of 2011, more than ninety-four percent of Americans had access to fixed broadband, and sixty-four percent of Americans had adopted fixed broadband).

75. See *Connect America Fund Broadband Map*, UNIVERSAL SERV. ADMIN. CO., <https://data.usac.org/publicreports/caf-map/> (last visited Oct. 27, 2021) (showing a total of 13.6 million locations receiving disbursements that provided support for broadband access through 2020). In addition, the Lifeline Program for Low-Income Consumers provides a modest subsidy to low-income consumers. It was not until 2016 when the FCC moved to “transition from primarily supporting voice services to targeting support at modern broadband services” in the Lifeline program. *Lifeline & Link Up Reform & Modernization*, 31 FCC Rcd. 3962, 3964, ¶ 6 (2016). Since 2016, the program has had up to 10.7 million annual participants who received subsidies and subscribed to broadband services. *Lifeline Subscribers by State or Jurisdiction January 2017 Through June 2017*, UNIVERSAL SERV. ADMIN. CO., <https://www.usac.org/about/reports-orders/fcc-filings/> (last visited Oct. 28, 2021); *Program Data, Lifeline Subscribership by County by Service Type*, UNIVERSAL SERV. ADMIN. CO., <https://www.usac.org/lifeline/resources/program-data/> (last visited Oct. 29, 2021) (showing the different types of services that participants subscribe to, including broadband, bundled broadband, and voice-only services).

B. DID THE ACT DRIVE CONTENT?

I haven't yet mentioned the content that was transmitted over the internet. Did content drive the success of the internet and thus, presumably, broadband internet service? If so, were some provisions of the Act necessary, or at least important, to that content? The answer to the first question is unclear and would occupy an article (or book). But we can have more confidence about the second question: with the possible exception of § 230, the Act played no meaningful role in aiding the ascent of the internet by increasing the quality or quantity of the content transmitted over the internet. Congress's main attempts at direct regulation of internet content involved limits on internet indecency, and the courts largely invalidated such legislation.⁷⁶ There was no Fairness Doctrine or Personal Attack and Political Editorial Rules for the internet.⁷⁷ There was no equivalent of the program access rules or the must-carry regime.⁷⁸ There were no compulsory copyright licenses for internet intermediaries.⁷⁹

The one provision of the Act that plausibly could have been essential to the rise of the internet to predominance is § 230 (a provision on which books could be and have been written).⁸⁰ Although most everything about § 230 is contested territory, it is reasonable to posit that the internet (and in particular content hosts like social media platforms and other intermediaries like internet service providers) would look quite different without § 230, through some combination of (1) greater restraints on individuals' ability to post materials that could expose intermediaries to liability (e.g., potentially defamatory material) and (2) much greater investment on the part of the intermediaries in content moderators whose job it was to remove user-generated content that could expose the intermediaries to liability.⁸¹ The first possibility would have

76. *See* *Reno v. ACLU*, 521 U.S. 844 (1997) (invalidating key provisions of the Communications Decency Act on First Amendment grounds).

77. *See* Report on Editorializing Broadcast Licensees, 13 F.C.C. 1246 (1949) (Fairness Doctrine); Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack of Where a Station Editorializes as to Political Candidates, 8 F.C.C.2d. 721 (1967) (Personal Attack and Political Editorial Rules).

78. *See* 47 U.S.C. § 548(c) (program access provisions); Revision of the Commission's Program Access Rules, 27 FCC Rcd. 12,605 (2012); 47 U.S.C. §§ 534, 535 (must carry provisions); *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (upholding the constitutionality of the must carry rules).

79. 17 U.S.C. § 111 (establishes compulsory licenses in favor of cable operators who want to retransmit copyrighted broadcast content).

80. *See, e.g.*, JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019).

81. *See, e.g.*, Derek E. Bambauer, *What does the day after Section 230 reform look like?*, BROOKINGS (Jan. 22, 2021), <https://www.brookings.edu/techstream/what-does-the-day->

reduced the freewheeling nature of content hosts like social media platforms, and the second would have imposed significant costs that might have reduced the growth of social media, internet service providers, and other intermediaries. Thus it may be that the internet in general and social media in particular would have achieved less explosive growth in the absence of § 230.

There are two obvious complications with this narrative: the existence of many services unaffected by § 230 and the experiences of other countries. As to the former: perhaps an internet with tamer user-generated content would be no less predominant. Many people value user-generated content, and it was likely what pulled many of the first users onto the internet, but it is not clear that user-generated content was necessary for the internet to attain predominance. As noted above, the availability of high-quality streaming video created by production companies has been a key ingredient to the internet's rise vis-à-vis multichannel video.⁸² And those production companies would be sensitive to their own possible liability and thus avoid uploading materials that could give rise to liability.

Of course, it is impossible to know what would have happened in the United States without § 230. But this relates to the second complication: § 230 is a U.S. statute, but the internet is predominant in developed countries around the world.⁸³ Indeed, even in China, which greatly restricts user-generated

after-section-230-reform-look-like/ (stating that, absent § 230, internet sites would be more hesitant about allowing user-generated content and those sites that allowed user-generated content would have to spend more money on reviewing and policing such content).

82. And perhaps the pathbreaking genre of video was porn. It is a commonplace among technologists that sexual content has been a key driver for the uptake of many new technologies—notably including VCRs, cable television, and the internet. *See, e.g.*, Laurence H. Winer, *Review: The Old Order Changeth*, 45 JURIMETRICS 333, 346 (2005) (reviewing MONROE E. PRICE, *MEDIA AND SOVEREIGNTY: THE GLOBAL INFORMATION REVOLUTION AND ITS CHALLENGE TO STATE POWER*) (“Every new technology from the VCR, to cable and satellite, to the Internet thrives on porn.”).

83. *Individuals Using the Internet*, INT’L TELECOMM. UNION (2020), <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> (estimating that as of 2019, 86.7% of the developed world use the internet); *Percentage of Households with Internet Access at Home and With a Computer*, INT’L TELECOMM. UNION (2020), <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> (estimating that as of 2019, 85.2% of households have internet access at home in the developed world).

content,⁸⁴ the internet has become dominant.⁸⁵ It is therefore difficult to attribute the rise of the internet over the last twenty-five years to § 230.

This relates to a broader and more fundamental point: any narrative that attributes the current predominance of the internet in the United States to a U.S.-specific factor has to contend with the internet's predominance in so many other countries. If one claims that any provision of the Act or FCC regulation was central to the current predominance of the internet, one must confront the question why countries that lack such laws also have a predominant internet. There are possible responses, of course. One obvious response is that most other countries did have laws similar to those in the Act. That is not true of § 230, but it is at least partially true of spectrum allocation. The United States was a leader in moving toward flexible licenses for large swaths of spectrum, enabling the development of wireless broadband internet access. But other countries also had legal regimes for spectrum licensing that allowed them to follow suit, and to a significant degree many of them did

84. See, e.g., Cybersecurity Law of the People's Republic of China (promulgated by the NPC Standing Comm. Nat'l People's Cong., Nov. 7, 2016, effective June 1, 2017) art. 12, translated in Rogier Creemers, Paul Trilio & Graham Webster, *Translation: Cybersecurity Law of the People's Republic of China*, NEW AMERICA (June 29, 2018), <https://www.newamerica.org/cybersecurity-initiative/digichina/blog/translation-cybersecurity-law-peoples-republic-china/> ("Any person and organization using networks shall abide by the Constitution and laws, observe public order, and respect social morality; they must not endanger cybersecurity, and must not use the Internet to engage in activities endangering national security, national honor, and national interests; they must not incite subversion of national sovereignty, overturn the socialist system, incite separatism, break national unity, advocate terrorism or extremism, advocate ethnic hatred and ethnic discrimination, disseminate violent, obscene, or sexual information, create or disseminate false information to disrupt the economic or social order, or information that infringes on the reputation, privacy, intellectual property or other lawful rights and interests of others, and other such acts.").

85. See Jun Xia, *The Chinese Model Of Universal Service Policy: A Two-Decade Retrospect Based on an Integrated Framework*, 22nd Biennial Conference for the International Telecommunications Society (June 2018), https://www.econstor.eu/bitstream/10419/190374/1/D1_1_Xia.pdf (detailing China's programs for universal telecommunications services over the last two decades); Wenyu Zhao, *Broadband Development Status and Trend in China*, CHINA ACAD. OF INFO. AND COMM'NS TECH. 5 (2018), https://www.ieee802.org/3/ad_hoc/ngrates/public/18_11/zhao_nea_01_1118.pdf ("China has 1.1 billion 4G users and 73.5% penetration, ranking the top five in the world, far higher than the average level of OECD countries and the world."); Yang Zongyou, *Broadband Coverage Reaches 98 pct of Rural Chinese Villages*, CHINA DAILY (Aug. 2, 2019), <http://www.chinadaily.com.cn/a/201908/02/WS5d43f3c6a310cf3e355639b3.html> (noting the success in China's universal telecom services programs); *Individuals Using the Internet (% of Population) – China*, WORLD BANK (2019), <https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=CN> (showing that as of 2019, 64% of the Chinese population uses the internet).

follow suit.⁸⁶ A second possible response is that the United States is so dominant that other countries were bound to follow its lead in how the internet developed (and thus became predominant) in their countries. Many other countries, however, did not follow our lead in internet regulation but still have a predominant internet. The most obvious example is China.⁸⁷ So the central point still has considerable force: any explanation that relies on factors unique to the United States is questionable given the predominance of the internet in so many other countries.

C. WERE NET NEUTRALITY REGULATIONS CENTRAL TO THE RISE OF BROADBAND INTERNET SERVICE?

A reader may look at the list of regulations discussed above and notice a particular omission: What about net neutrality regulations? That is, what about the FCC's regulations pursuant to the Act preventing internet access providers from blocking, throttling, or otherwise discriminating against internet traffic? These regulations have given rise to litigation, legislative proposals, and more commentary than any human could read. But it is not clear that these regulations significantly aided the internet's ascent to predominance.

At the outset, it bears noting that users' desire for openness on the internet has played a huge role in the development of the internet. Many Americans' introduction to the online world was via CompuServe, Prodigy, and America Online.⁸⁸ These "online service companies" offered only closed proprietary content. Users dialed in to the company's computers and had access only to

86. See Reinhold Fahlbeck, *Flexibility: Potentials and Challenges for Labor Law*, 19 COMP. LAB. L. & POL'Y J. 515, 518 (1998) ("The U.S. is at one end of a 'flexibility spectrum' in terms of actual scope of and potential for flexibility. The U.K. comes close to that same end."); OFCOM, A STATEMENT ON SPECTRUM LIBERALISATION 1 (2005), <https://www.ofcom.org.uk/consultations-and-statements/category-2/liberalisation2> (stating that Ofcom is proceeding with spectrum flexibility, which it termed "liberalisation" and defined as "the removal and reduction of restrictions on spectrum use"); OFCOM, SPECTRUM FRAMEWORK REV. (2005), <https://www.ofcom.org.uk/consultations-and-statements/category-1/sfr> (adopting liberalization); DEP'T OF COMMC'NS, SPECTRUM POL'Y FRAMEWORK FOR CAN., 9 (2007), <https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf08776.html> (adopting a framework for spectrum policy that includes "permitting the flexible use of spectrum to the extent possible" and noting that "[a] number of countries, such as Australia, the United Kingdom and the United States have undertaken extensive reviews of their spectrum management programs, and are currently implementing changes As a result of these reviews, these countries are taking steps to evolve from a prescriptive style of spectrum management to an approach that embraces more flexibility and a greater reliance on market forces.").

87. See *supra* notes 84–85 and accompanying text.

88. See, e.g., Peter H. Lewis, *The CompuServe Edge: Delicate Data Balance*, N.Y. TIMES, Nov. 29, 1994 (identifying CompuServe, Prodigy, and America Online as the "Big Three information services").

material created by or affiliated with that company; users could not go directly onto the World Wide Web.⁸⁹ As I have previously written: “As the Web continued to develop, however, these companies could not attract customers (or keep the ones they had) unless they provided open access to it.”⁹⁰ Consumers rejected these walled gardens; they wanted access to the whole Web.⁹¹ Even after the demise of these walled gardens, some providers offered internet access services designed to serve as portals that would highlight affiliated content. Users would be able to access the internet, but the idea was that consumers would want (or at least be happy to have) a landing page that, the companies hoped, would keep consumers on the webpages of their affiliates.⁹² That, too, proved unpopular. Users wanted an open internet. Indeed, the original idea behind net neutrality regulations was to embody in regulations the openness that had largely characterized the internet after the market failure of the walled garden approach.⁹³

89. See Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 1990–91 (2006) (“The first large-scale networking of consumer PCs took place through self-contained ‘walled garden’ networks like CompuServe, The Source, and Prodigy. Each network connected its members only to other subscribing members and to content managed and cleared through the network proprietor.”); Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 166 (2008) (“The most popular Internet service providers of the mid-1990s used a walled garden to direct subscribers to proprietary online forums or third-party content that cannot be accessed by non-subscribers in order to generate profit In addition to directing subscribers to exclusive content within the walled garden, such walled-garden Internet service providers would also take measures to make it difficult to access, and sometimes even outright prevent their users from accessing, content outside the walled garden.”).

90. Stuart Minor Benjamin, *Spectrum Abundance and the Choice Between Private and Public Control*, 78 N.Y.U. L. REV. 2007, 2087 (2003).

91. See Ciolli, *supra* note 89, at 169 (“A variety of factors converged to greatly reduce the prominence of walled-garden Internet service providers in the early twenty-first century. These factors—greater demand for broadband Internet access, increased demand for communities outside of the walled gardens, and technological improvements—were necessary to cause the transition from the age of walled-garden providers to the era of the decentralized Internet and Web 2.0.”); Austin Bunn, *Death of a Child Prodigy*, VILL. VOICE (Oct. 26, 1999), <https://www.villagevoice.com/1999/10/26/death-of-a-child-prodigy/> (noting that Prodigy went from 1.13 million subscribers in 1995 to under 200,000 by 1999 and abandoned its walled garden approach).

92. Does anyone remember Excite@Home? To refresh your memory, see Frank Rose, *The \$7 Billion Delusion*, WIRED (Jan. 1, 2002), <https://www.wired.com/2002/01/excite/> (“Excite@Home promised to merge the search geeks and the cablecos to become the AOL of broadband. Then the tragedy of reality set in.”).

93. See, e.g., Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 930 (2001) (“[T]he extraordinary growth of the Internet rests fundamentally upon its design principles. Some of these principles relate to the openness of the Internet’s standards and the openness of the

Unsurprisingly, the concepts behind net neutrality were (and are) quite popular among users.⁹⁴ And the openness of the internet (after the demise of walled gardens) likely has been central to its growth. The question I am asking is different: how essential were net neutrality regulations to the ascent of broadband internet service?

There is a long regulatory history that I will very briefly summarize here. As I noted above, a key statutory distinction was between “telecommunications” services that were subject to pervasive regulation and “information” services that were subject to little regulation.⁹⁵ In the late 1990s, the FCC subjected incumbent local exchange telephone carriers to rules requiring interconnection and unbundling for their nascent DSL service, treating the services they offered as telecommunications services.⁹⁶ By contrast, the FCC refrained from imposing any significant regulations on cable modem internet service. And, in response to a 2000 Ninth Circuit opinion concluding that cable modem service was a telecommunications service, in 2002 the FCC classified cable modem service as information services and continued with its policy of imposing no meaningful regulation on cable modem service.⁹⁷ In 2005 the Commission ended this difference in its regulatory treatment of DSL and cable modem service, “establish[ing] a minimal regulatory environment for wireline broadband internet access services” and classifying internet access provided over the telephone network as an information service.⁹⁸ At the same time, it issued a five-paragraph non-binding policy statement in which it articulated four fairly minimal principles,

software that implemented those standards The tremendous innovation that has occurred on the Internet, in other words, depends crucially on its open nature.”).

94. Paul Bischoff, *Do I Support Net Neutrality*, COMPARITECH (Mar. 18, 2019), <https://www.comparitech.com/blog/vpn-privacy/supporting-net-neutrality/> (detailing the results of a nationwide survey showing that eighty-two percent of Americans support net neutrality); Mozilla, *Poll: Americans Overwhelmingly Support Net Neutrality*, MEDIUM (Jun. 6, 2017), <https://medium.com/mozilla-internet-citizen/poll-americans-overwhelmingly-support-net-neutrality-98b6b77f6cfe> (showing the results of a public opinion poll finding that seventy-six percent of Americans support net neutrality).

95. See *supra* note 31 and accompanying text.

96. See *Advanced Telecommunications Capability*, *supra* note 32, at 24028–31, ¶¶ 34–37 (1998) (classifying DSL service as a telecommunications service under Title II).

97. *2002 Cable Modem Order*, *supra* note 32, at 4802, ¶ 7 (2002) (“[W]e conclude that cable modem service, as it is currently offered, is properly classified as an interstate information service, not as a cable service, and that there is no separate offering of telecommunications service.”).

98. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14,853, 14,855, ¶ 1, 14,857, ¶ 4 (2005), *petition for review denied by Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

all of which were “subject to reasonable network management.”⁹⁹ In 2008, in response to Comcast interfering with some subscribers’ use of peer-to-peer networking applications, the Commission issued its next action on net neutrality, in the form of an adjudicative order.¹⁰⁰ Comcast had argued that it merely delayed (rather than blocked) peer-to-peer traffic, and that the 2005 policy statement prohibited only blocking, but the FCC concluded that Comcast had indeed blocked peer-to-peer traffic.¹⁰¹ Comcast also argued that “even if its practice is discriminatory, it qualifies as reasonable network management,” but the FCC rejected that argument as well.¹⁰² The FCC ultimately imposed only a modest remedy, in significant part because Comcast committed to end the practice of interfering with peer-to-peer networking applications by “institut[ing] a protocol-agnostic network management technique”: the order required Comcast to make disclosures detailing its new approach and the implementation of that approach.¹⁰³ That order was short-lived, as the D.C. Circuit rejected it on jurisdictional grounds in early 2010.¹⁰⁴

In late 2010, the FCC responded with a new order that, like its predecessors, relied on Title I. The order imposed antidiscrimination, anti-blocking, and transparency requirements on broadband internet access service providers.¹⁰⁵ The transparency requirements were relatively uncontroversial and modest.¹⁰⁶ The antidiscrimination rules and, to a lesser extent, the anti-blocking rules were the heart (and controversial elements) of the rules. Notably, these rules did not impose blanket bans. The anti-blocking rule prohibited broadband access providers from “block[ing] lawful content, applications, services, or non-harmful devices, subject to reasonable network management,” and the antidiscrimination rule provided that they “shall not unreasonably discriminate in transmitting lawful network traffic over a consumer’s broadband internet access service. Reasonable network

99. The four principles were as follows: consumers are entitled to “access the lawful Internet content of their choice,” “run applications and use services of their choice, subject to the needs of law enforcement,” “connect their choice of legal devices that do not harm the network,” and “competition among network providers, application and service providers, and content providers.” *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Policy Statement, 20 FCC Rcd. 14,986, 14,988, ¶ 4 (2005).

100. *Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd. 13,028 (2008).

101. *Id.* ¶ 44.

102. *Id.* ¶ 45.

103. *Id.* ¶ 54.

104. *Comcast Corp. v. FCC*, 600 F.3d 642, 660–61 (D.C. Cir. 2010).

105. *See Preserving the Open Internet (2010)*, *supra* note 7, at 17,906, ¶ 1.

106. The transparency rules merely required that broadband access providers “publicly disclose accurate information regarding the network management practices, performance, and commercial terms of [their] broadband Internet access services.” *Id.* at 17,937, ¶ 54.

management shall not constitute unreasonable discrimination.”¹⁰⁷ In addition to allowing “reasonable network management,” the rules did not prohibit paid prioritization (allowing edge providers to pay extra for better service), but instead simply said that such prioritization was unlikely to satisfy the antidiscrimination standard.¹⁰⁸

In 2014, the D.C. Circuit invalidated the antidiscrimination and anti-blocking rules.¹⁰⁹ In 2015, the FCC issued new net neutrality regulations. One huge element of the 2015 rules was that, for the first time, the FCC reclassified broadband internet access service as a telecommunications service under Title II (while it also forbore from applying some provisions of Title II, such as section 251’s requirement that network elements be unbundled).¹¹⁰ And the substance of the 2015 rules went beyond the 2010 rules. Most notably, the FCC created three “bright-line rules” that flatly prohibited blocking, throttling, and paid prioritization. The more flexible approach of the 2010 rules was gone, replaced by clear prohibitions.¹¹¹

Two and a half years later, in early 2018, the FCC adopted an order repealing the 2015 rules and reclassified broadband internet access service back to being an information service under Title I.¹¹² The 2018 rules also eliminated all the substantive rules in the 2015 order, although it did return to the 2010 transparency rule.¹¹³

The various alternatives to net neutrality regulation were not much more than no regulation at all. The principles articulated in 2005 required nothing. The transparency requirements in the 2018 rules actually require something (disclosure), but what they require is quite modest, and ISPs did not oppose them.¹¹⁴ And that’s all the 2018 rules required. I emphasize this because the

107. *Id.* at 17,942, ¶ 63, 17,944, ¶ 68.

108. *Id.* at 17,947, ¶ 76. The order laid out the following rule on “reasonable network management”: “A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.” *Id.* at 17,952, ¶ 82.

109. *Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014).

110. *Protecting and Promoting the Open Internet (2015)*, *supra* note 7, at 3757–58, ¶¶ 355–56.

111. *Id.* at 5607, ¶ 14. The 2015 rules also promulgated a broader transparency rule and a “General Conduct Rule” that prohibited broadband access providers from “unreasonably interfere[ing] with or unreasonably disadvantage[ing] (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users.” *Id.* at 5609, ¶ 21.

112. *See Restoring Internet Freedom (2018)*, *supra* note 7, at 312, ¶ 2.

113. *Id.* at 313, ¶ 3.

114. It seems that ISPs wanted to present themselves as transparent for their own market reasons (particularly after the very negative public reaction to Comcast’s secret throttling).

question I am asking is what sections of the Act played an important affirmative role in the rise of broadband internet service. As I discuss more fully below, insofar as the answer is that deregulatory provisions—provisions that blocked or dismantled regulations or gave the FCC the authority to do the same—were important, the Act is not playing an affirmative role.

ISPs disclaimed interest in blocking and did not fight transparency requirements. The real flashpoint with respect to net neutrality was over antidiscrimination rules.¹¹⁵ Antidiscrimination rules were and are the heart of net neutrality.¹¹⁶

Antidiscrimination rules, and Title II more generally, applied to DSL service until 2005, but cable modem service has consistently been the predominant provider of broadband internet access service, and cable modem service was not subject to any rules until 2010.¹¹⁷ And even as to the 2010-2017 period when net neutrality rules did apply to cable modem internet access service, there were two different regimes. The 2010 rules allowed for reasonable network management and did not forbid all forms of payment for priority.¹¹⁸ It was the 2015 rules that forbade all forms of paid prioritization.¹¹⁹ So not only were net neutrality rules in effect for only seven years, but also for five of those years the prohibition was weaker.

Virtually every empirical aspect of net neutrality regulation is contested ground. Did the imposition of net neutrality regulations reduce investment in broadband infrastructure? Perhaps yes,¹²⁰ perhaps no.¹²¹ Assuming that ISPs will prioritize favored traffic in the absence of net neutrality regulations (e.g., now), will that prioritization harm the growth of the internet? The theory underlying net neutrality regulations is that they enhance innovation and

115. Actually, what scared ISPs the most was the prospect of price regulation of broadband internet access under Title II, but that never happened.

116. See *Preserving the Open Internet* (2010), *supra* note 7; *Protecting and Promoting the Open Internet* (2015), *supra* note 7.

117. See *Preserving the Open Internet* (2010), *supra* note 7; *2002 Cable Modem Order*, *supra* note 32, at 4803, ¶ 9 (“Throughout the brief history of the residential broadband business, cable modem service has been the most widely subscribed to technology, with industry analysts estimating that approximately sixty eight percent of residential broadband subscribers today use cable modem service.”).

118. See *Preserving the Open Internet* (2010), *supra* note 7, at 17,948, ¶ 77.

119. *Protecting and Promoting the Open Internet* (2015), *supra* note 7, at 5603, ¶ 4.

120. See, e.g., Anna-Maria Kovacs, *The Effect of Title II Classification on Wireless Investment* (July 2017) <https://cbpp.georgetown.edu/publications/publications-policy-papers/>; Hal J. Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2017), <https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era/>.

121. See, e.g., *Restoring Internet Freedom* (2018), *supra* note 7, at 367–68, ¶ 97 (discussing Internet Association economic study).

investment among edge providers and ultimately benefit consumers by giving them offerings that reach them at the same speed.¹²² Net neutrality opponents beg to differ, of course.¹²³ But assuming that preventing prioritization does have these benefits, the question remains how much difference preventing prioritization made in the rise of the internet to predominance. After all, it may both be true that net neutrality regulations protected edge providers and that this protection had little if any impact on the internet's ascent, because (1) users would have flocked to the internet whether it had a few dominant edge providers or a greater number of edge providers and/or (2) users' experience of the edge providers would not have changed much (because the difference in, for example, loading speeds would have been measured in milliseconds) resulting in edge providers that would have been a bit weaker but still available.

I am not claiming that net neutrality regulations made no difference. And I certainly am not claiming that the principles of net neutrality (as opposed to net neutrality regulations) made no difference. My point is simply that the back-and-forth history of net neutrality regulation, and the difficulty of settling on any empirical conclusions, makes it hard to confidently ascribe an essential role to net neutrality regulations in the ascent of broadband internet to its current predominance. The answer to the question of the importance of net neutrality regulations to the current position of the internet is, I think, a resounding "quite possibly."

D. NONREGULATION AND PREEMPTION DO NOT CONSTITUTE AN AFFIRMATIVE ROLE FOR REGULATION

There is a different category of the Act's provisions and accompanying regulations that arguably was the most important in enabling the ascent of broadband internet service: provisions preempting state (and local) regulation, and provisions allowing for (or requiring) federal non-regulation. One possible way to inhibit any service is to impose so many regulatory requirements that its growth is greatly impeded. This could have happened with respect to broadband internet service, and provisions in the Act preempting state

122. See, e.g., *Preserving the Open Internet* (2010), *supra* note 7, at 17,910–11, ¶ 14 (arguing that net neutrality regulations "enable[] a virtuous circle of innovation in which new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses.").

123. See, e.g., *Verizon v. FCC*, 740 F.3d 623, 649 (D.C. Cir. 2014) (noting Verizon's argument that the net neutrality rules "will necessarily have the opposite of their intended effect because they will 'harm innovation and deter investment by increasing costs, foreclosing potential revenue streams, and restricting providers' ability to meet consumers' evolving needs.'").

regulations and preventing some forms of federal regulation arguably helped prevent that from happening.

The FCC has relied on a range of provisions to preempt state regulation of broadband. For instance, 47 U.S.C. § 152(b) allows the FCC to preempt state regulation of a service if its interstate and intrastate components are not separable.¹²⁴ On that basis, the FCC preempted state attempts at regulating internet services, notably VoIP communications.¹²⁵ 47 U.S.C. § 332(c)(3)(A) preempted state regulation of entry into the mobile telephone market or the rates charged by mobile providers. And other preempting provisions exist.¹²⁶

Perhaps the most significant deregulatory element of the Act is the information services category and the Commission's treatment of it: the FCC routinely applied a policy of "nonregulation" to information services under *Computer II*, *Computer III*, and the Act.¹²⁷ That is, the Commission interpreted its statutory authority as providing for "unregulated information service[s]," and it accordingly left such services unregulated.¹²⁸

124. *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986) (finding a basis for Commission preemption "where compliance with both federal and state law is in effect physically impossible"); Minn. Pub. Utils. Comm'n v. FCC, 483 F.3d 570, 576 (8th Cir. 2007) (§ 152 "allows the FCC to preempt state regulation of a service which would otherwise be subject to dual federal and state regulation where it is impossible or impractical to separate the service's intrastate and interstate components, and the state regulation interferes with valid federal rules or policies").

125. *See* Minn. Pub. Utils. Comm'n., 483 F.3d at 576.

126. *See, e.g.*, 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."); 47 U.S.C. § 543(a) (preempting state or local regulation of cable television rates).

127. *See* Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958, 104, ¶ 351 (June 16, 1986) ("retain[ing] the general enhanced and basic service framework of Computer II and reaffirm[ing] the unregulated status of enhanced services").

128. *See, e.g.*, Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service, 19 FCC Rcd. 3307, 3307, ¶ 1 (2004) ("[W]e declare pulver.com's . . . offering to be an unregulated information service subject to the Commission's jurisdiction We formalize the Commission's policy of nonregulation to ensure that Internet applications remain insulated from unnecessary and harmful economic regulation at both the federal and state levels."); *id.* at 3316, ¶ 15 ("We determine, consistent with our precedent regarding information services, that FWD is an unregulated information service and any state regulations that seek to treat FWD as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with our policy of nonregulation."); Vonage Holdings Corp., 19 FCC Rcd. 22,404, 22,416 (2004) (identifying "the Commission's long-standing national policy of nonregulation of information services"); John Blevins, *The Use and Abuse of "Light-Touch" Internet Regulation*, 99 B.U. L. REV. 177, 204 (2019) (stating that "The non-regulation of 'information services' merely continued the historical non-regulation of enhanced services.");

This rejection of regulation of information services was quite significant as a matter of regulatory policy. Some have argued that the FCC's nonregulation of internet access service pursuant to Title I enabled the ascent of broadband internet service.¹²⁹

But this argument does not provide an affirmative role for the Act: the nonregulatory approach under Title I is one set of provisions blocking all others and thus leaving the underlying service as unregulated as it would be if no jurisdiction attempted to regulate it in the first place. We can credit Congress and the FCC for creating regulatory restraints like this, but it seems strange to treat this as a triumph of regulation: the whole point was to have these services subject to no meaningful government control at all. To say that law X was useful because it allowed for the negation of law Y is not much of an endorsement of the legal regime that contains them both and doesn't attribute much value to the regime that contains them both. To put the point differently, insofar as the only important regulations under the Act are those that blocked other regulations, we have not generated much justification for the legal regime.

Some might object that focusing on affirmative regulations is needlessly constricting, and that these regulation-blocking provisions (as implemented) deserve pride of place. I have no quarrel with that perspective. My point is simply that this is not an argument for the importance of a particular regulation under the Act to the rise of broadband internet service. Instead, it is an argument for the importance of nonregulation.

To be clear, I am not claiming that most provisions of the Act are irrelevant. The sections regulating telephony, broadcasting, and multichannel video are important to the services they regulate, and even in a diminished state those services are significant. For instance, broadcasters are less central to the lives of Americans than they were in the 1970s, but broadcasters still play a major role for many Americans and their regulation (for example, media ownership rules) can thus be quite important. The provisions on universal service are particularly important in rural areas. The Act is not only relevant but vital in many spheres. Beyond that, the services regulated by the Act (particularly cable television, landline telephony, and cellular telephony) were

Fed.-State Joint Bd. on Universal Serv., 13 FCC Rcd. 11,501 (1998) (Statement of Commissioner Susan Ness) (noting "the success of the policy of *non*-regulation of information services).

129. See, e.g., Antonia M. Apps & Thomas M. Dailey, *Non-Regulation of Advanced Internet Services*, 8 GEO. MASON L. REV. 681, 718 (2000) (arguing that "The FCC should continue [its] policy of non-regulation with respect to Internet services in the broadband era."); Lawrence J. Spiwak, *The Preemption Predicament over Broadband Internet Access Services*, 21 FEDERALIST SOC. REV. 32 (2020).

the launching pad for broadband internet service, and without successful cable and telephony industries the initial rollout of internet access might have been delayed. Insofar as the Act's provisions helped, for instance, cable television pass the vast majority of homes by the early 1990s,¹³⁰ they helped create the conditions that allowed for the launching of internet services. My point instead is that the ascent of broadband internet services from mere significance to their current predominance relied on a fairly small number of the Act's provisions.

IV. THE UPSHOT: THE CASE FOR REWRITING THE ACT HAS GROWN WEAKER OVER THE YEARS

So what should we make of the discussion above? I would identify three related strands. First, the crafting of the provisions of the Act were the focus of much lobbying, but in the end some of those provisions have been dormant, and many more have been relevant to industries that themselves are becoming less important as time goes on because of the ascendance of the internet. Second, and quite similarly, provisions of the Act became the focus of massive litigation battles between and among providers of telephony, broadcasting, and multichannel video that were the focus of these companies even as broadband internet service was diminishing the importance of those battles. The companies focused on the existing industries and seemed to fail to focus on the changes that broadband would unleash for their businesses. But, third, perhaps the predominance of broadband internet service was inevitable.¹³¹ In light of all these developments, the case for rewriting the Act is weaker today than it was in the earlier part of this century.

As to the first point, telephony and multichannel video were the subjects of major lobbying efforts in the 1980s through the early 2000s. There was a massive push for cable deregulation that culminated in the Cable Communications Policy Act of 1984 and a massive push for more cable regulation that produced the Cable Television Consumer Protection and Competition Act of 1992. There were several acts regulating satellite multichannel video, most notably the Satellite Home Viewer Act of 1988 and the Satellite Home Viewer Improvement Act of 1999. And the biggest lobbying frenzy surrounded the most important telecommunications legislation since the 1934 Act—the 1996 Act. The lobbying was intense because the scope of the 1996 Act was so broad. It changed rules on the terms and renewal of broadcast licenses, changed media ownership rules, and

130. *See supra* note 51 and accompanying text.

131. After all, its predominance is the norm in much of the world. *See supra* notes 83–85 and accompanying text.

provided for a transition to digital television broadcasting.¹³² It also regulated internet indecency (though the Supreme Court rejected such regulation on First Amendment grounds).¹³³ But the center of the 1996 Act, and of the lobbying over the 1996 Act, was the provisions governing telephony.

The time and money spent in lobbying may have been exceeded by the time and money spent in litigation over the implementation of the statutory provisions. The provisions and accompanying FCC rules generated massive and extended litigation—over (to pick a few of the greatest hits) what network elements incumbent local exchange telephone carriers had to offer to competitive local exchange carriers,¹³⁴ what prices they could charge for those elements,¹³⁵ the circumstances under which the regional bell operating

132. See 1996 Act §§ 201–04.

133. See 1996 Act § 502 (containing the Communications Decency Act); *Reno v. ACLU*, 521 U.S. 844 (1997) (holding that the central indecency provisions of the Communications Decency Act violated the First Amendment).

134. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499, 15,627–49 (1996) (establishing, in a 680-page rulemaking (excluding appendices) implementing the central telephony provisions of the 1996 Act, the terms under which incumbent local exchange carriers had to offer network elements to competitive local exchange carriers); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389–92 (1999) (finding that the 1996 FCC rulemaking unreasonably interpreted the 1996 Act in determining which network elements were “necessary” and the absence of which would “impair” competitors); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696 (1999) (on remand, adopting new interpretation of “impair”); *USTA v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) (rejecting the FCC’s revised impairment standard); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16,978, 17,035 (2003) (on remand, revising again the FCC’s impairment standard); *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (rejecting the FCC’s re-revised impairment standard); *Unbundled Access to Network Elements*, 20 FCC Rcd. 2533 (2005) (on remand, revising the impairment standard yet again); *Covad Commc’ns. Co. v. FCC*, 450 F.3d 528 (2006) (“The [FCC] has thrice attempted—unsuccessfully—to implement the ‘unbundling’ provisions of the [1996 Act] Because we conclude the Commission’s fourth try is a charm, we deny all of the petitions for review.”).

135. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499 (1996) (requiring that prices for unbundled network elements be set under a cost methodology known as TELRIC (Total Element Long Run Incremental Cost); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (vacating pricing rules on jurisdictional grounds); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (holding that the FCC did have jurisdiction to prescribe such pricing rules); *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000) (on remand, rejecting use of TELRIC methodology); *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467 (2002) (upholding the TELRIC methodology).

companies could offer long distance telephone service,¹³⁶ and the intercarrier compensation rates for completing a call.¹³⁷

This sets up the second point: this litigation occurred while the underlying business models were changing dramatically, and in some cases collapsing. The litigation over traditional telephony is the most obvious example: massive litigation continued through the early 2000s even as consumers were abandoning their landlines in such large numbers that the litigation resembled fighting over the deck chairs on the Titanic.¹³⁸ Somewhat less dramatically,

136. See, e.g., Application of Verizon, New England Inc., Bell Atlantic Communications, Inc. NYNEX Long Distance Company, and Verizon Global Networks, Inc. for Authorization to Provide In-Region, InterLATA Services in Massachusetts, 16 FCC Rcd. 8988, 8990, ¶ 1 (2001) (approving Verizon's application to offer long distance service); WorldCom, Inc. v. FCC, 308 F.3d 1, 11 (2002) (rejecting WorldCom's challenge to FCC order); Joint Application by SBC Communications, Inc. Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., for Provision of In-Region InterLATA Services in Kansas and Oklahoma, 16 FCC Rcd. 6237, 6239, ¶ 1 (2001) (approving SBS Communications' application to provide long distance service in Kansas and Oklahoma); Sprint Commc'ns. Co. v. FCC, 274 F.3d 549, 562 (2001) (affirming FCC decision and rejecting Sprint's challenge); Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, 15 FCC Rcd. 3953, 3955, ¶ 1 (1999) (approving Bell Atlantic's application to offer long distance service); AT&T v. FCC, 220 F.3d 607, 633 (D.C. Cir. 2000) (affirming FCC order and rejecting AT&T's challenge).

137. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, 14 FCC Rcd. 3689, 3689–90, ¶ 1, 3693, ¶ 7 (1999) (applying “end-to-end” analysis to exclude ISP calls from reciprocal compensation requirement (compensation for a local exchange carrier that completes a call originating in the same area) because ISP calls were not “local”); Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000) (vacating FCC order because Commission did not explain why “end-to-end” analysis was relevant); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd. 9151, 9151–52, ¶¶ 1–2 (2001) (on remand, implementing a similar rate cap system but relying on different authority); WorldCom, Inc. v. FCC, 288 F.3d 429, 430 (D.C. Cir. 2002) (rejecting the Commission's reliance on its proffered statutory authority but declining to vacate “[b]ecause there may well be other legal bases for adopting the rules chosen by the Commission”); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 850 (D.C. Cir. 2008) (directing the FCC to explain the legal basis for its ISP-bound compensation rules within six months); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, 24 FCC Rcd. 6475, 6478–79, ¶¶ 6–7 (2008) (adjusting its intercarrier compensation rules); Core Commc'ns, Inc. v. FCC, 592 F.3d 139, 141 (D.C. Cir. 2010) (upholding FCC order, thus putting an end to this litigation 14 years after the passage of the 1996 Act).

138. See Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates Based on Data from the National Health Interview Survey, July – December 2006*, CENTER FOR DISEASE CONTROL 4 tbl.1 (2007), <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200705.pdf> (showing that between 2003 and 2006, the percentage of American

regulation and litigation on cross-ownership of broadcasters and newspapers proceeded while the newspaper industry cratered so badly that the value proposition of broadcasters joining with newspapers became weaker with each passing day.¹³⁹

That leads to the third strand: inevitability. One take on this history is that the major players were myopic, fighting their longstanding battles among existing services while failing to appreciate the full force of the incoming broadband tsunami. There is some foundation for this argument. For example, entertainment companies and multichannel video providers battled fiercely over channels and programs while seeming to treat broadband internet video as a relatively small player.¹⁴⁰

The counterargument is that the ascendance of the internet was inexorable once streaming video became available. So, on this argument, once broadband internet service became widely available, it was only a matter of time before the other services were overtaken. There was nothing they could do about it.

Both arguments could be correct: perhaps the existing players were fighting the last war, but the predominance of broadband internet service was still inevitable, so that their failure to respond to the challenge posed by the internet at most hastened the transformation that was coming anyway.

Arguments about inevitability are dangerous, of course. We have only the one universe, so we cannot know what would have happened in an alternate universe. But the argument for inevitability seems reasonably strong in light of the ascendance of broadband internet service around the world. Broadband

households with only a landline dropped precipitously from 43% to just 29.6% and that the overall subscription to landline phones decreased over 11%).

139. See 2006 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 23 FCC Rcd. 2010, ¶ 13 (2008) (relaxing the newspaper/broadcast cross-ownership ban); BENJAMIN & SPETA, *supra* note 1, at 473 (“The year immediately after the FCC issued its 2008 order saw serious financial difficulties for many newspapers, leading to cutbacks in coverage and major cuts in staff. Some major newspapers ceased publication (e.g., the Rocky Mountain News and the Seattle Post-Intelligencer), and others had near-death experiences (e.g., the San Francisco Chronicle and the Boston Globe). And many commentators—including newspaper publishers—expressed skepticism about the long-term viability of newspapers.”); see also Elaine C. Kamarck & Ashley Gabriele, *The News Today: 7 Trends In Old And New Media*, BROOKINGS (Nov. 2015), <https://www.brookings.edu/wp-content/uploads/2016/07/new-media.pdf> (showing the general decline of newspaper readership and performance over time).

140. See, e.g., Michael Schneider & Kate Aurthur, *R.I.P. Cable TV: Why Hollywood Is Slowly Killing Its Biggest Moneymaker*, VARIETY (July 21, 2020), <https://variety.com/2020/tv/news/cable-tv-decline-streaming-cord-cutting-1234710007/> (“As the MVPDs and entertainment companies battled, they were distracted from coming up with a plan to fight the imminent OTT [over-the-top] threat”).

internet service has become predominant in different countries with different political, economic, and social systems.¹⁴¹ As I have noted, that highlights the problem with focusing on U.S.-specific factors for the rise of broadband in the United States. The corollary is that it suggests that broadband internet service was going to become predominant under most any legal regime.

This is not to suggest that the exact shape of the various internet markets—access, content, applications, etc.—was inevitable. For example, under a different regime there might have been a strict separation between carriage and content, and that might have made a significant difference in various aspects of the internet, and perhaps sped up or delayed the internet's ascent to predominance. But in light of where things stood in the mid-1990s in terms of the initial rollout of internet access, the provisions discussed above (like the Pole Attachments Act), and the strictures on content regulation imposed by the First Amendment, it seems overwhelmingly likely that broadband internet service was going to become the predominant telecommunications service.

These points lead me to conclude that the case for rewriting the Act has grown weaker over the last twenty-five years. As I noted above, within a few years of the 1996 Act's passage there were calls for its overhaul. The provisions on telephony provoked the most energetic debate. But, more broadly, many players had a sense that the marketplace for telephony, multichannel video, and broadcasting was changing in ways that the Act had not anticipated and was not well-suited to efficiently resolve. As those industries have receded in importance, so, too, have the specifics of their regulation. The regulation of telephony, multichannel video, and broadcasting is still important, not least to the many people and companies involved in their provision. But they are becoming less important over time.

There of course remain vibrant and impassioned arguments over aspects of the Act—the possible application common carriage regulation to broadband internet access service and § 230 are probably the two most prominent examples. But resolving those questions does not require rewriting the Act. Indeed, each issue can be resolved with narrowly targeted legislation only a few pages long.¹⁴² Simply stated, as time goes on, the case for a new Act

141. See *supra* notes 83–85 and accompanying text; Jacob Poushter, *Smartphone Ownership and Internet Usage Continues to Climb in Emerging Economies*, PEW RSCH. CTR. (Feb. 22, 2016), <https://www.pewresearch.org/global/2016/02/22/internet-access-growing-worldwide-but-remains-higher-in-advanced-economies/>.

142. For example, fourteen bills have been introduced in this congressional session to amend § 230. Most are less than 750 words. The longest, coming in at 3,446 words, is less than a tenth of the 44,727 words of the 1996 Act. See Meghan Anand, Kiran Jeevanjee, Daniel Johnson, Brian Lim, Irene Ly, Matt Perault, Jenna Ruddock, Tim Schmeling, Niharika

becomes weaker. Most of its elements, creaky as they are, are becoming less significant as telecommunications moves toward the seemingly inevitable dominance of broadband internet service.

V. CONCLUSION

The 1996 Act soon came to be seen as outdated. And it became clear over time that Congress, in failing to focus on the rise of broadband internet service, missed the central development of the last twenty-five years. But Congress had company: in the 1990s and the early 2000s there was a broad consensus among market players that streaming internet video would be a niche player, because consumers would always want a dedicated multichannel video service.¹⁴³ Cable

Vattikonda, Noelle Wilson & Joyce Zhou, *All the Ways Congress Wants to Change Section 230*, SLATE (Nov. 5, 2021), <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html> (presenting a comprehensive list of proposed legislation to amend § 230); Platform Accountability and Consumer Transparency Act, <https://www.congress.gov/bill/116th-congress/senate-bill/4066/text?format=xml> (bill contains 3446 words); 1996 Act (Act contains 44,727 words); Stop Shielding Culpable Platforms Act, <https://www.congress.gov/bill/117th-congress/house-bill/2000/text?q=%7B%22search%22%3A%5B%22jim+banks%22%5D%7D&r=4&s=5> (bill contains 430 words).

143. Throughout the 1990's and early 2000's the FCC did not consider internet streaming to be a strong competitor to MVPDs. *See* Annual Assessment of the Status of the Competition in the Market for the Delivery of Video Programming, Fourth Annual Report, 20 FCC Rcd. 2275, 2811, ¶ 97 (1998) ("Video over the Internet, however, is not comparable in quality to broadcast video provided by MVPDs, and it is unclear whether the needed improvements will be made to make video service over the Internet a viable competitor."); Annual Assessment of the Status of the Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report, 20 FCC Rcd. 2755, 2817–18, ¶ 114 (2005) ("Streaming video is currently most viable when delivered over broadband networks, but some industry watchers believe that it will only become a fully competitive consumer application if connection speeds significantly increase over those achieved over cable and DSL broadband."). It was not until the thirteenth report, published in early 2009 but approved in late 2007, that the FCC presented Internet streaming as a serious competitor to linear programming, and even then its language was a bit guarded. *See* Annual Assessment of the Status of the Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report, 24 FCC Rcd. 542, 613, ¶ 153 (2009) ("Several commenters observe that established models for the distribution of video programming are being challenged by these technological advancements and consumers' ability to receive video programming via alternative means, not just from traditional linear networks."). The world is of course quite different today. *See, e.g.*, Christopher Zara, *Cord Cutting Was So Bad Last Year That Pay-TV Penetration Is Down to 1994 Levels*, FAST CO. (Mar. 2, 2021), <https://www.fastcompany.com/90609976/cord-cutting-was-so-bad-last-year-that-pay-tv-penetration-is-down-to-1994-levels> (reporting that in 2020 cable and satellite companies lost 6 million subscribing households, a decline of 7.3%); Sara Fischer, *Pay-TV's Death Spiral*, AXIOS (Oct. 27, 2020), <https://www.axios.com/cable-tv-subscribers-down-pandemic-e179bfe7-9b3b-42cc-85e7-869591354a46.html> (the title pretty much summarizes the article). Shira Ovide, *Cable TV Is the New Landline*, N.Y. TIMES (Jan. 6, 2022), <https://>

companies were happy to offer Netflix to their cable modem subscribers, secure in the knowledge that internet video would not undermine their cable television subscriber model. Cable companies saw their biggest competitor as DBS, and vice-versa.¹⁴⁴ Simply stated, any lack of foresight in Congress about the rise of broadband internet service was widely shared.

None of this should surprise anyone. To quote either Niels Bohr or Yogi Berra, “It is very difficult to make an accurate prediction, especially about the future.”¹⁴⁵ Of course almost everyone’s predictions in 1996 were wrong—that is the norm. Perhaps the degree of wrongness was notable, especially if measured by the many billions of dollars won and lost on bets about the future of telecommunications. But in a fast-moving world, the only constant is change, and confident predictions about technological developments are a fool’s game.¹⁴⁶ Such a critique of predictions has some additional bite for this Article. First, this critique supplies an additional reason not to rewrite the Act. Given that future developments will render at least some of our current assumptions and suppositions incorrect, a Telecommunications Act of 2022 (or 2032) is likely to suffer a fate similar to that of the 1996 Act. With any luck a new Act won’t miss anything as big as the 1996 Act missed the rise of the internet, but it will assuredly rely on some premises that change. So I think the best framing is that the choice is not between an outdated 1996 Act and an up-to-date 2022 Act, but instead between an outdated 1996 Act and a soon-to-be-at-least-somewhat-outdated 2022 Act.

www.nytimes.com/2022/01/06/technology/cable-tv.html (stating that “it’s clear that the cable TV system that for decades brought joy and headaches to tens of millions of Americans is petering out”); Gavin Bridge, *Cord-Cutting Q1 2022 Review: The Cycle of Decline Continues*, VARIETY (May 13, 2022), <https://variety.com/vip/cord-cutting-q1-2022-review-the-cycle-of-decline-continues-1235265504/> (noting an accelerated rate of decline in MVPD subscriptions).

144. See, e.g., Annual Assessment of the Status of the Competition in the Market for the Delivery of Video Programming, Eighth Annual Report, 17 FCC Rcd. 1244, 1249, ¶ 13 (2002) (breaking down the video marketplace with cable and DBS having the largest market shares); ANDREW STEWART WISE & KIRAN DUWADI, COMPETITION BETWEEN CABLE TELEVISION AND DIRECT BROADCAST SATELLITE – IT’S MORE COMPLICATED THAN YOU THINK 4-5 (2005) <https://www.fcc.gov/reports-research/working-papers/competition-between-cable-television-and-direct-broadcast-satellite-> (treating the key video competition as between cable and DBS).

145. See Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 363 n. 269 (2000) (noting uncertainty as to which of these two great 20th century thinkers should be credited with this sentiment).

146. See Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 270–72, 372–73 (1999) (discussing the ways that rapid changes in technology undermine factual predictions and assertions).

But, for this Article, a second aspect of the danger of predictions hits closer to home: I am assuming in this Article that the services that are the focuses of the Act—traditional telephony, broadcasting, and multichannel video—will not revive such that one or more of them become the predominant service(s), overtaking broadband internet. If they do, then the Act would be much more relevant, and the case for amending it would be stronger.

I accept the very real possibility that my assumption is wrong, and that the case for amending the Act will in the future become much stronger. But I also believe that a revival of telephony, broadcasting, and/or multichannel video leading to their predominance is sufficiently unlikely that the prospect does not justify an overhaul of the Act now. I think we can (Netflix and) chill.

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

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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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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 Navarra, *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://>

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*, SCIENCEDAILY (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).

THE POLITICAL DYNAMICS OF LEGISLATIVE REFORM: WHAT WILL CATALYZE THE NEXT TELECOMMUNICATIONS ACT OF 1996?

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ABSTRACT

Although most studies of major communications reform legislation focus on the merits of their substantive provisions, analyzing the political dynamics behind the legislation can yield important insights. An examination of the tradeoffs that led the major industry segments to support the Telecommunications Act of 1996 (the “1996 Act”) provides a useful illustration of a political bargain. Analyzing the current context identifies seven components that could form the basis for the next communications statute: (1) universal service; (2) pole attachments; (3) privacy; (4) intermediary immunity; (5) net neutrality; (6) spectrum policy; and (7) antitrust reform. Assessing where industry interests overlap and diverge and the ways that the political environment can hinder passing reform legislation provides insights into how these components might combine to support the enactment of the next Telecommunications Act of 1996.

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I. INTRODUCTION

When the Telecommunications Act of 1996 (the “1996 Act”) was signed into law, it was hailed as an extraordinary feat of legislation.¹ Signed amid unusual fanfare after a deliberative process that spanned many years, this comprehensive legislative reform was the product of bipartisan cooperation during a time of unusually strong partisan acrimony.²

Such an unusual achievement offers potential lessons for what might lead to the next great communications statute. Although most of this Symposium’s

1. See, e.g., Remarks on Signing the Telecommunications Act of 1996, 1996 PUB. PAPERS 185, 189 (Feb. 8, 1996) (calling the 1996 Act “landmark legislation [that] fulfills my Administration’s promise to reform our telecommunications laws . . .”). President Clinton reportedly called it the most significant piece of legislation he signed. Larry Pressler, *Politics and Telecommunications*, 58 FED. COMM. L.J. 555, 555 (2006).

2. Harold Furchtgott-Roth & Arielle Roth, *Answering Four Questions on the Anniversary of the Telecommunications Act of 1996*, 68 FED. COMM. L.J. 83, 85–88 (2016).

other contributions have focused on the impact of the 1996 Act's substantive provisions, this Article focuses on the political dynamics surrounding its enactment. Part II analyzes the 1996 Act as a political deal among the leading commercial and political interest groups. Part III outlines how the 1996 Act's major components have decreased or increased in importance over time, and explores what issues might form the basis for a new compact capable of generating support from the key constituencies. Part IV examines opportunities for potential alignment, political quid pro quo, and potential obstacles to closing such a deal.

II. THE 1996 ACT AS A POLITICAL BARGAIN

The primary focus of the 1996 Act was to break down the regulatory barriers that kept local telephone service, long distance telephone service, and cable television in separate and distinct technological siloes.³ In return for authorizing their entry into other markets, each segment also had to agree to two broad tradeoffs: allowing other types of firms into their markets and being subjected to some degree of regulatory oversight.⁴ Thus, the quid pro quo aspects of the 1996 Act have all the makings of a classic political bargain.⁵

Like all major legislation, the 1996 Act was shaped by factors unique to its time. For example, it arose during a period of strong bipartisan support for deregulation that began during the Reagan years and continued at least through the Clinton Administration.⁶ In addition, frustrations with Judge Harold

3. Remarks on Signing the Telecommunications Act of 1996, *supra* note 1, at 188 (“The Act opens up competition between local telephone companies, long distance providers, and cable companies . . .”); *Reno v. ACLU*, 521 U.S. 844, 857–58 (1997) (“The major components of the statute . . . were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting.”).

4. CHARLES B. GOLDFARB, CONG. RSCH. SERV., RL 33034, TELECOMMUNICATIONS ACT: COMPETITION, INNOVATION, AND REFORM 10, at CRS-12 (2007) (noting that “[t]he general objective of the 1996 Act was to open up markets to competition” while also discussing new obligations imposed on incumbents and new carriers—such as requirements to interconnect their networks and guidelines on intercarrier compensation rates).

5. Other scholars have previously explored these dynamics. *See, e.g.*, Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835, 866–73 (1997); Furchtgott-Roth & Roth, *supra* note 2, at 84–88; Matthew Spitzer, *Dean Krattenmaker's Road Not Taken: The Political Economy of Broadcasting in the Telecommunications Act of 1996*, 29 CONN. L. REV. 353 (1996).

6. H.R. REP. NO. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (reporting Congress's intent to “provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . .”) (citations omitted). *See generally* Joseph P. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM.

Greene's more than decade-long supervision of AT&T's breakup helped fuel calls for legislative reform.⁷

These factors, while important, would not be sufficient to ensure the 1996 Act's enactment unless all the major industry segments received sufficient benefits to attract their support. Although we cannot go into every detail of a 107-page statute,⁸ the deal's outlines are relatively clear. The 1996 Act affected four types of telecommunications: (1) telephony; (2) cable; (3) broadcasting; and (4) the Internet.

A. TELEPHONY

Perhaps the 1996 Act's most important provisions relate to telephony,⁹ and especially to local-telephone companies. The 1996 Act authorized local Bell Operating Companies to sell long distance service once they had opened their local telephone markets to competition.¹⁰ At the same time, the 1996 Act repealed the statutory provision prohibiting telephone companies from offering cable television service, authorizing local telephone-companies (called local exchange carriers (LECs)) to offer cable television service.¹¹ The 1996

L. REV. 1323, 1325–27 (1998) (characterizing the 1996 Act as the archetypical example of the shift away from regulatory oversight toward competition and maximization of consumer choice across six industries: (1) railroads; (2) airlines; (3) trucks; (4) telecommunications; (5) electricity; and (6) natural gas).

7. For a representative example, see PETER W. HUBER, MICHAEL K. KELLOGG & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW § 9.6.1.2, at 828–30 (2d ed. 1999). For a more sympathetic assessment of Judge Greene's performance, see Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation Under Judge Greene*, 50 HASTINGS L.J. 1395, 1459–71 (1999).

8. For overviews of the 1996 Act, see generally Jonathan E. Canis & Enrico C. Soriano, *The Telecommunications Act of 1996: A Global Analysis*, 4 COMMLAW CONSPECTUS 147 (1996); Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 123 (1996); Michael I. Meyerson, *Ideas of the Marketplace: A Guide to the 1996 Telecommunications Act*, 49 FED. COMM. L.J. 251 (1997).

9. See, e.g., 145 CONG. REC. 2784 (1999) (statement of Sen. Trent Lott) (calling the telephone provisions the 1996 Act's "centerpiece"); Christopher S. Yoo, *Modularity Theory and Internet Regulation*, 2016 U. ILL. L. REV. 1, 40; James B. Speta, *Antitrust and Local Competition Under the Telecommunications Act*, 71 ANTITRUST L.J. 99, 99 (2003).

10. 47 U.S.C. § 271(c)(2).

11. Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 56, 124 (repealing 47 U.S.C. § 533(b)). Congressman Rick Boucher has traced this provision to a bill he co-sponsored with then-Senator Al Gore, which he said planted "the first seeds of the Act." Rep. Rick Boucher, *Reflecting on Twenty Years Under the Telecommunications Act of 1996: A Collection of Essays on Implementation*, 68 FED. COMM. L.J. 1, 4 (2016) [hereinafter *Reflecting on Twenty Years*]. This provision simply codified a string of lower court decisions, holding that the ban violated the First Amendment. Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 754–57 (2010); Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms,*

Act also preempted all state laws limiting competition in local and long distance telephone service¹² and overturned the Supreme Court's decision in *MCI Telecommunications Corp. v. AT&T Co.*¹³ by giving the Federal Communications Commission (FCC) the flexibility to decline to apply any unnecessary regulations.¹⁴

In return, LECs became subject to measures designed to open their markets to competition. Specifically, the 1996 Act imposed a regime of resale, number portability, dialing parity, and reciprocal compensation on all LECs.¹⁵ Incumbent LECs (ILECs)—defined as those providing service the day the 1996 Act was signed—bore additional obligations to interconnect and provide unbundled access to their network elements.¹⁶ The 1996 Act also codified, for the first time, the FCC's longstanding “universal service” policy that promoted extending communications services to as many Americans as possible. Further, it expanded affordable, nationwide telephone-service to schools, health care providers, and libraires, funded by contributions from telecommunications carriers providing long distance telephone services.¹⁷ At the same time, the 1996 Act codified the FCC's so-called Customer Proprietary Network Information rules, which were developed by the FCC during its Computer Inquiries to protect competition in local telecommunications,¹⁸ and extended them to protect user privacy by applying to both small and large carriers.¹⁹ It also required all LECs and other investor-owned utilities to provide others with access to their poles, ducts, conduits, and rights of way.²⁰

and Privacy, 1 J. FREE SPEECH L. 463, 493 (2021). The 1996 Act permits telephone companies to offer cable service as an unregulated radio-based service, a common carrier, a cable operator, or a new hybrid category known as *open video systems*, 47 U.S.C. § 571(a), that never amounted to anything significant.

12. 47 U.S.C. § 253(d).

13. 512 U.S. 218 (1994); Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order, 13 FCC Rcd. 4045, 20735 n.11 (1996), <https://docs.fcc.gov/public/attachments/FCC-96-424A1.pdf>.

14. 47 U.S.C. § 160.

15. *Id.* § 251(b).

16. *Id.* § 251(c).

17. *Id.* § 254(b)(6) & (d).

18. Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 F.C.C.2d 958, 1089–90 ¶ 261 (1986), *vacated in part on other grounds sub nom.*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

19. 47 U.S.C. § 222; FED. COMM'NS COMM'N, REPORT NO. CC 98-5, FCC CLARIFIES CUSTOMER PRIVACY PROVISIONS OF 1996 ACT (1998), https://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1998/nrcc8019.html.

20. 47 U.S.C. §§ 224, 251(b)(4). The prior statute enacted in 1978 did not require utilities to permit pole attachments, but it did regulate the rates utilities could charge for them. Pole Attachments Act of 1978, Pub. L. No. 95-234, 92 Stat. 35 (1978) (amended 1996).

B. CABLE

The deal was more complex for the cable industry, coming on the heels of broad deregulation in 1984 followed by the re-imposition of regulation in 1992²¹ and with key parts of the deal emerging late in the legislative process.²² The primary benefit to the cable industry was a framework that deregulated the rates charged to consumers.²³ The 1996 Act also prohibited state and local governments from limiting cable operators' ability to provide telephone service.²⁴ The 1996 Act further allowed cable operators to own broadcast networks and expanded their ability to own broadcast stations.²⁵

In return, the cable industry accepted significant tradeoffs. As noted earlier, one tradeoff was opening the local cable market to competition from local telephone companies.²⁶ Cable was also subject to greater restrictions on indecent programming, including: (1) larger fines for transmitting obscene programming;²⁷ (2) the obligation to scramble sexually explicit programming and to scramble or block programming upon subscriber request;²⁸ (3) and the obligation not to carry obscenity, indecency, or nudity on public or leased access channels.²⁹ The 1996 Act also required cable operators to open their networks to third-party set-top boxes³⁰ and to provide closed captioning for video programming.³¹

C. BROADCASTING

The broadcasting industry was a major beneficiary of the 1996 Act, particularly after Minority Leader Robert Dole put a hold on the legislation passed by the House in 1994, correctly expecting that both houses of Congress would flip to Republican control.³² The most dramatic change was liberalizing

21. Christopher S. Yoo, *An Unsung Success Story: A Forty-Year Retrospective on U.S. Communications Policy*, 41 TELECOMM. POL'Y 891, 898 (2017).

22. *Reflecting on Twenty Years*, *supra* note 11, at 52 (Sen. Larry Pressler).

23. *See* 47 U.S.C. § 543 (authorizing regulation with a preference for competition, leading to deregulation in practice).

24. *Id.* § 541(b)(3). In calculating the cable franchise-fee, the franchising authority may not include telecommunications. *Id.* § 542(b).

25. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(f)(1), 110 Stat. 56, 111 (revising 47 C.F.R. § 76.501).

26. *See supra* note 11 and accompanying text.

27. 47 U.S.C. § 559.

28. *Id.* §§ 560, 561.

29. *Id.* § 532(c)(2).

30. *Id.* § 549.

31. *Id.* § 613.

32. *Reflecting on Twenty Years*, *supra* note 11, at 70 (Gerard J. Waldron).

ownership restrictions for radio and television stations.³³ Regarding the digital television transition, the 1996 Act added a new provision requiring that “[i]f the Commission determines to issue additional licenses” for digital television, it “should limit the initial eligibility for such licenses” to incumbent broadcasters.³⁴ The 1996 Act lengthened the licensing term to eight years and revised the renewal process that made incumbent licensees more likely to be renewed.³⁵ The 1996 Act also removed the restriction barring broadcast stations from affiliating with more than one network.³⁶

However, the broadcast industry’s biggest burden was the obligation that all television sets with screens of thirteen inches or larger be equipped with a V-chip that permits viewers to block programming based on its rating.³⁷ The 1996 Act further called for creating an FCC advisory committee to establish a rating system within one year of enactment unless the industry voluntarily created one on its own.³⁸ Broadcasters must also transmit the rating of any video content that has received a rating.³⁹

D. INTERNET

The 1996 Act almost entirely ignored the Internet⁴⁰ except for pornography. Congress adopted the CDA, which criminalized using an interactive consumer-service to share content that depicts sexual or excretory activities to minors.⁴¹ These provisions grew out of legislation that Senator James Exon had submitted the previous year and had drawn significant opposition from the Justice Department, an adverse proposed amendment by Senator Patrick Leahy, and a frigid response from House Speaker Newt

33. Telecommunications Act of 1996, Pub. L. No. 104-104, Sec. 202(a)-(d), 110 Stat. at 110-11 (revising 47 C.F.R. § 73.3555).

34. 47 U.S.C. § 336(a)(1).

35. *Id.* §§ 307(c), 309(k).

36. Telecommunications Act of 1996, Pub. L. No. 104-104, Sec. 202(e), 110 Stat. at 111 (revising 47 C.F.R. § 73.658(g)).

37. 47 C.F.R. § 303(x).

38. *Id.* § 303 note (effective Date of 1996 Amendment).

39. *See id.* § 303(w)(2) (rendered ineffective by an FCC order issued March 12, 1998).

40. Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 2 (2005) (observing that Congress “largely failed to take the Internet into consideration when enacting the [1996 Act]”); *see also* Reno v. ACLU, 521 U.S. 844, 857 (1997) (“The major components of the [1996 Act] have nothing to do with the Internet”).

41. John D. Podesta—who served as Counselor to Senate Minority Leader Tom Daschle when the 1996 Act was passed and would later serve as White House Chief of Staff during President Clinton’s second term—said “with the rather major exception of censorship, Congress simply legislated as if the Net were not there.” John D. Podesta, *Unplanned Obsolence: The Telecommunications Act of 1996 Meets the Internet*, 45 DEPAUL L. REV. 1093, 1109 (1996).

Gingrich.⁴² CDA opponents backed Representatives Cox and Wyden's floor amendment providing immunity to interactive computer service providers, with both provisions ending up in the final legislation.⁴³

E. THE IMPACT OF THE 1996 ACT

Looking back at the 1996 Act from the vantage point of twenty-five years, what is perhaps most striking is the number of major provisions that ended up not having any enduring importance.⁴⁴ For example, the 1996 Act's relaxation of the ownership rules was expected to generate greater concentration of media ownership, which in turn would reduce media diversity.⁴⁵ Yet both predicted results are more empirically complicated than generally believed. For example, Eli Noam's comprehensive study examined media-concentration levels across various sectors from 1984 to 2005, which he then combined into aggregate measures.⁴⁶ Noam found certain mass media sectors remained unconcentrated,⁴⁷ others went from concentrated to moderately concentrated,⁴⁸ while still others went from unconcentrated to moderately concentrated.⁴⁹ From 1996 to 2005, the weighted average of all twenty-seven mass media sectors increased from unconcentrated to the low end of moderately concentrated levels, with submeasures for content media industries and news media remaining unconcentrated.⁵⁰ In terms of the effect of concentration on diversity, reviews of the literature find the empirical evidence to be mixed.⁵¹ The Supreme Court's recent decision—upholding the FCC's

42. Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 64–67 (1996).

43. *Id.* at 67–72, 91–92.

44. For a related argument, see Stuart Minor Benjamin, *Ships Passing in the Night: The Communications Act and the Convergence on Broadband*, 37 BERKELEY TECH. L.J. ____ (2022)

45. See, e.g., C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 856–57, 862–64, 868–72 (2002); Paul Wellstone, *Growing Media Consolidation Must Be Examined to Preserve Our Democracy*, 52 FED. COMM. L.J. 551 (2000).

46. ELI M. NOAM, *MEDIA OWNERSHIP AND CONCENTRATION IN AMERICA* (2009).

47. *Id.* at 299, 312–13 (TV/video distribution), 313 (combined TV/video programming and distribution), 314 (print).

48. *Id.* at 303–04 (electronic mass media programming distribution), 312–13 (TV/video programming).

49. *Id.* at 299 (mass media distribution), 314 (film), 317 (music).

50. *Id.* at 317–18.

51. Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669, 699 & nn.126–130, 700, 700 n.136 (2005) (reviewing the empirical literature and finding it inconclusive); Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. 781, 797–98 (2009); Joel Waldfogel, *Should We Regulate Media Ownership?*, in *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS 3* (Philip M. Napoli ed., 2007). Notably, Ho and Quinn's study found that some mergers reduced diversity, while others increased it. Ho & Quinn, *supra*, at 833–60.

2017 order repealing its Newspaper/Broadcast and Radio/Television Crossownership Rules and relaxing its Local Television Ownership Rule as no longer necessary to promote competition, localism, and viewpoint diversity—likely signals the denouement of the media-ownership debate.⁵²

Regarding telephony, long distance revenue withered even before voice over Internet Protocol (VoIP) and online video conferencing providers—such as Free World Dialup, Vonage, and Skype—rendered long distance revenue largely worthless.⁵³ The telephony provisions failed to induce competition in local telephone services and have been abandoned.⁵⁴ Competition in local telephone services emerged not through entry induced by the 1996 Act but through the advent of cellular telephony (another technology almost entirely ignored by the 1996 Act).⁵⁵

Nor has the 1996 Act had much effect on the cable industry. For example, rate regulation works only when a provider cannot maintain its profit margin simply by degrading product quality.⁵⁶ Somewhat ironically, empirical studies suggest that, given a set level of spending per customer, companies spent less on quality post-regulation.⁵⁷ Telephone companies have made small forays into providing cable service but have yet to emerge as significant players. Instead, the primary competition has come from direct broadcast satellite (DBS) providers (such as DirecTV and the DISH Network),⁵⁸ and is now giving way to over-the-top providers (such as Netflix, Amazon Prime, Disney+, HBO Max, Hulu, and Peacock).⁵⁹ In contrast, the set-top box initiative has languished.⁶⁰

52. FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1160 (2021).

53. See Yoo, *supra* note 21, at 893–94 (noting the decrease in long distance pricing, which caused revenues to drop even before consumers began using VOIP and video conferencing for long distance communications).

54. See Daniel F. Spulber & Christopher S. Yoo, *Toward a Unified Theory of Access to Local Telephone Networks*, 61 FED. COMM. L.J. 43, 56–57 (2008) (describing how the FCC’s 2003 Triennial Review Order and 2005 Triennial Review Remand Order ended unbundling for local telephone service).

55. Yoo, *supra* note 21, at 896.

56. Yoo, *supra* note 51, at 685–87.

57. See THOMAS W. HAZLETT & MATTHEW L. SPITZER, PUBLIC POLICY TOWARD CABLE TELEVISION: THE ECONOMICS OF RATE CONTROLS 128–35 (1997); Gregory S. Crawford, *The Impact of the 1992 Cable Act on Household Demand and Welfare*, 31 RAND J. ECON. 422, 444–45 (2000).

58. Yoo, *supra* note 21, at 899.

59. See *United States v. AT&T, Inc.*, 916 F.3d 1029, 1034, 1042 (D.C. Cir. 2019) (discussing how internet-based video services are competing vigorously with traditional cable television).

60. On the failure of set-top boxes, see Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 COLO. TECH. L.J. 33, 51–52 (2017). For economic critiques, see T. Randolph

The importance of the 1996 Act's broadcasting provisions has similarly faded. After a number of delays, the digital television transition has largely been completed: full-power analog stations went dark in summer 2009,⁶¹ low-power analog stations outside of Alaska returned their second channels by July 13, 2021,⁶² and the final licenses were returned on January 10, 2022.⁶³ The V-chip remains largely unused.⁶⁴ The indecency restrictions proved to be short lived: the Supreme Court struck down the CDA in 1997⁶⁵ and invalidated the cable-indecency provisions three years later.⁶⁶

Most of the reforms to broadcast, telephone, and cable regulation widely regarded as the key elements of the 1996 Act thus had little-to-no long-term impact. This means that the political deal undergirding its enactment appears not to have played out as expected.

III. POTENTIAL BUILDING BLOCKS FOR A NEW COMMUNICATIONS STATUTE

There was one major component of the 1996 Act that has had lasting importance: universal service. Three others—telecommunications privacy, intermediary immunity under Section 230, and pole attachments—were not considered significant features of the 1996 Act⁶⁷ but have continued to have

Beard, George S. Ford, Lawrence J. Spiwak & Michael Stern, *Wobbling Back to the Fire: Economic Efficiency and the Creation of a Retail Market for Set-Top Boxes*, 21 *COMMLAW CONCEPTUS* 1 (2012); Ralitz A. Grigorova-Minchev & Thomas W. Hazlett, *Policy-Induced Competition: The Case of Cable TV Set-Top Boxes*, 12 *MINN. J.L. SCI. & TECH.* 279 (2011).

61. Most full-power analog television stations went dark on June 12, 2009. Press Release, Fed. Commc'ns Comm'n, Full-Power TV Broadcasters Go All Digital (June 13, 2009), <https://docs.fcc.gov/public/attachments/DOC-291384A1.pdf>. One hundred eighteen stations participating in the nightlight program were permitted to operate until July 12, 2009. FCC Announces Revised Participant List for Statutory Analog Nightly Program, 24 *FCC Rcd.* 7805 (2009).

62. Fed. Commc'ns Comm'n, Media Bureau Reminds Low Power Television and Television Translator Stations That the July 13, 2021, Digital Transition Date and Other Important Deadlines Are One Week Away, Public Notice No. DA 21-786 (2021), <https://docs.fcc.gov/public/attachments/DA-21-786A1.pdf>.

63. State of Alaska Request for Waiver of Section 74.731(m) of the Commission's Rules – Low Power Television Analog Termination Date, 36 *FCC Rcd.* 10765 (2021).

64. Violent Television Programming and Its Impact on Children, 22 *FCC Rcd.* 7929, 7942 ¶ 29 (2007) (citing a 2004 Kaiser Family Foundation study, a 2003 Annenberg Public Policy Center study, and a 2007 Zogby poll).

65. *Reno v. ACLU*, 521 U.S. 844, 857 (1997).

66. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 827 (2000).

67. For example, universal service was mentioned in the short summary of the 1996 Act released by the Clinton White House, but privacy, Section 230, and pole attachments were not. See Vice President Al Gore, *A Short Summary of the Telecommunications Reform Act of 1996*,

unexpected and lasting significance. In addition, three new issues have arisen that were not part of the 1996 Act, including net neutrality, spectrum policy, and antitrust reform. Together, these seven issues have potential to serve as the basis for a new communications statute.

A. MAJOR PROVISION OF THE 1996 ACT THAT HAS CONTINUING SIGNIFICANCE: UNIVERSAL SERVICE

Unlike the other issues discussed in this Part, universal service was an important enough component of the 1996 Act to merit a reference in President Clinton's signing statement.⁶⁸ Since then, extending Internet connectivity to more Americans has received increased bipartisan support, with FCC Chairmen from both parties consistently regarding closing the digital divide as a top priority.⁶⁹ Bipartisan support for expanding Internet connectivity has led to a series of reforms to the FCC's universal service programs.⁷⁰ Specifically, in 1997, the Clinton Administration expanded the low-income program's support level and geographic scope.⁷¹ In 2008, the George W. Bush Administration broadened universal service to include wireless.⁷² The Obama Administration further increased the level of support while cracking down on

WHITE HOUSE, <https://clintonwhitehouse4.archives.gov/WH/EOP/OP/telecom/summary.html> (last visited Apr. 16, 2022).

68. Remarks on Signing the Telecommunications Act of 1996, *supra* note 1, at 188.

69. See, e.g., William Kennard, Chairman, FCC, Address before the National Telephone Cooperative Association Annual Meeting: A Networked Future for All Americans (Feb. 10, 1999), <https://transition.fcc.gov/Speeches/Kennard/spwek907.html>; Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. ON TELECOMM. & HIGH TECH. L. 5, 17 (2004); Leslie Cauley, *Martin Wants Broadband Across USA*, ABC NEWS (Aug. 21, 2008, 5:54 AM) (quoting FCC Chairman Kevin Martin), <https://abcnews.go.com/Technology/story?id=5614675>; Julius Genachowski, Chairman, FCC, Connecting America: A Plan to Reform and Modernize the Universal Service Fund and Intercarrier Compensation System (Oct. 6, 2011), <https://docs.fcc.gov/public/attachments/DOC-310252A1.pdf>; *Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Com., Sci., and Transp.*, 116th Cong. 1–2 (2016) (statement of Tom Wheeler, Chairman, FCC); *Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Com., Sci., and Transp.*, 116th Cong. 1 (2020) (statement of Ajit Pai, Chairman, FCC).

70. For the early post-1996 history of universal service reform, see Daniel A. Lyons, *Narrowing the Digital Divide: A Better Broadband Universal Service Program*, 52 UC DAVIS L. REV. 803, 817–26 (2019).

71. Federal-State Joint Board on Universal Service, 12 FCC Rcd. 8776, 8957, 8959–61, 8963 (1997).

72. Federal-State Joint Board on Universal Service Tracfone Wireless, Inc., 27 FCC Rcd. 6206, 6207, 6210, 6214–15 (2005).

fraud and abuse in 2012⁷³ and began phasing out support for voice in favor of broadband.⁷⁴

The COVID-19 pandemic accelerated this conversation, as remote work and school became vital,⁷⁵ and additional funding soon followed. The Coronavirus Response and Relief Supplemental Appropriations Act (CRRSAA), enacted during the Trump Administration as part of the Consolidated Appropriations Act of 2021, allocated an additional \$3.2 billion for low-income support.⁷⁶ The Biden Administration continued implementing this mandate by subsidizing low-income households up to \$50 per month and up to \$100 for one-time purchases of computers or tablets, with tribal households eligible to receive up to \$75 per month.⁷⁷ This program was extended as part of the Infrastructure Act, with the Affordable Connectivity Program providing low-income households with \$30 per month toward broadband services.⁷⁸

In addition, rural areas received increased financial support, beginning with the FCC creating the High Cost Fund in 1997, which reduced rates in high cost areas.⁷⁹ The American Recovery and Reinvestment Act, which passed during the opening days of the Obama Administration, allocated \$7.2 billion toward new construction of broadband infrastructure.⁸⁰ The Obama Administration began redirecting rural support away from funding fixed-line voice service toward funding mobile voice and broadband service in 2011.⁸¹ The administration also shifted focus from high-cost to unserved areas and used reverse auctions to allocate support.⁸² However, ISPs declined \$285 million of the \$300 million offered during Connect American Fund (CAF) Phase I and the CAF Phase II auctions allocated only \$1.5 billion out of the \$20 billion available. In response, the Trump Administration replaced CAF

73. Lifeline and Link Up Reform and Modernization, 27 FCC Rcd. 6656, 6659 (2012).

74. *See* Lifeline and Link Up Reform and Modernization, 31 FCC Rcd. 3962, 3964 (2016).

75. Brandon Baker, *The Multilayered Challenges of Broadband Expansion*, PENN TODAY (June 18, 2021), <https://penntoday.upenn.edu/news/multi-layered-challenges-broadband-expansion> (noting that “the pandemic has underscored the need for broadband in a way that is very popular”).

76. Pub. L. No. 116-260, sec. 904(i)(2), 134 Stat. 1182, 2135 (2021).

77. Emergency Broadband Benefit Program, 36 FCC Rcd. 4612, 4614 ¶ 4 (2021).

78. *Affordable Connectivity Program*, FCC, <https://www.fcc.gov/acp> (last visited Mar. 23, 2022).

79. Federal-State Joint Board on Universal Service, 12 FCC Rcd. 8776, 8784 ¶ 10 (1997).

80. Pub. L. No. 111-5, § 6001(g), 123 Stat. 115, 514 (2008).

81. Connect America Fund, 26 FCC Rcd. 17663, 17671 ¶ 20 (2011), *petitions for review denied sub nom.* In re FCC 11-161, 753 F.3d 1015 (10th Cir. 2014).

82. *Connect America Fund*, 26 FCC Rcd. at 17723 ¶ 150, 17780–83 ¶¶ 321–329.

with the new Rural Digital Opportunity Fund (RDOF),⁸³ which in November 2020 successfully allocated \$9.2 of the \$16 billion in available funds in its Phase I auction, covering up to 5.2 million of the 5.3 million targeted homes.⁸⁴ The forthcoming RDOF Phase II auction should offer up to \$11.2 billion in additional universal service funding.⁸⁵

In addition to these ongoing programs, Congress recently enacted several measures to provide more funding for closing the digital divide. The CRRSAA allocated an additional \$1.3 billion for rural broadband.⁸⁶ The Broadband Infrastructure Framework, enacted into law with bipartisan support in one of the signature accomplishments of the Biden Administration to date, includes \$65 billion for broadband deployment.⁸⁷ These contributions provide meaningful assistance, but many areas still need ongoing support for annual operating-costs.

Universal service reform thus already has significant momentum that may lead to additional funding in the next communications statute. Indeed, the Broadband Infrastructure Framework's influx of funding came with a Congressional directive for the FCC to explore the future of Universal Service Funding (USF).⁸⁸ That said, the ongoing support's funding mechanism represents a significant challenge. The statute provides that "[e]very telecommunications carrier that provides interstate telecommunications services" shall contribute,⁸⁹ a classification exempting "information service providers" from having to provide funding. Taxes that artificially raise the

83. Rural Digital Opportunity Fund Connect America Fund, 35 FCC Rcd. 686, 688 ¶ 4 (2020).

84. *Compare* Press Release, Fed. Comm'ns Comm'n, FCC Releases Final List of Areas Eligible for Rural Digital Opportunity Fund Phase I Auction (Oct. 8, 2020), <https://docs.fcc.gov/public/attachments/DOC-367419A1.pdf> (5.3 million homes targeted), *with* Press Release, Fed. Comm'ns Comm'n, Successful Rural Digital Opportunity Fund Auction to Expand Broadband to Over 10 Million Rural Americans (Dec. 7, 2020), <https://docs.fcc.gov/public/attachments/DOC-368588A1.pdf> (5.2 million homes covered).

85. RDOF/*Broadband Federal Funding*, CAL. PUB. UTILS. COMM'N, <https://www.cpuc.ca.gov/broadbandfederal/funding/> (last visited January 10, 2022).

86. Coronavirus Response and Relief Supplemental Appropriations Act, Pub. L. No. 116-260, § 905(b), 134 Stat. 3305, 2138 (2020).

87. Investment and Jobs Act, Pub. L. No. 117-58, § 60102, 135 Stat. 429, 1182–1205 (2021).

88. Nadia Dreid, *FCC to Probe Future of Universal Service Funding*, LAW360 (Dec. 17, 2021), <https://www.law360.com/articles/1449534/fcc-to-probe-future-of-universal-service-funding>.

89. 47 U.S.C. § 254(d).

price of elastic incremental activity necessarily create well-known economic inefficiencies.⁹⁰

Moreover, technological change has destabilized this funding mechanism.⁹¹ Due to the steep decline in long distance telephone revenues, the contribution rate has increased steadily, rising from 5.7% in the second quarter of 2000⁹² to a peak of 31.8% in the third quarter of 2021⁹³ before receding to 25.2% in the first quarter of 2022.⁹⁴

At a high level, there are two proposed solutions: expand the contribution base to include the Big Tech firms that send content through the network or fund the program through congressional appropriations. The former approach is supported by FCC Commissioner Brendan Carr,⁹⁵ the Broadband Deployment Advisory Committee's model state code,⁹⁶ and Senators Wicker, Capito, and Young, who introduced the Funding Affordable Internet with Reliable (FAIR) Contributions Act.⁹⁷ The latter has drawn former FCC

90. Jerry Hausman & Howard Shelanski, *Economic Welfare and Telecommunications Regulation: The E-Rate Policy for Universal-Service Subsidies*, 16 YALE J. ON REG. 19, 33–36 (1999); Krattenmaker, *supra* note 8, at 165–66; Jerry Ellig, *Intercarrier Compensation and Consumer Welfare*, 2005 U. ILL. J.L. TECH. & POL'Y 97, 106–12 (2005).

91. See Lyons, *supra* note 70, at 839–42 (noting that USF costs have been rising, while the revenue base has fallen as demand for traditional long-distance calls has fallen).

92. Fed. Commc'ns Comm'n, Proposed Second Quarter 2000 Universal Service Contribution Factor, Public Notice No. DA 00-517 (Mar. 7, 2000), <https://docs.fcc.gov/public/attachments/DA-00-517A1.pdf>.

93. Fed. Commc'ns Comm'n, Proposed Third Quarter 2021 Universal Service Contribution Factor, Public Notice No. DA 21-676 (June 10, 2021), <https://docs.fcc.gov/public/attachments/DA-21-676A1.pdf>.

94. Fed. Commc'ns Comm'n, Proposed First Quarter 2022 Universal Service Contribution Factor, Public Notice No. DA 21-1550 (Dec. 13, 2021), <https://docs.fcc.gov/public/attachments/DA-21-1550A1.pdf>.

95. Joan Engebretson, *FCC Commissioner Wants Big Tech to Contribute to USF, Help Fund Universal Broadband*, TELECOMPETITOR (May 25, 2021), <https://www.telecompetitor.com/fcc-commissioner-wants-big-tech-to-contribute-to-usf-help-fund-universal-broadband/>.

96. See Broadband Deployment Advisory Comm., Fed. Commc'ns Comm'n, State Model Code for Accelerating Broadband Infrastructure Deployment and Investment 30 ¶ 13 (Dec. 6, 2018), <https://www.fcc.gov/sites/default/files/bdac-12-0607-2018-model-code-states-final-approved-sections.pdf> [hereinafter BDAC State Model Code] (stating that “[e]ntities that financially benefit for access to a broadband system located in the state, including advertising providers, shall contribute to the Broadband Deployment Fund”).

97. Press Release, S. Comm. on Com., Sci., & Transp., Wicker, Capito, Young Introduce Bill to Explore Collecting USF Contributions from Big Tech (July 21, 2021), <https://www.commerce.senate.gov/2021/7/wicker-capito-young-introduce-bill-to-explore-collecting-usf-contributions-from-big-tech>.

Chairman Ajit Pai's support.⁹⁸ The next communications statute may have to address how to make universal service funding mechanisms more sustainable.

B. MINOR PROVISIONS OF THE 1996 ACT THAT HAVE BECOME MORE SIGNIFICANT THAN EXPECTED

In contrast to universal service, which was always considered an important part of the 1996 Act, other provisions that were regarded as minor at the time have turned out to unexpectedly loom large in current communications policy. These provisions include privacy, intermediary immunity under Section 230, and pole attachments.

1. *Privacy*

In general, U.S. law relies primarily on sector-specific privacy regulation, with primary responsibility for protecting general privacy concerns resting with the Federal Trade Commission (FTC) under its authority to curb deceptive trade practices, ensuring actors honor their privacy policies.⁹⁹ The FTC's jurisdiction does not apply to common carriers.¹⁰⁰ This exception took on a new importance when the Obama Administration reclassified broadband Internet access service as a telecommunications service, which divested the FTC of its jurisdiction.¹⁰¹ The FCC issued new rules reinterpreting the privacy provisions of the 1996 Act to protect all personally identifiable information.¹⁰² Five months later, Congress invoked the Congressional Review Act to invalidate the FCC's new privacy rules.¹⁰³

The more influential development is the wave of state privacy legislation triggered by the referendum-induced enactment of the California Consumer Privacy Act (CCPA).¹⁰⁴ Other states have similarly adopted general privacy

98. Remarks of FCC Chairman Ajit Pai to the Multicultural Media, Telecom & Internet Council and the National Grange (Jan. 12, 2021) (calling on Congress to set aside \$50 billion from the C-Band auction to fund the Universal Service Program for the next five years), <https://docs.fcc.gov/public/attachments/DOC-369186A1.pdf>.

99. 15 U.S.C. § 45(a)(1).

100. *Id.* § 45(a)(2).

101. Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5724–25 ¶¶ 283–284 (2015).

102. Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 31 FCC Rcd. 13911 (2016).

103. Act of Apr. 3, 2017, Pub. L. No. 115-22, 131 Stat. 88.

104. CAL. CIV. CODE §§ 1798.100-199.100 (West 2020). The California Privacy Rights Act (CPRA) amended the CCPA by referendum in November 2020. Cal. Proposition 24 (2020), https://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1798.100.&nodeTreePath=8.4.47&lawCode=CIV

regulation,¹⁰⁵ while still others have enacted legislation targeting ISPs by requiring subscriber permission before disclosing personal information.¹⁰⁶ The proliferation of state privacy laws have led a wide range of companies, many of which had been skeptical of federal privacy legislation, to become more supportive of the idea.¹⁰⁷ Interest in a federal solution might be another aspect incorporated into the next round of major legislative reform.

2. *Section 230 of the Communications Decency Act*

Although Congress debated most of the 1996 Act's major provisions for years, some provisions received significantly less consideration. For example, although Senator James Exon initially introduced the CDA as standalone legislation designed to curb indecency on the Internet,¹⁰⁸ the Senate added the CDA to the 1996 Act by a vote of 84-16,¹⁰⁹ with many of its provisions never having been subjected to hearings or committee deliberation.¹¹⁰ The provision that would eventually be codified at 47 U.S.C. § 230 received even less consideration, having been added to the bill on the House floor by a vote of 420-4.¹¹¹ Although Section 230 was conceived as an alternative to the CDA, the final legislation included both.¹¹² When the Supreme Court invalidated the provisions originating in Senator Exon's proposal, Section 230 emerged as the CDA's only enduring provision.¹¹³

Section 230 reflected an approach that was quite different from that taken by the CDA. Rather than regulate online indecency directly, Section 230 increased private actors' incentives to engage in self-regulation by enacting "Protection for 'Good Samaritan' blocking and screening of offensive material."¹¹⁴ Section 230 specified that providers that host content are not

105. See COLO. REV. STAT. §§ 6-1-1301 to -1313 (2021); VA. CODE ANN. §§ 59.1-575 to -585 (2021). Other general state privacy statutes preceded the CCPA. See DEL. CODE ANN. tit. 6, §§ 1201C-1206C (2015).

106. See ME. STAT. tit. 35-A, § 9301 (2019). Other state privacy statutes, which treated ISPs differently, preceded the CCPA. See MINN. STAT. §§ 325m.01–.09 (2002); NEV. REV. STAT. § 205.498 (1999).

107. Will Oremus, *Beware of Tech Companies Bearing Privacy Laws*, SLATE (Aug. 28, 2018, 5:50 AM), <https://slate.com/technology/2018/08/facebook-and-googles-plan-for-a-new-federal-privacy-law-is-really-about-protecting-themselves.html>.

108. S. 314, 104th Cong. (1995).

109. 141 CONG. REC. 16026 (1995).

110. *Reno v. ACLU*, 521 U.S. 844, 858 (1997).

111. 141 CONG. REC. 22054 (1995).

112. See *Force v. Facebook, Inc.*, 934 F.3d 53, 79 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part) (noting that USF costs have been rising, while the revenue base has fallen because people make fewer traditional long-distance calls).

113. *Id.*

114. 47 U.S.C. § 230(c).

publishers and thus are not liable for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, flighty, excessively violent, harassing, or otherwise objectionable.”¹¹⁵

During its early years, Section 230 was lauded as “the twenty-six words that created the Internet” due to its role in fostering growth of web platforms by protecting edge providers from third-party content liability.¹¹⁶ However, the 2018 enactment of a statute variously named the Stop Enabling Sex Traffickers Act (SESTA) and the Fight Online Sex Trafficking Act (FOSTA) withdrew immunity for interactive computer service providers that promote or facilitate prostitution.¹¹⁷

More recently, Section 230 has become one of the most controversial aspects of the 1996 Act. While some advocates defend the importance of Section 230 in fostering a free Internet,¹¹⁸ the statute has faced growing criticism from both sides of the aisle. Both Presidents Trump and Biden have called for its repeal or amendment.¹¹⁹ Calls for Section 230 reform have come from the bench as well; Justice Thomas encouraged “[p]aring back the sweeping immunity courts have read into § 230” when a more appropriate case comes before the Court.¹²⁰ Dozens of bills to revise or repeal Section 230 have been introduced in Congress since 2020.¹²¹

Bipartisan support creates some possibility that reforming Section 230 might be part of the next communications statute. However, the stark

115. *Id.* § 230(c)(1), (2)(A).

116. *See generally* JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019) (exploring the explosive legal and economic growth created by the adoption of Section 230).

117. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

118. *See, e.g.*, Eric Goldman, *Dear President Biden: You Should Save, Not Revoke, Section 230*, BULL. ATOMIC SCIENTISTS (Jan. 12, 2021), <https://thebulletin.org/premium/2021-01/dear-president-biden-you-should-save-not-revoke-section-230/>.

119. *See* Rachel Lerman, *Social Media Liability Law Is Likely to Be Reviewed under Biden*, WASH. POST (Jan. 18, 2021), <https://www.washingtonpost.com/politics/2021/01/18/biden-section-230/>.

120. *Malwarebytes, Inc. v. Enigma Software Grp.*, 141 S. Ct. 13, 18 (2020) (Thomas, J., concurring).

121. Meghan Anand, Kiran Jeevanjee, Daniel Johnson, Brian Lim, Irene Ly, Matt Perault, Jenna Ruddock, Tim Schmeling, Niharika Vattikonda, Noelle Wilson & Joyce Zhou, *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021), <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html>; *see also* Cristiano Lima, *Congress Is Weighing Changes to Section 230, Again. Here Are What Bills Stand a Chance*, WASH. POST (Nov. 29, 2021, 9:13 AM EST), <https://www.washingtonpost.com/politics/2021/11/29/congress-is-weighing-changes-section-230-again-heres-what-bills-stand-chance/>.

differences in the two parties' attitudes may leave little room for agreement.¹²² Republicans generally believe that online platforms exercise too much editorial discretion,¹²³ whereas Democrats are concerned that they exercise too little.¹²⁴

3. Pole Attachments

Section 230's amendment of the Pole Attachment Act of 1978 was regarded as minor when it was enacted. The Pole Attachment Act requires utilities to provide cable television systems and telecommunications providers with nondiscriminatory access to their poles, ducts, conduits, and rights of way.¹²⁵ Although this was not regarded as a significant provision of the 1996 Act,¹²⁶ the deployment of new network technologies has heightened its importance. For example, the ongoing deployment of the newest generation of mobile broadband technology, 5G, employs base stations that serve areas much smaller than those served by previous technologies (often known as

122. See Todd Shields & Ben Brody, *Washington's Knives Are Out for Big Tech's Social Media Shield*, BLOOMBERG (Aug. 11, 2020), <https://www.bloomberg.com/news/articles/2020-08-11/section-230-is-hated-by-both-democrats-and-republicans-for-different-reasons> (explaining that Democrats criticize Section 230 for enabling social misconduct while Republicans feel that it is used as a censorship tool).

123. See Exec. Order No. 13,925, 85 Fed. Reg. 34,079, 34,080–81 (May 28, 2020) (noting that

Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike . . .

and calling for the FCC to initiate a rulemaking to revise Section 230's interpretation); Memorandum from the Energy and Com. Comm. Republican Staff to Stakeholders and Interested Parties, Big Tech Accountability Platform (Apr. 15, 2021), <https://republicans-energycommerce.house.gov/wp-content/uploads/2021/04/2021.04.15-Big-Tech-Memo-Staff-Legislative-Concepts.pdf>.

124. See Shannon Bond, *Democrats Want to Hold Social Media Companies Responsible for Health Misinformation*, NPR (Jul. 22, 2021, 3:59 PM EST), <https://www.npr.org/2021/07/22/1019346177/democrats-want-to-hold-social-media-companies-responsible-for-health-misinformation> (discussing proposed reforms to Section 230 supported by Democrats that would strip immunity from firms promoting health misinformation during a health crisis); Makena Kelly, *Democrats Take First Stab at Reforming Section 230 After Capitol Riots*, VERGE (Feb. 5, 2021), <https://www.theverge.com/2021/2/5/22268368/democrats-section-230-moderation-warner-klobuchar-facebook-google> (discussing proposed reforms to Section 230 supported by Democrats that would require platforms to introduce additional moderation).

125. 47 U.S.C. § 224(f)(1).

126. For example, President Clinton's signing statement did not mention the pole attachment provisions. See Remarks on Signing the Telecommunications Act of 1996, *supra* note 1.

small cells).¹²⁷ The need to locate base stations in more locations is leading 5G providers to invoke the Pole Attachment Act place small cells on utility poles.¹²⁸

The 1996 Act gives the FCC the authority to regulate pole attachment rates, although this authority does not apply to poles owned by cities, cooperatives, or those that are subject to state regulation.¹²⁹ However, in 2018, the FCC invoked the authority granted by the 1996 Act to preempt state and local laws that constitute barriers to entry to new broadband service providers¹³⁰ to: (1) establish time limits for deciding permit requests, (2) limit fees for small-cell attachments to reasonable approximations of objective costs, (3) invalidate state and local moratoria on telecommunications services and facilities deployment, and (4) implement a federal “one touch make-ready” process that replaced state and local laws.¹³¹ Each of these regulations were largely upheld on judicial review.¹³² The need to deploy 5G and other new technologies on pole attachments may create demand for changing the formula for the reasonableness of pole attachment rates or broadening the access obligation to apply to facilities owned by municipalities and cooperatives.

C. ISSUES THAT ARE CURRENTLY SIGNIFICANT THAT WERE NOT PART OF THE 1996 ACT

Given the technological and economic dynamism of the modern communications environment, it is unsurprising that certain provisions of the 1996 Act ended up being more and less important than expected. Equally predictable is that new issues have arisen since 1996 that the 1996 Act failed to anticipate. These include three topics that could form the basis for a new political deal that could support the next great communications statute: net neutrality, spectrum policy, and antitrust reform.

127. Christopher S. Yoo & Jesse Lambert, *5G and Net Neutrality*, in *THE FUTURE OF THE INTERNET – INNOVATION, INTEGRATION AND SUSTAINABILITY* 221, 225 (Guenter Knieps & Volcker Stocker eds., 2019).

128. *See* Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 32 FCC Rcd. 9760, 9765 (2017).

129. 47 U.S.C. § 224(a)(1) & (3), (b)-(c).

130. *Id.* §§ 253, 332(c)(7)(B)(i).

131. Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 33 FCC Rcd. 9088, 9092 (2018), *denying the petitions for review in part and granting petitions for review in part sub nom.* “One touch make-ready” is a process “that allows new attachers themselves to do all the preparations” necessary to attach new equipment to existing utility poles. *City of Portland v. United States*, 969 F.3d 1020, 1050 (9th Cir. 2020).

132. *Portland*, 969 F.3d 1020.

1. *Net Neutrality*

The debate over net neutrality has dominated communications policy for nearly the past two decades.¹³³ The Obama Administration enacted rules prohibiting last-mile Internet service providers, such as AT&T and Comcast, from engaging in unreasonable discrimination against certain types of traffic, only to see those rules revoked during the Trump Administration.¹³⁴ President Biden's Executive Order calling on the FCC to revive net neutrality regulation guarantees that this issue will remain central.¹³⁵

One of the principal legal issues in the debate over net neutrality, which requires ISPs to treat all Internet traffic equally, turns on the narrow question whether services offered by last-mile broadband ISPs, such as AT&T or Comcast, constitute *information services* or *telecommunications services*. The D.C. Circuit has held that the FCC cannot mandate nondiscrimination if they are classified as the former¹³⁶ but may do so if classified as the latter.¹³⁷ Supreme Court precedent dictates that the statute is ambiguous as to the proper statutory classification of last-mile broadband Internet access service and that, therefore, courts must defer to the FCC's reasonable interpretation under the *Chevron* doctrine.¹³⁸

The FCC has reclassified last-mile broadband Internet access service each of the last three times the White House has changed parties, and each time that action was upheld by the courts.¹³⁹ Consistent with the recent change in power, President Biden's Executive Order on Promoting Competition in the American Economy endorsed reclassifying last-mile broadband Internet access service yet again.¹⁴⁰ Moreover, seven states have responded to the most

133. For the article generally credited with coining the phrase net neutrality, see Tim Wu, *Net Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003). For a response and reply published in the same journal the next year, see Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition?: A Comment on the End-to-End Debate*, 3 J. ON TELECOMM. & HIGH TECH. L. 23 (2004); Tim Wu, *The Broadband Debate: A User's Guide*, 3 J. ON TELECOMM. & HIGH TECH. L. 69 (2004).

134. For a brief history of net neutrality regulation, see *Mozilla Corp. v. FCC*, 940 F.3d 1, 17–18 (D.C. Cir. 2019).

135. Exec. Order No. 14,036, § 5(l)(i), 86 Fed. Reg. 36,987, 36,994 (July 9, 2021).

136. See *Verizon v. FCC*, 740 F.3d 623, 650, 655–57 (D.C. Cir. 2014).

137. *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 710–11 (D.C. Cir. 2016).

138. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 996–97 (2005).

139. See *id.* at 1003 (upholding the George W. Bush Administration's decision to classify last-mile broadband access as an information service); *U.S. Telecom Ass'n*, 825 F.3d at 744 (upholding the Obama Administration's decision to reclassify last-mile broadband access as a telecommunications service); *Mozilla*, 940 F.3d at 86 (upholding the Trump Administration's decision to reclassify last-mile broadband access as an information service).

140. See Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,994 (July 9, 2021).

recent reclassification by enacting statutes regulating net neutrality, with nine additional states introducing similar legislation during their 2021 sessions.¹⁴¹ Courts have thus far split on whether federal law preempts state attempts to regulate net neutrality.¹⁴² The desire to stop net neutrality from oscillating back and forth every time the White House switches parties and to clarify the role of state legislation may provide some support for addressing net neutrality in the next communications statute.

2. *Spectrum Policy*

The politics around the 1996 Act focused almost entirely on the digital television transition. As noted earlier, the Act required that should the FCC decide to issue digital television licenses, they could go only to incumbent broadcasters.¹⁴³ Even before the Act was passed, a bipartisan group of senators led by Senate Majority Leader Robert Dole criticized this provision as corporate welfare and required the FCC to agree not to issue any digital television licenses until Congress had taken further action.¹⁴⁴ In addition, the Omnibus Budget Reconciliation Act of 1993 had mandated the use of auctions to allocate spectrum licenses starting on July 1, 1997.¹⁴⁵

Faced with the prospect of having to pay for spectrum, television broadcasters began “tripping all over themselves to give up their First Amendment rights,” to use the words of one FCC official.¹⁴⁶ After resisting the idea of ratings for years, the industry quickly capitulated and agreed to create its own rating system.¹⁴⁷ Shortly after Dole left the Senate to campaign for the presidency full time on June 11, 1996, Congress notified the FCC that it had abolished the Dole agreement.¹⁴⁸ Two months later, the FCC and the

141. See Casey Lide, *State Net Neutrality Laws May Lead to Federal Legislation*, NAT'L L. REV. (Mar. 1, 2021), <https://www.natlawreview.com/article/state-net-neutrality-laws-may-lead-to-federal-legislation>.

142. *Compare* N.Y. State Telecomm. Ass'n v. James, 544 F. Supp. 3d 269, 279–88 (E.D.N.Y. 2021) (holding the FCC's decision not to regulate broadband preempted state law), *with* ACA Connects – Am.'s Commc'ns Ass'n v. Bonta, 24 F.4th 1233, 1237 (9th Cir. 2022) (holding the opposite).

143. 47 U.S.C. § 336(a)(1).

144. Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 352–53 (2003) [hereinafter Yoo, *Rise and Demise*]; Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1700 (2003) [hereinafter Yoo, *Rethinking Free, Local Television*].

145. Pub. L. No. 103-66, sec. 6002, § 309(j), 107 Stat. 312, 388–92 (1993).

146. Quoted in Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 942 (1997).

147. See 47 U.S.C. § 303 note (Applicability of Rating Provision).

148. Hazlett, *supra* note 146, at 940; see also Yoo, *Rise and Demise*, *supra* note 144, at 353; Yoo, *Rethinking Free, Local Television*, *supra* note 144, at 1700.

industry reached an agreement to impose a three-hour-a-week requirement for children's educational programming.¹⁴⁹ The major broadcast networks began making putatively voluntary commitments to provide more free air time for federal political candidates.¹⁵⁰ In the Balanced Budget Act of 1997, Congress explicitly forbade the FCC from auctioning digital television licenses.¹⁵¹ The net result of these events doubled the number of digital licenses given to television broadcasters, the only industry receiving spectrum for free, without increasing broadcasting's competitiveness or diversity.¹⁵²

As noted earlier, the completion of the digital television transition and the decline of the broadcast television industry has turned this story into more of a parable than an analysis of a live policy issue.¹⁵³ The more important current challenge is the demand for wireless broadband, which has grown precipitously in recent years. The shift is demonstrated eloquently by the recent incentive auction, in which many television broadcasters received payments in return for allowing their spectrum to be redeployed for wireless broadband.¹⁵⁴ Auctions also provide incremental revenue that can allow Congress to avoid the supermajority approval for all measures that are not budget neutral.¹⁵⁵ The FCC has successfully reallocated several new spectrum bands to wireless broadband,¹⁵⁶ but continuing growth may require further legislative attention.

149. See Policies & Rules Concerning Children's Television Programming, 11 FCC Rcd. 10660, 10718–23 ¶¶ 120–29 (1996).

150. See Hazlett, *supra* note 146, at 942.

151. 47 U.S.C. § 309(j)(2); see also Yoo, *Rethinking Free, Local Television*, *supra* note 144, at 1700.

152. Krattenmaker, *supra* note 8, at 163–64.

153. See *supra* notes 61–62 and accompanying text.

154. See Thomas W. Hazlett, *FCC "Incentive Auction" Marks Progress and Pitfalls Towards Freeing Wireless Spectrum*, BROOKINGS INST. (May 24, 2017), <https://www.brookings.edu/blog/techtank/2017/05/24/fcc-incentive-auction-marks-progress-and-pitfalls-towards-freeing-wireless-spectrum/>.

155. See Cong. Budget Off., *Budgetary Implications of the Balanced Budget Act of 1997*, at 11–15 (Dec. 1997), <https://www.cbo.gov/sites/default/files/105th-congress-1997-1998/reports/bba-97.pdf>.

156. See Press Release, Fed. Commc'ns Comm'n, *FCC Announces Winning Bidders of 3.5 GHz Band Auction* (Sept. 2, 2020), <https://docs.fcc.gov/public/attachments/DOC-366624A1.pdf>; Press Release, Fed. Commc'ns Comm'n, *FCC Opens 100 Megahertz of Mid-Band Spectrum for 5G* (Mar. 17, 2021), <https://www.fcc.gov/document/fcc-opens-100-megahertz-mid-band-spectrum-5g>; Press Release, Fed. Commc'ns Comm'n, *FCC Adopts New Rules for the 6 GHz Band, Unleashing 1,200 Megahertz of Spectrum for Unlicensed Use* (Apr. 23, 2020), <https://docs.fcc.gov/public/attachments/DOC-363945A1.pdf>; Press Release, Fed. Commc'ns Comm'n, *FCC Grants C-Band Spectrum Licenses* (July 23, 2021), <https://docs.fcc.gov/public/attachments/DOC-374358A1.pdf>.

3. *Antitrust Reform*

Perhaps the most dramatic change in the political attitudes over technology in the past decade has occurred with respect to digital platforms. At the time when the 1996 Act was passed, these platform companies were flying below the radar. Amazon was a mere two years old, a year from going public, and a platform that only sold books.¹⁵⁷ Google was two years on the horizon¹⁵⁸ and Facebook was eight.¹⁵⁹ Apple was in the midst of a severe slump, firing its CEO, and a year away from bringing back Steve Jobs.¹⁶⁰ The only established technology firm was Microsoft, which was confronting a series of major antitrust suits.¹⁶¹ The most significant player was America Online, whose merger with Time Warner would soon make it the target of antitrust scrutiny.¹⁶²

The world looks quite different today. According to *The Financial Times*, Apple, Microsoft, Alphabet (Google), Amazon, and Meta (Facebook) represented five of the seven largest firms in the world by market capitalization as of December 2021.¹⁶³ The federal government has brought antitrust cases against Google and Facebook and is investigating cases against Amazon and Apple.¹⁶⁴ During their 2020 campaigns, both presidential candidates endorsed vigorous antitrust enforcement against Big Tech companies.¹⁶⁵ President Biden has issued an executive order encouraging the fair and vigorous enforcement of the antitrust laws and calling on the FTC Chair to consider enacting rules to prevent “unfair data collection and surveillance practices” and “unfair

157. *Amazon.com, Inc. History*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/amazon-com-inc-history/> (last visited Aug. 27, 2021).

158. *Google, Inc. History*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/google-inc-history/> (last visited Aug. 27, 2021).

159. Christopher McFadden, *A Brief History of Facebook, Its Major Milestones*, INTERESTING ENG’G (July 7, 2020), <https://interestingengineering.com/history-of-facebook>.

160. See OWEN W. LINZMAYER, *APPLE CONFIDENTIAL 2.0: THE DEFINITIVE HISTORY OF THE WORLD’S MOST COLORFUL COMPANY* 151, 198–202, 289 (2004).

161. See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998).

162. See *Am. Online, Inc.*, 131 F.T.C. 829 (2001).

163. Matthew Johnston, *Biggest Companies in the World by Market Cap*, INVESTOPEDIA (Dec. 21, 2021), <https://www.investopedia.com/biggest-companies-in-the-world-by-market-cap-5212784>.

164. *Factbox: How Big Tech Is Faring Against U.S. Lawsuits and Probes*, REUTERS (Aug. 20, 2021, 6:11 PM EDT), <https://www.reuters.com/technology/big-gy-wins-two-battles-fight-with-us-antitrust-enforcers-2021-06-29/>.

165. See Jon Swartz, *Here’s Where Biden and Trump Stand on Antitrust, Social Media and Other Tech Issues*, MARKETWATCH (Oct. 1, 2020, 5:21 PM ET), <https://www.marketwatch.com/story/heres-where-biden-and-trump-stand-on-antitrust-social-media-and-other-tech-issues-2020-10-01>.

competition in major Internet marketplaces.”¹⁶⁶ He also appointed as head of the FTC one of the leading advocates for more stringent antitrust scrutiny of Big Tech firms.¹⁶⁷

Interest in antitrust enforcement against Big Tech has also been a hot topic on Capitol Hill. The House Judiciary Committee conducted a July 2020 hearing at which the CEOs of Amazon, Apple, Facebook, and Google testified¹⁶⁸ as part of a sixteen-month investigation that produced a 449-page staff report.¹⁶⁹ During the summer of 2021, the House Judiciary Committee passed six bills on antitrust, with provisions on updating merger filing fees, amending the venues for antitrust suits brought by state attorney generals, limiting the ability of technology companies to buy nascent competitors, lowering switching costs between platforms, prohibiting companies from preferencing their own products over those of competitors, and authorizing the breakup of technology companies when necessary to eliminate conflicts of interest.¹⁷⁰ On the other side of the Capitol, Senators Klobuchar and Grassley have introduced antitrust reform legislation that would adopt positions similar to provisions included in the House bills.¹⁷¹

The House Judiciary Committee’s approval of these bills did not proceed down straight party lines. Some Republicans voted in favor, and some Democrats voted against,¹⁷² with lawmakers from California emerging as key

166. Exec. Order No. 14,036, § 5(b), (h)(i) & (iv), 86 Fed. Reg. 36,987, 36,991–92 (July 14, 2021).

167. See Press Release, Fed. Trade Comm’n, Lina M. Khan Sworn in as Chair of the FTC (June 15, 2021), <https://www.ftc.gov/news-events/press-releases/2021/06/lina-m-khan-sworn-chair-ftc>.

168. *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google: Hearing Before the House Judiciary Comm.*, 116th Cong (2020) 11–35, <https://www.govinfo.gov/content/pkg/CHRG-116hhrg41317/html/CHRG-116hhrg41317.htm>.

169. See SUBCOMM. ON ANTITRUST, COM. AND ADMIN. L., HOUSE COMM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REP. AND RECOMMENDATIONS (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [hereinafter CICILLINE REPORT].

170. See Sharis A. Pozen, *House Judiciary Passes Six Antitrust Bills Targeting Tech Platforms and Large Transactions, Setting Up Vote Before House of Representatives*, CLIFFORD CHANCE (June 28, 2021), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/House-Judiciary-Committee-Passes-Six-Antitrust-Bills-Targeting-Tech-Platforms-and-Large-Transactions.pdf>.

171. Press Release, Sen. Amy Klobuchar, Klobuchar, Grassley, Colleagues to Introduce Bipartisan Legislation to Rein in Big Tech (Oct. 14, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/10/klobuchar-grassley-colleagues-to-introduce-bipartisan-legislation-to-rein-in-big-tech> [hereinafter Klobuchar Press Release].

172. Pozen, *supra* note 170, at 4.

opponents to the legislation.¹⁷³ The Senate bill was cosponsored by five Democrats and five Republicans.¹⁷⁴ Opponents have argued that these proposals would hurt the United States' ability to compete with China, while supporters of the legislation have disputed this contention.¹⁷⁵ The complex nature of the coalitions backing these proposals suggests some possibility they could generate enough votes to support passage, but only if they can attract sufficient votes in the Senate to break cloture.

The constellation of interests thus appears to be quite different from the one undergirding the enactment of the 1996 Act. These distinctions necessarily render impossible the recreation of the political deal that led to the 1996 Act. At the same time, they open new potential bases for a political bargain.

IV. POSSIBLE PATHS FOR GETTING TO YES

How might these various components coalesce into a political deal that offers sufficient benefits to enough different segments of the telecommunications and technology industry to support enactment? The key players are likely to play distinctly different roles. Television broadcasting, which has historically exerted strong influence on legislation, is less likely to do so in the future. Although multichannel video continues to serve as a key business of the cable industry, its focus is increasingly shifting to broadband. Regarding telecommunications, voice has become a relatively minor application riding on a broadband pipe, which has brought their interests more into alignment with the future direction of the cable industry, and the technological emphasis has shifted from wired to wireless transmission and from existing networks to the deployment of new technologies such as 5G. The rapid ascent of Internet intermediaries, such as Google, Facebook, and Amazon, adds a new dynamic to the legislative dealmaking. Finally, transactions such as the Comcast-NBC Universal merger, AT&T's short-lived acquisition of Time Warner, and Verizon's unsuccessful purchases of Yahoo! and America Online, have caused the sharp distinctions between these

173. Emily Birnbaum, *California Lawmakers Back the "Goose That Lays the Golden Eggs" in Antitrust Fight*, POLITICO (Jun. 25, 2021), <https://www.politico.com/news/2021/06/25/california-lawmakers-antitrust-496180> (explaining how "bipartisan lawmakers are coming out aggressively in defense of Silicon Valley, the 'goose that lays the golden eggs,' in the words of Rep. Lou Correa (D), one of the members of the delegation.").

174. See Klobuchar Press Release, *supra* note 171.

175. See Zachary Basu & Margaret Harding McGill, *Ex-Intel Officials Claims Antitrust Could Hurt U.S. in China Tech Race*, AXIOS (Sept. 15, 2021), <https://www.axios.com/china-antitrust-big-tech-national-security-d0fb2141-ae4e-407c-97ef-8da09cb54b55.html>.

categories to break down and have given particular companies multiple perspectives on the same issue.

A. AREAS WHERE STAKEHOLDER INTERESTS OVERLAP

Two areas exist where the interests of multiple sectors of the industry potentially overlap. The first is universal service. The second is federal privacy legislation. The alignment of the various sectors makes these issues likely candidates to be key components in any future communications reform legislation.

1. *Universal Service*

Universal service is an area where the interests of different industry segments largely overlap. Closing the digital divide would clearly benefit Internet intermediaries by providing them with access to more customers. In fact, the leading players have long supported initiatives to develop new technologies for expanding Internet connectivity, such as Facebook's Connectivity initiative,¹⁷⁶ Google's now defunct Loon and Station projects¹⁷⁷ and its much curtailed fiber project,¹⁷⁸ and Amazon's Project Kuiper initiative to use low-earth orbit satellites to provide broadband.¹⁷⁹

Both telephone-based and cable-based ISPs are becoming more sanguine about universal service as well. Many have supported low-income connectivity initiatives of their own, such as Comcast Internet Essentials, Access from AT&T, and Charter's Spectrum Internet Assist, among others.¹⁸⁰ Regarding rural support, the shift to reverse auctions and other reforms have made large ISPs increasingly open to accepting universal service funding.¹⁸¹ Large ISPs

176. See Shira Ovide, *Facebook Goes Boring. Yes!*, N.Y. TIMES (June 28, 2021), <https://www.nytimes.com/2021/06/28/technology/facebook-internet-access.html>.

177. Both projects ran for several years but were recently terminated. Manish Singh, *Alphabet Shuts Down Loon Internet Balloon Company*, TECHCRUNCH (Jan. 21, 2021, 7:42 PM EST), <https://techcrunch.com/2021/01/21/google-alphabet-is-shutting-down-loon-internet/>.

178. See David Anders, *Whatever Happened to Google Fiber?*, C|NET (Mar. 5, 2021, 8:50 AM PT), <https://www.cnet.com/home/internet/google-fiber-explained/>.

179. See Harry Menear, *Satellite Showdown: OneWeb vs. Starlink vs. Project Kuiper*, MOBILE MAG. (Mar. 26, 2021), <https://mobile-magazine.com/wireless-networks/satellite-showdown-oneweb-vs-starlink-vs-project-kuiper>.

180. See Julie Zeglen, *Comcast Is Doubling Internet Essentials Speeds. The Move Comes Amid Ongoing Digital Equity Initiatives—and Calls to Do More*, TECHNICALLY (Feb. 2, 2021, 4:12 PM), <https://technical.ly/2021/02/02/comcast-internet-essentials-digital-divide/>; *Connecting Communities to the American Dream*, AT&T PUB. POL'Y (July 30, 2021, 12:43 PM), <https://www.attpublicpolicy.com/universal-service/connectingcommunities/>.

181. AT&T and Verizon declined to participate in the first round of CAF Phase I in 2012. See Joan Engebretson, *Verizon, AT&T Decline Broadband Connect America Funding*, TELECOMPETITOR (July 25, 2012), <https://www.telecompetitor.com/verizon-att-decline->

have also begun actively pursuing state grants issued under the Broadband Infrastructure Framework.¹⁸²

A key priority for ISPs is to ensure that these funds are targeted toward areas in which no ISP is already providing service, as reflected in the universal service fund's shift in focus from high cost to unserved areas.¹⁸³ This shift makes sense from a policy standpoint: the biggest social returns will likely come from targeting the limited financial support that is available toward those who are completely cut off from the Internet rather than those who have connectivity but only from a single provider. Indeed, the legislation that created the Broadband Infrastructure Framework enacted during the Biden Administration confirms this insight by prioritizing funding for unserved areas over underserved areas.¹⁸⁴ Focusing subsidies on areas where purely private service is uneconomical also eliminates any divergence of interest. If anything, it alleviates political pressure on incumbents from having to make investments that are uneconomical. Directing universal support toward unserved areas also avoids the unfairness of asking a private company that has invested its own capital to compete with a provider that is being subsidized by the government.

The one potential area of divergence is the source of universal service funding. As noted earlier, universal service is currently funded by a tax base (interstate long distance) that is dwindling more and more every year.¹⁸⁵ Suggestions to expand the current tax to include Big Tech firms providing services through the network would run directly counter to the interests of

connect-america-funding/. AT&T began to show greater receptivity during the second CAF Phase I round in 2013 by accepting \$100 million, but Verizon continued not participating. Joan Engebretson, *Verizon Again Declines CAF Funding But AT&T Accepts*, TELECOMPETITOR (Aug. 20, 2013), <https://www.telecompetitor.com/verizon-again-declines-caf-funding-but-att-accepts/>. Large ISPs participated slightly more actively in the 2015 CAF Phase II program, in which AT&T accepted \$428 million in funding and Verizon accepted \$49 million for properties they were selling to Frontier. Nicole Blanchard, *AT&T, Frontier, Others Accept \$1.5B in CAF-II Funding Despite FCC's Changing Broadband Definition*, FIERCE TELECOM (Dec. 2, 2015, 8:00 AM), <https://www.fiercetelecom.com/special-report/at-t-frontier-others-accept-1-5b-caf-ii-funding-despite-fcc-s-changing-broadband>. Charter Communications was the biggest winner in the RDOF Phase I reverse auction and is incorporating the \$1.2 billion in universal service support into a \$5 billion rural buildout initiative. *Charter Announces \$5 Billion Initiative to Connect Unserved Americans*, CHARTER PUB. POL'Y (Feb. 5, 2021), <https://policy.charter.com/blog/charter-announces-5-billion-initiative-to-connect-unserved-americans>.

182. See, e.g., Diana Goovaerts, *Comcast, Verizon Snag \$44.9M to Help Deliver Universal Broadband in Delaware*, FIERCE TELECOM (Mar. 18, 2022, 11:33 AM), <https://www.fiercetelecom.com/broadband/comcast-verizon-snag-449m-help-deliver-universal-broadband-delaware>.

183. See *supra* note 82 and accompanying text.

184. Investment and Jobs Act, Pub. L. No. 117-58, § 60102(h)(1)(A)(i)(I)–(II), 135 Stat. 429, 1196 (2021).

185. See *supra* notes 91–94 and accompanying text.

Internet intermediaries.¹⁸⁶ Although this could conceivably constitute a wedge issue between Internet intermediaries and ISPs, the latter have chosen to support transitioning universal service support to general appropriations.¹⁸⁷ Not only is funding universal service through general revenue better public policy;¹⁸⁸ it aligns the interests of the different sectors rather than driving a wedge between them.

2. *Privacy*

The data-driven nature of the Big Tech firms' business models has long made privacy regulation one of their primary concerns. Big Tech firms have become more amenable to federal privacy-legislation, given the potential difficulties of dealing with a patchwork regime produced by lobbying battles fought across all fifty states.¹⁸⁹ Interestingly, leading telephone-based and cable-based ISPs have lent support to the push for federal privacy-legislation¹⁹⁰

186. See *supra* notes 95–97 and accompanying text.

187. Mike Dano, *Verizon, AT&T Want to Reshape Lifeline*, LIGHT READING (Jan. 22, 2021), <https://www.lightreading.com/osbs/verizon-atandt-want-to-reshape-lifeline-/a/d-id/766862> (explaining that AT&T and Verizon consider the funding mechanism for Lifeline unsustainable, and both advocate for Congress to create a direct appropriation so recipients can pay for their chosen broadband service). Some portions of the industry are holding onto expanding the tax base as a backup option. Jonathan Spalter, *Who Should Pay for Universal Broadband Connectivity?*, MULTICHANNEL NEWS (Mar. 25, 2021), <https://www.nexttv.com/blogs/who-should-pay-for-universal-broadband-connectivity>.

188. See *supra* note 90 and accompanying text.

189. See David McCabe & Cecilia Kang, *As Congress Dithers, States Step in to Set Rules for the Internet*, N.Y. TIMES (May 14, 2021), <https://www.nytimes.com/2021/05/14/technology/state-privacy-internet-laws.html> (noting that Google, Amazon, and Facebook spent \$5 million on state lobbying efforts in 2019, with Facebook's Vice President of State and Local Policy stating that “[w]hile we support state efforts to address specific challenges . . . there are some issues, like privacy, where it's time for updated federal rules for the internet—and those need to come from Congress.”).

190. See, e.g., *Privacy*, AT&T, <https://about.att.com/csr/home/reporting/issue-brief/privacy.html> (last visited Aug. 26, 2021) (describing AT&T's support for federal consumer privacy legislation); Kathy Grillo, *Privacy: It's Time for Congress to Do Right by Consumers*, VERIZON NEWS CTR. (Oct. 9, 2018), <https://www.verizon.com/about/news/privacy-its-time-congress-do-right-consumers>; Tom Rutledge, *Charter Urges Congress to Pass Legislation Protecting Privacy Everywhere on the Internet*, CHARTER PUB. POL'Y (Apr. 8, 2018), <https://policy.charter.com/blog/charter-urges-congress-pass-legislation-protecting-privacy-everywhere-internet>; see also Letter from the Business Roundtable to Sen. Majority Leader Mitch McConnell et al. (Sept. 10, 2019), <https://s3.amazonaws.com/brt.org/BRT-CEOLetteronPrivacy-2.pdf> (letter from organization consisting of fifty-one businesses from across the economy, including AT&T, Amazon, and Comcast, calling for federal privacy legislation).

as they pursue more diversified business models based on advertising revenue.¹⁹¹

The extent to which federal privacy legislation would preempt state law poses perhaps the biggest privacy-related challenge to technology firms.¹⁹² Although industry members would prefer a uniform federal standard,¹⁹³ many privacy advocates regard any federal legislation as a floor above which states would remain free to enact additional restrictions.¹⁹⁴ A complicating factor is the fact that some states have enacted privacy laws that apply only to ISPs, as noted above.¹⁹⁵ Needless to say, ISP-specific measures are of greater concern to ISPs than to edge providers.¹⁹⁶

B. AREAS WHERE BIG TECH HAS MORE AT STAKE

Although the interests of various stakeholders align for universal service and federal privacy legislation, there are some issues that are more critical for big companies and other issues that loom larger for ISPs. In particular, Big Tech companies have more at stake on two potential areas for future reform

191. See, e.g., Peter Adams, *AT&T Sells Xandr to Microsoft, Ending Ill-Fated Bid to Dethrone Digital Duopoly*, MARKETING DIVE (Dec. 21, 2021), <https://www.marketingdive.com/news/att-sells-xandr-to-microsoft-ending-ill-fated-bid-to-dethrone-digital-duo/616411/> (describing AT&T's unsuccessful attempts to enter the advertising business by purchasing Time Warner and the Xandr ad-tech platform).

192. See Scott Ikeda, *Big Tech Moves to Influence State Privacy Laws, Laying the Groundwork for a Federal Push*, CPO MAG. (May 28, 2021), <https://www.cpomagazine.com/data-privacy/big-tech-moves-to-influence-state-privacy-laws-laying-the-groundwork-for-a-federal-push/> (“[The] conventional wisdom is that Silicon Valley would prefer federal privacy laws that are favorable to them to a patchwork of state laws that vary in their terms.”); Anupam Chander, Margot E. Kaminski & William McGeeveran, *Catalyzing Privacy Law*, 105 MINN. L. REV. 1733, 1798 (2021) (describing benefits and costs of federal preemption of privacy regulation).

193. See Todd Feathers, *Big Tech Is Pushing States to Pass Privacy Laws, and Yes, You Should Be Suspicious*, MARKUP (Apr. 15, 2021), <https://themarkup.org/privacy/2021/04/15/big-tech-is-pushing-states-to-pass-privacy-laws-and-yes-you-should-be-suspicious> (explaining that experts believe Big Tech's “ultimate goal is to prompt federal legislation that would potentially override California's privacy protections.”).

194. See Gicel Tomimbang, *Authors of Federal Privacy Bill and California's Privacy Ballot Initiative Discuss the Future of U.S. Consumer Law*, CONSUMER PRIVACY WORLD (Jan 12, 2022), <https://www.consumerprivacyworld.com/2022/01/authors-of-federal-privacy-bill-and-californias-privacy-ballot-initiative-discuss-the-future-of-u-s-consumer-privacy-law/>; Makenzie Holland, *Feds Debate While States Act on Data Privacy Laws*, SEARCHSECURITY (Mar. 2021), <https://www.techtarget.com/searchsecurity/feature/Feds-debate-while-states-act-on-data-privacy-laws>.

195. See *supra* note 106 and accompanying text.

196. See *ACA Connects – Am.'s Commc'ns Ass'n v. Frey*, 471 F. Supp. 3d 318 (D. Me. 2020) (illustrating a First Amendment challenge by four ISP trade associations against Maine's ISP-specific privacy law). In full disclosure, I am serving as an expert consultant in this litigation.

legislation: Section 230 and antitrust. Note that the divergence of interest is not necessarily an insurmountable barrier to a new communications statute. However, it does frame more clearly the terms under which the key subsectors of the industry might strike a mutually beneficial deal.

1. *Section 230 of the Communications Decency Act*

Given the broad protections from liability that Section 230 currently provides to Big Tech firms, these companies have the most to lose from the increasing calls from both Democrats and Republicans to limit its scope or repeal it entirely, although some companies are making tactical concessions to ensure that wholesale repeal of the statute is off the table.¹⁹⁷ At the same time, some ISPs have come out in support of Section 230 reform, contrasting Internet intermediaries' freedom to moderate content with both the liability imposed on traditional distributors of third-party content, such as book publishers, newspapers, and broadcasters, and the nondiscrimination mandates associated with net neutrality.¹⁹⁸ Content providers have similarly pushed for Section 230 reform as a means to protect their intellectual property, joined by other noncommunications industries supporting such reform for their own reasons.¹⁹⁹

Differences in the reasons motivating Democrats' and Republicans' calls for Section 230 reform may leave little common ground for agreement,²⁰⁰ although calls for greater transparency regarding the substance of online platforms' content moderation policies may offer some basis for a compromise solution.²⁰¹ The takedowns that occurred in the aftermath of the

197. Adi Robertson, *Mark Zuckerberg Just Told Congress to Upend the Internet*, VERGE (Oct. 29, 2020), <https://www.theverge.com/2020/10/29/21537040/facebook-mark-zuckerberg-section-230-hearing-reform-pact-act-big-tech>.

198. Joan Marsh, *The Neutrality Debate We Need to Have*, AT&T PUB. POL'Y (Aug. 31, 2020), <https://www.attpublicpolicy.com/fcc/the-neutrality-debatewe-need-to-have/>.

199. David McCabe, *IBM, Marriott and Mickey Mouse Take on Tech's Favorite Law*, N.Y. TIMES (Feb. 4, 2020), <https://www.nytimes.com/2020/02/04/technology/section-230-lobby.html>.

200. See *supra* notes 121–124 and accompanying text.

201. Nandita Bose & David Shepardson, *Senators Propose Reform to Key U.S. Tech Liability Shield*, REUTERS (Jun. 24, 2020), <https://www.reuters.com/article/us-usa-tech-section-230/senators-propose-reform-to-key-u-s-tech-liability-shield-idUSKBN23V2V3> (discussing the Platform Accountability and Consumer Transparency Act, or PACT Act, co-sponsored by Democratic Senator Brian Schatz and Republican Senator John Thune, which would require tech platforms to explain their content moderation practices).

enactment of SESTA and FOSTA²⁰² lend some credibility to predictions that limiting Section 230's scope would lead to less posting of Internet content.²⁰³

2. Antitrust Reform

Big Tech firms are also facing antitrust scrutiny, with Google, Facebook, Apple, and Amazon becoming targets of the antitrust reform movement.²⁰⁴ Interestingly, the Ranking Member of the House Subcommittee on Antitrust, Commercial and Administrative Law has attempted to draw a link between possible reforms of antitrust and Section 230, arguing that antitrust reform is the only way to curb supposed discrimination in content moderation.²⁰⁵

Although the 2020 House Staff proposed several general changes to antitrust that were not specific to Big Tech,²⁰⁶ the current raft of proposals reported by the House Judiciary Committee on June 24, 2021, largely target “online platforms.”²⁰⁷ The same is true about the bill reported by the Senate Judiciary Committee.²⁰⁸ The proposals' lack of direct applicability to ISPs have led the industry to remain unsurprisingly silent about the legislation.

ISPs' reticence to get involved does carry some risk. The logic of their technological neutrality arguments when criticizing ISP-specific state privacy

202. See Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> (noting that several popular websites like Craigslist and Reddit removed swaths of content soon after the passage of SESTA and FOSTA).

203. Derek E. Bambauer, *What Does the Day After Section 230 Reform Look Like?*, BROOKINGS (Jan. 22, 2021), <https://www.brookings.edu/techstream/what-does-the-day-after-section-230-reform-look-like/> (“The first and most predictable effect of a diminution of Section 230 will be a wave of litigation. . . . The second immediate effect is likely that internet sites will become much more cautious about content.”).

204. Nicole Goodkind, *Congress Targets Tech Giants Apple, Google, Amazon, and Facebook in New Series of Antitrust Laws*, FORTUNE (Jun. 11, 2021), <https://fortune.com/2021/06/11/congress-targets-tech-giants-apple-google-amazon-and-facebook-in-new-series-of-antitrust-laws/>.

205. See Cat Zakrzewski & Aaron Schaffer, *The Technology 202: GOP Divisions Threaten the Bipartisan Efforts to Pass Antitrust Legislation*, WASH. POST (Jun. 17, 2021), <https://www.washingtonpost.com/politics/2021/06/17/technology-202-gop-divisions-threaten-bipartisan-efforts-pass-antitrust-legislation/>.

206. See CICILLINE REPORT, *supra* note 169, at 383–86, 390–404.

207. Four of the five bills reported by the House Judiciary Committee apply only to *online platforms*, which by definition can only be “a website, online or mobile application, operating system, digital assistant, or online service.” H.R. 3816, 117th Cong. § 2(g)(10) (2021); H.R. 3825, 117th Cong. § 5(10) (2021); H.R. 3826, 117th Cong. § 3(h) (2021); H.R. 3849, 117th Cong. § 5(12) (2021). The sole exception is the bill on merger filing fees, which applies to all firms. H.R. 3843, 117th Cong. (2021).

208. S. 2992, 117th Cong. (2022).

laws and net neutrality appears to apply equally to these antitrust proposals. Moreover, telecommunications firms have been active in merger markets in the past²⁰⁹ and have been the not-infrequent target of enforcement activity, evidenced most recently by AT&T's short-lived acquisition of Time Warner.²¹⁰ Criticisms from some quarters that the current proposals do not include ISPs²¹¹ creates some possibility that the bills may expand to include network providers as well, which would of course broaden the scope of the firms concerned about this issue.

C. AREAS WHERE ISPs HAVE MORE AT STAKE

At the same time, other issues exist in which ISPs have more skin in the game than Big Tech. Three areas in particular loom the largest: spectrum policy, pole attachments, and net neutrality. Notably, the more technical nature of these first two topics place them further from the public eye than the third. In each case, Big Tech's interests are not completely opposed to those of the ISPs. In addition, there are some areas in which the interests of different types of ISPs diverge.

1. *Spectrum*

Wireless broadband is the most rapidly growing segment of the industry, and satisfying this burgeoning demand depends on access to ever-increasing amounts of spectrum. The need for more spectrum unifies all actors in this space. Network providers and Big Tech firms all need spectrum to provide service to their customers. The incentive auction even allowed struggling broadcasters to benefit from mobile broadband's rise.²¹²

That said, key industry segments line up somewhat differently with respect to the best way to deploy spectrum. Traditional wireless providers, such as AT&T, Verizon, and T-Mobile, have staked their future on 5G and are lobbying for additional allocations of licensed spectrum to support its

209. Jean-Christophe Lebraud & Peter Karlströmer, *The Future of M&A in Telecom*, MCKINSEY & CO. (2011), https://www.mckinsey.com/~/_/media/mckinsey/dotcom/client_service/Telecoms/PDFs/M_A.ashx.

210. *See* United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019) (upholding the district court's rejection of the federal government's challenge to AT&T's acquisition of Time Warner).

211. *See, e.g.*, Karl Bode, *Recent Antitrust Push Is Weirdly Narrow, Pretends Telecom and Banking Don't Exist*, TECHDIRT (June 17, 2021, 5:54 AM), <https://www.techdirt.com/articles/20210615/07412446992/recent-antitrust-push-is-weirdly-narrow-pretends-telecom-banking-dont-exist.shtml>; Katharine Trendacosta, *When It Comes to Antitrust, It's All Connected*, ELEC. FRONTIER FOUND. (Aug. 26, 2021), <https://www.eff.org/deeplinks/2021/08/when-it-comes-antitrust-its-all-connected>.

212. *See supra* note 154 and accompanying text.

deployment.²¹³ Big Tech firms like Google and ISPs like Comcast that to date have largely foregone significant investments in licensed spectrum tend to support allocating increasing amounts to unlicensed spectrum.²¹⁴

2. Pole Attachments

In addition to spectrum, firms looking to deploy 5G networks need access to locations where they can locate their small cells. On the one hand, traditional wireless firms embrace pole attachment reforms that make it easier to deploy new network infrastructure.²¹⁵ Their position was initially supported by Google to facilitate its deployment of Google Fiber,²¹⁶ although questions about the future of this initiative may cause its position to change. Wireline ISPs that are not deploying wireless networks have opposed these reforms because of the additional burdens they impose and concerns that new entrants eager to deploy as quickly as possible will pay too little attention to preventing the disruption of service to existing customers.²¹⁷

The real schism on this issue lies between those deploying new networks and incumbents that are providing service through existing technologies, with the former including the telephone industry and the latter consisting primarily of the cable industry. Indeed, the history of pole attachments reveals the extent to which each industry's position is contingent on its construction plans. Cable was the primary beneficiary of the Pole Attachments Act during the industry's early years,²¹⁸ but its position has reversed now that its networks are fully deployed.

3. Net Neutrality

The positions of the different segments of the industry have shifted over time. Net neutrality has been critically important to ISPs throughout the course

213. Unlicensed Use of the 6 GHz Band, 35 FCC Rcd. 3852 (2020).

214. Jay Peters, *Google Is Trying to Test a Secret 6 GHz Network in 17 Different States*, VERGE (Aug. 17, 2020), <https://www.theverge.com/2020/8/17/21372797/google-fcc-test-6ghz-network-17-states>; Use of the 5.850-5.925 GHz Band, 35 FCC Rcd. 13440 (2020).

215. See *AT&T Statement on Reforming Pole Attachment Process*, AT&T PUB. POL'Y (Aug. 2, 2018, 11:44 AM), <https://www.attpublicpolicy.com/regulatory-legislative-reform/att-statement-on-reforming-pole-attachment-process/>; Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, Fed. Comm'ns Comm'n (Sept. 11, 2017), <https://ecfsapi.fcc.gov/file/10911001404566/2017%2009%2011%20Verizon%20broadband%20deployment%20ex%20parte.pdf>.

216. See Jon Brodtkin, *FCC Sides with Google Fiber over Comcast with New Pro-Competition Rule*, ARS TECHNICA (Aug. 2, 2018), <https://arstechnica.com/tech-policy/2018/08/fcc-gives-google-fiber-and-new-isps-faster-access-to-utility-poles/>.

217. Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 33 FCC Rcd. 7705 (2018).

218. See *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330–31 (2002).

of the debate. Big Tech's relationship with net neutrality has been more complex. During the beginning years of the debate, first Microsoft and then Google represented net neutrality's strongest advocates. This began to change in the lead up to the 2010 Open Internet Order, when Google and Verizon brokered a deal in which both firms would support the imposition of net neutrality on wired broadband in exchange for lighter touch regulation of wireless broadband.²¹⁹ Netflix took over as the primary net neutrality advocate during the debates leading up to the 2015 Open Internet Order.²²⁰ When the 2018 Restoring Internet Freedom Order abolished net neutrality, Big Tech companies opposed the decision and began to advocate for legislation to stabilize the situation.²²¹

Big Tech companies have been criticized for the tepidness of their support for net neutrality.²²² This perception is far from illusory: Netflix's CEO has acknowledged that net neutrality is "not our primary battle at this point" for the simple reason that "we're big enough to get the deals we want."²²³ The same conclusion was drawn by Tim Wu—the scholar credited with coining the phrase "net neutrality," and who is currently serving as special advisor to President Biden for technology and competition policy—acknowledging that Big Tech companies "have mixed motives in this area" and now that they have

219. David Goldman, *Why Google and Verizon's Net Neutrality Deal Affects You*, CNN MONEY (Aug. 5, 2010, 4:29 PM ET), https://money.cnn.com/2010/08/05/technology/google_verizon_net_neutrality_rules/index.htm.

220. Karl Bode, *Google, Facebook, and Netflix Decide They Care About Net Neutrality Again*, VICE (Jan. 9, 2018, 9:00 AM), <https://www.vice.com/en/article/d344pj/google-facebook-and-netflix-net-neutrality-lawsuit>.

221. *Id.*

222. *Id.*; Karl Bode, *Google Lawyer Again Insists They Didn't Sell Out on Neutrality*, DSL REPS. (Aug. 12, 2010, 3:40 PM EDT), <http://www.dslreports.com/shownews/Google-Lawyer-Again-Insists-They-Didnt-Sell-Out-On-Neutrality-109870>; Natasha Lomas, *Net Neutrality Protestors Arrested at Google HQ*, TECHCRUNCH (June 25, 2014, 5:48 AM EDT), <https://techcrunch.com/2014/06/25/occupygoogle-arrests/>; Marguerite Reardon, *FCC beware: Facebook, Google like net neutrality just as it is*, C|NET (July 7, 2017, 12:47 PM PT), <https://www.cnet.com/tech/services-and-software/fcc-beware-facebook-google-like-net-neutrality-just-as-it-is/>; Joe Pinsker, *Where Were Netflix and Google in the Net-Neutrality Fight?*, ATL. (Dec. 20, 2017) <https://www.theatlantic.com/business/archive/2017/12/netflix-google-net-neutrality/548768/>; Klint Finley, *Tech Giants to Join Legal Battle Over Net Neutrality*, WIRED (Jan. 5, 2018, 4:33 PM), <https://www.wired.com/story/tech-giants-to-join-legal-battle-over-net-neutrality/>; Klint Finley, *Big Tech's Fight for Net Neutrality Moves Behind the Scenes*, WIRED (May 27, 2018, 7:00 AM), <https://www.wired.com/story/big-techs-fight-for-net-neutrality-moves-behind-the-scenes/>.

223. Tony Romm, *Netflix CEO: Net Neutrality Is No longer Our 'Primary Battle'*, VOX (May 31, 2017, 1:38 PM EDT), <https://www.vox.com/2017/5/31/15720268/netflix-ceo-reed-hastings-net-neutrality-open-internet>.

achieved scale, “it’s to some degree to their advantage to climb up the ladder and pull it up after them.”²²⁴

Critics are also drawing an analogy between net neutrality and the extent to which Big Tech companies possess market power and prioritize their own content.²²⁵ At the same time, Big Tech companies are becoming significant network operators in their own right, building wide-area networks that cover most continents and becoming the largest constructors of undersea cables in the world.²²⁶ They have largely chosen to operate these as private networks, primarily to avoid the regulatory burdens of the type associated with net neutrality.²²⁷

The softening of Big Tech’s position on net neutrality suggests the possibility of finding some common ground. That said, any legislation that is not sufficiently protective of net neutrality runs the risk of generating significant political backlash.

D. POLITICAL OBSTACLES

Our brief review has identified a number of issues that could form the basis for a political bargain sufficient to support enactment of a new communications statute. Aside from the substance of such a political deal, considerable obstacles remain to its possible enactment.

First and foremost are the priorities of the Biden Administration. To its credit, it has maintained a laser-like focus on seven priorities: COVID-19, climate, racial equity, the economy, health care, immigration, and restoring the United States’ global standing.²²⁸ Aside from the inclusion of rural broadband

224. April Glaser & Will Oremus, *The Big Tech Companies That Love Net Neutrality Have a Ton to Gain from Its Demise*, SLATE (Dec. 13, 2017, 4:53 PM), <https://slate.com/technology/2017/12/tim-wu-explains-why-the-tech-companies-that-love-net-neutrality-have-a-ton-to-gain-from-its-demise.html>.

225. Fred Campbell, *The Truth About ‘Net Neutrality,’ the Left, and Google*, FORBES (May 3, 2017, 9:49 AM EDT), <https://www.forbes.com/sites/fredcampbell/2017/05/03/the-truth-about-net-neutrality-the-left-and-google/>; Jeremy Carl, *Debating Net Neutrality: Big-Tech Monopolies Are the Real Problem*, NAT’L REV. (Jun. 11, 2019), <https://www.nationalreview.com/2019/06/debating-net-neutrality-big-tech-monopolies-are-the-real-problem/>; Ryan Singel, *Net Neutrality Protestors Call for Google to Stand Tall*, WIRED (Aug. 3, 2010, 8:47 PM), <https://www.wired.com/2010/08/net-neutrality-google-protest/>.

226. Christopher S. Yoo, *Paul Baran, Network Theory, and the Past, Present, and Future of the Internet*, 17 COLO. TECH L.J. 161, 181–82 (2018).

227. See Mark Jamison, *Facebook Tells Us Why Net Neutrality Regulation Is a Bad Idea*, AEI (Apr. 16, 2019), <https://www.aei.org/technology-and-innovation/telecommunications/facebook-tells-us-why-net-neutrality-regulation-is-a-bad-idea/>.

228. *The Biden-Harris Administration Immediate Priorities*, WHITE HOUSE, <https://www.whitehouse.gov/priorities/> (last visited Aug. 27, 2021).

funding in the infrastructure bill, none of the priorities identified here appear to fall within this list.

The second is the high level of partisanship in the current Congress. For only the third time in U.S. history, the Senate is equally divided between the two major parties, with Vice President Kamala Harris providing the casting vote to break ties.²²⁹ The Democrats' majority in the House of Representatives is larger but sufficiently thin to limit the prospects for major legislative reform.²³⁰ The loss of a majority in either chamber in the midterm elections would make these possibilities even more remote. That said, the bipartisan nature of the support for the infrastructure bill and for antitrust reform suggest that this problem may not be insurmountable.

Finally, combining the substantive elements discussed above into a single piece of legislation would be complicated by the fact that different provisions fall within the jurisdiction of different congressional committees. Specifically, classic telecommunications issues such as universal service, intermediary immunity, spectrum policy, pole attachments, and net neutrality fall within the ambit of the commerce committees, while the judiciary committees bear responsibility for privacy and antitrust. The involvement of two sets of committee leaders and members will no doubt make the difficult process of enacting major legislative reform even harder.

V. CONCLUSION

Politics is often described as the art of the possible. This pragmatic observation underscores the importance of thinking about major reform legislation as more than just debates over substantive issues but also about building coalitions of support. This approach provides insights into the enactment of the Telecommunications Act of 1996 and reveals possible avenues for the passage of the next major communications statute.

Although predictions are hazardous, especially about the future,²³¹ some thoughts are warranted on the likely direction of communications reform. In

229. Jennifer Epstein, Steven T. Dennis & Laura Litvan, *Divided Senate Gives Kamala Harris Powerful Tiebreaker Role*, BLOOMBERG (Jan. 17, 2021), <https://www.bloomberg.com/news/articles/2021-01-17/senate-divided-by-party-gives-harris-powerful-tiebreaker-role>.

230. See Party Breakdown, U.S. House of Representatives Press Gallery (accessed Aug. 11, 2021), <https://pressgallery.house.gov/member-data/party-breakdown>.

231. Although this quotation is often associated with various people, including Mark Twain, Niels Bohr, Samuel Goldwyn, Nostradamus, and Yogi Berra, the earliest verified published use of the phrase appeared in 1948 in the autobiography of Danish politician Karl Kristian Steincke. Garson O'Toole, *It's Difficult to Make Predictions, Especially About the Future*, QUOTE INVESTIGATOR (Oct. 20, 2013), <https://quoteinvestigator.com/2013/10/20/no-predict/>.

terms of political salience and financial importance, the most important issue in play is antitrust reform. Although this issue has the most relevance for Big Tech companies, it should interest every stakeholder, as all major telecommunications companies have a strong interest in preserving the economically focused approach that currently animates antitrust law, and they all no doubt plan to undertake mergers and engage in conduct that could be subject to new antitrust rules that may be adopted.

The second most important issue is privacy. Although the Big Tech firms currently rely the most on advertising, many other stakeholders are exploring the possibility of pursuing business models based on the use of data. In addition, the increasing number of state privacy statutes is raising the real possibility that every stakeholder may face a legal environment that is badly fragmented.

Although the ISPs share a degree of interest in both these issues, net neutrality and spectrum reform have bigger implications for their business models. And politicians appear to be most interested in antitrust and Section 230 reform, although those most interested in antitrust tend to advocate for outcomes that almost all of the key stakeholders would tend to resist.

Any enactment of communications reform legislation in the short run would depend on whether any one proposal can cobble together enough interest from a sufficient cross section of stakeholders to induce them to support such a proposal. Many parties that were previously content with the status quo, or at least preferred sticking with it over assuming the risks of major reform, now appear motivated enough to participate in some form of compromise.

Although these immediate concerns will determine whether such reform legislation could be enacted in the near future, it is important not to make too much of the politics of the moment. Major reform legislation is typically the process of years of deliberation. Thus, laying the groundwork for reform legislation can serve important purposes regardless of the short-term prospects.

