EDITOR'S NOTE

Welcome to the second Issue of Volume 67 of the Federal Communications Law Journal, the nation's premier communications law journal and the official journal of the Federal Communications Bar Association.

This Issue features a pair of Articles by members of two different regulatory agencies discussing the FCC's 2015 Open Internet Order. The first piece, by Commissioner Ajit Pai, examines the Order from his perspective as a member of the Federal Communications Commission. Commissioner Pai's Article first addresses the procedural issues implicated by the Open Internet rulemaking. The Article then analyzes the substance of the Order, including issues associated with reclassification, the FCC's treatment of mobile broadband, and Section 706 of the Telecommunications Act.

Next, Commissioner Maureen Ohlhausen presents her perspective on the Order as a member of the Federal Trade Commission. Commissioner Ohlhausen's Article first compares and contrasts the differing regulatory approaches employed by the FTC and the FCC. The Article then turns to the history of FCC rulemaking in the field of net neutrality. Finally, Ohlhausen's Article discusses the implications of the FCC's prescriptive regulatory approach to net neutrality.

In addition to these pieces, this Issue contains three student Notes. In the first Note, Ryan Radia proposes a way forward on retransmission consent. Radia explores the present framework governing retransmission consent and argues that the Next Generation Television Marketplace Act has the potential to level the playing field in the media market for the 21st Century. In the next Note, Rachel Noteware provides a second view on retransmission consent, concluding that the FCC should adopt a more active role in preventing blackouts. In the final Note, Andrew Hasty contends that the FTC can better protect consumer privacy by viewing data-for-service agreements as exchanges of economic value, and adopting a privacy framework centered on increased disclosure of the privacy "price" of those transactions.

The Journal is committed to providing its readership with substantive coverage of relevant topics in communications law, and we appreciate the continued support of contributors and readers alike. We welcome your feedback and submissions—any questions or comments about this Issue or future issues may be directed to fclj@law.gwu.edu, and any submissions for publication consideration may be directed to fcljarticles@law.gwu.edu. This Issue and our archive are available at http://www.fclj.org.

Anthony Glosson
Editor-in-Chief

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FEDERAL COMMUNICATIONS BAR ASSOCIATION

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ARTICLES

The Federal Communications Commission is coming under intense political pressure to reclassify broadband Internet access as a common carrier telecommunications service under Title II of the Communications Act. Yet, almost no attention has been directed at the fine details of how reclassification will be implemented. Relying on the plain terms of the FCC's governing statute, current case law, and the Commission's own precedent, we examine such details in this Article and conclude the following: First, reclassification would turn edge providers into "customers" of Broadband Service Providers ("BSPs"), and this new "carrier-to-customer" relationship (as opposed to a "carrier-to-carrier" relationship) would require all BSPs to create, and then tariff, a termination service for Internet content under Section 203 of the Communications Act. Because a tariffed rate cannot be set arbitrarily, and since a service cannot be generally tariffed at a price of zero, reclassification would require all edge providers (not their carriers)—as customers of the BSP—to make direct payments to the BSPs for termination services. Second, as competition is the basis for Section 10 forbearance, the Commission is precluded from setting aside tariffing because it has labeled all Broadband Service Providers as "terminating monopolists." As such, the agency has boxed itself in for mandatory tariffing under Title II.

To protect consumers online, we need informed, flexible, and fact-based enforcement supplemented with self-regulation using technical standards developed through consensus-based, multi-stakeholder organizations of engineers, consumers, and businesspeople. In this article, Commissioner Ohlhausen first describes a framework for thinking about regulation of fast-changing industries and compares and contrasts the FCC and the FTC's approaches. Next, she briefly summarizes the history of the net neutrality issue, including the FCC's 2010 Open Internet Order, the subsequent Verizon

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to blackouts. Motivated by the same public interest as preserving access to local and diverse media sources, the discontinuance framework of adjustable forfeitures based on the harm of the service disruption can guide FCC implementation of its statutory authority to prevent retransmission consent blackouts.

Treating Consumer Data Like Oil: How Reframing Digital Interactions Might Bolster the Federal Trade Commission's New Privacy Framework

As desktop PCs give way to smartphones, and as engineers embed everyday objects—like cars, eyeglasses, and HVAC systems—with the ability to sense, remember, and communicate information to anyone or anything with an Internet connection, enterprising companies extract enormous amounts of consumer data in an effort to squeeze as much value out of consumers' attention as possible. In many ways, data has become the new oil. While this trend promises to improve efficiency, lower costs, and create products and services that enrich consumers' lives, it also raises complicated and evolving privacy dilemmas.

To address these dilemmas, the United States relies heavily upon the Federal Trade Commission to safeguard consumers without stifling innovation. Concerned that technological advancement may be leaving privacy safeguards behind, the FTC recently unveiled a new framework for redressing privacy's dilemmas while also acknowledging that limits to its authority prevent the agency from achieving the framework's goals. To overcome these limits, the agency asked Congress to consider enhancing its privacy enforcement powers, but this request has drawn criticism from those who fear that an omnibus or top-down approach would suppress innovation.

In order to ensure that privacy safeguards keep pace with rapidly evolving technology without suppressing innovation, this Note argues that consumers' digital interactions should be recognized as the commercial exchanges of value that they are. Recognizing the value exchange that occurs when consumers search the web or download apps would create a flexible mandate for entities that collect consumer data to disclose the bargain's material terms by requiring informed consent. This, in turn, might lead to "simplified choice" and "privacy by design" as companies competed over the "price" charged to consumers. While more critical thinking needs to be devoted to the topic, recognizing consumers' digital interactions as the commercial exchanges of value that they are could substantiate the FTC's new privacy framework without relying on congressional action, creating a flexible regulatory solution that scales to meet privacy's evolving dilemmas.

The Story of the FCC'S Net Neutrality Decision and Why It Won't Stand Up in Court

Ajit Pai*

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* Commissioner, Federal Communications Commission. B.A., Harvard (1994); J.D., University of Chicago Law School (1997). The author was appointed by President Obama to the Commission for a term that expires on June 30, 2016.

We live in the Internet age. We speak, we post, we rally, we learn, we listen, we watch, we buy, we sell, we meet—in short, we *live*—online. The Internet has transformed billions of lives here and around the world. It has aided the cause of freedom, lifted people out of poverty, democratized entrepreneurship, and much more.

How did this come to be? In the United States, the answer is twofold. First, the private sector took risks. Over the past two decades, companies invested well over $1 trillion in connecting Americans to the Internet. Confident of limited regulation, they laid fiber, upgraded cable systems, launched satellites, built towers, and deployed spectrum in order to provide broadband Internet access from Alaska to Arizona, Maine to Mississippi.

Second, government stayed out of the way. Starting almost twenty years ago, a bipartisan consensus favored an open Internet. A Democratic President and Republican Congress enshrined in the Telecommunications Act of 1996 the principle that the Internet should be a "vibrant and competitive free market . . . unfettered by Federal or State regulation."[1] And dating back to the Clinton Administration, every FCC Chairman—Republican and Democrat—let the Internet grow free from utility-style regulation. The results of Internet freedom, both for consumers and online entrepreneurs, speak for themselves.[2] Indeed, given how quickly and deeply the online economy in this country has progressed, I believe the Internet is the greatest free-market innovation in history.

Unfortunately, the FCC recently replaced that freedom with government control. On February 26, 2015, a narrow majority of the FCC abandoned those policies. It reclassified broadband Internet access service as a Title II telecommunications service. It seized unilateral authority to regulate Internet conduct, to direct where Internet service providers put their investments, and to determine what service plans will be available to the American public. This was a radical departure from the bipartisan, market-oriented policies that served us so well for the last two decades.

The fate of net neutrality regulation will ultimately be decided in the courts. Litigants have already sought judicial review of these new rules.[3] In this Article, I'll discuss why I believe procedural defects and substantive flaws will prevent the FCC's decision from standing up in court.

And if I'm wrong—if this *Order* manages to survive judicial review—American consumers will be worse off. For these will be the consequences: higher broadband prices, slower speeds, less broadband deployment, less innovation, and fewer options for American consumers.

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1. Communications Act of 1934, as amended, § 230(b)(2).

2. The market capitalization of the top 15 public Internet firms in 1995 was $16.75 billion. In 2015, it was $2.42 trillion, or 146 times the 1995 level. http://bit.ly/1Qaa3d4. None of this would be the case if Internet entrepreneurs were struggling under the anticompetitive boot of a monopolist Internet service provider.

3. *See, e.g.*, Protective Petition for Review for United States Telecom Association, United States Telecom Association v. Federal Communications Commission and United States of America, No. 15-1063 (D.C. Cir. Mar. 23, 2015).

Indeed, we already have seen evidence that the investment and innovation that fomented the digital revolution has slowed as a result of the agency's power grab.[4]

I. DEFECTS IN PROCESS

First—process. I don't believe the FCC complied with the requirements of the Administrative Procedure Act in adopting Internet regulations.[5] In particular, the public did not know what rules the *Order* adopted beforehand because the FCC never proposed them.

A. Reclassification

Recall that last year's *Notice of Proposed Rulemaking* came on the heels of the D.C. Circuit's *Verizon* decision, which "struck down the 'anti-blocking' and 'anti-discrimination' rules," holding that "the Commission had imposed *per se* common carriage requirements on providers of Internet access services."[6] The purpose of the *Notice* was to "respond directly to that remand and propose to adopt enforceable rules of the road, consistent with the court's opinion, to protect and promote the open Internet."[7] Or, as Chairman Wheeler put it: "In response [to the *Verizon* decision], I promptly stated that we would reinstate rules that achieve the goals of the 2010 *Order* using the Section 706-based roadmap laid out by the court. That is what we are proposing today."[8]

And it was. Every single proposal and every single tentative conclusion in the *Notice* was tailored to avoid reclassification and to comply with the limits the *Verizon* court put on the Commission's authority under section 706 of the Telecommunications Act.[9]

For example, the *Notice* proposed to define "blocking" as failing "to provide an edge provider with a minimum level of access that is sufficiently robust, fast, and dynamic for effective use by end users and edge providers."[10] It did so "to make clear that the no-blocking rule would allow individualized bargaining above a minimum level of access," which

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4. *See, e.g.*, Statement of FCC Commissioner Ajit Pai On New Evidence That President Obama's Plan To Regulate The Internet Harms Small Businesses And Rural Broadband Deployment (May 7, 2015), *available at* http://go.usa.gov/3wAkn (listing examples of Internet service providers who have stated under penalty of perjury that they are reducing investment in broadband infrastructure as a result of the FCC's decision).

5. 5 U.S.C. § 553 (2012).

6. Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, FCC 14-61, 29 FCC Rcd. 5561, 5569, para. 23 (2014) [hereinafter *Notice*] (citing Verizon v. FCC, 740 F.3d 623, 656–59 (D.C. Cir. 2014)).

7. *Notice*, *supra* note 6, 29 FCC Rcd. at 5569, para. 24.

8. *Id.* at 5647 (Statement of Chairman Tom Wheeler).

9. Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56 (codified as amended at 47 U.S.C. § 1302 (2012)).

10. *Notice*, *supra* note 6, 29 FCC Rcd. at 5627 (Proposed Rule § 8.11(a)).

was "the revised rationale the court suggested would be permissible rather than *per se* common carriage."[11] The *Notice* then devoted an entire section to "establishing the minimum level of access under the no-blocking rule,"[12] because "the [*Verizon*] court suggested [such a rule] would be permissible rather than *per se* common carriage"[13] and would be "[c]onsistent with the court's ruling."[14]

The *Notice* was even more forthright that its proposed rule barring commercially unreasonable practices was tied to the limits of the *Verizon* decision. Under that rule, the Commission would, "consistent with the court's decision, . . . permit broadband providers to engage in individualized practices"—indeed, the "encouragement of individualized negotiation" was one of its "essential elements."[15] The *Notice* tentatively concluded that such a rule was appropriate because the "court underscored the validity of the 'commercially reasonable' legal standard"[16] and "explained that such an approach distinguished the data roaming rules at issue in *Cellco* from common carrier obligations."[17] Or as the *Notice* put it: "The core purpose of the legal standard that we wish to adopt . . . is to effectively employ the authority that the *Verizon* court held was within the Commission's power under section 706."[18] Or as the title of that subpart put it even more bluntly: The goal of the FCC was "codifying an enforceable rule to protect the open Internet that is not common carriage *per se*."[19]

If this weren't enough, the FCC "propose[d] that the Commission exercise its authority under section 706, consistent with the D.C. Circuit's opinion in *Verizon v. FCC*, to adopt our proposed rules"[20] and then cited section 706 of the Telecommunications Act—*but not a single provision of Title II*—in the *Notice*'s ordering clauses.[21] And it affirmatively proposed to remove several legal provisions from the "authority" section of our Part

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11. *Id.* at 5595, para. 95.
12. *Id.* at 5596, Section III.D.3 (capitalizations omitted); *see Notice*, *supra* note 6, 29 FCC Rcd. at 5596–98, paras. 97–104 (discussing the proposed minimum-level-of-access requirement).
13. *Id.* at 5595, para. 95.
14. *Id.*at 5596, para. 97.
15. *Id.* at 5599–5600, para. 111.
16. *Id.* at 5599, para. 110.
17. *Id.* at 5602, para. 116.
18. *Id.* at 5602, para. 118.
19. *Id.* at 5599, Subpart III.E (capitalizations omitted); *see also Notice*, *supra* note 6, 29 FCC Rcd. at 5602–10, paras. 116–41 (discussing the proposed no-commercially-unreasonable-practices rule).
20. *Id.* at 5610, para. 142.
21. *Id.* at 5625, para. 183 ("Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 4(i)–(j), 303 and 316 of the Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. §§ 151, 152, 154(i)–(j), 303, 316, 1302, that this Notice of Proposed Rulemaking IS ADOPTED."). Title II of the Act consists of sections 201 through 276. Communications Act §§ 201–276, 47 U.S.C. §§ 201–276 (2012 & Supp. 2013).

8 "Open Internet" rules—including all references to Title II—and leave section 706 of the Telecommunications Act as the prime authority for the proposed rules.[22]

In all, the *Notice* cited or quoted the *Verizon* decision fifty-two separate times,[23] proposed two pages of rules that would be consistent with that decision and within the Commission's section 706 authority,[24] and reiterated in tentative conclusion after tentative conclusion that the FCC should tread no further than the limits the *Verizon* court set on the FCC's authority under section 706.

Contrast that with the FCC's decision. The entire *Order* is premised on the reclassification of broadband Internet access service as a Title II, telecommunications service. Accordingly, none of these rules follow the section 706-based roadmap laid out by the *Verizon* court, and none of them purport to do so.[25] As a result, instead of a minimum-level-of-access rule (that would follow the roadmap), the *Order* adopts the flat no-blocking rule that the *Verizon* court overturned.[26] Instead of the rule against commercially unreasonable practices, which was intended to encourage "individualized negotiation," the *Order* adopts a flat ban on individual negotiations through a no-paid-prioritization rule.[27] And rather than limiting the new rules to those proposed in the *Notice*, the *Order* also adopts a never-before-proposed no-throttling rule[28] and a wholly new no-unreasonable-interference-or-unreasonable-disadvantage standard for Internet conduct.[29]

Given this new legal justification, it's no wonder that the FCC now feels compelled to cite nine new sources of legal authority for adopting the

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22. *Compare* 47 C.F.R. Part 8 ("Authority: 47 U.S.C. secs. 151, 152, 153, 154, 201, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 503, 522, 536, 548, 1302."), *with Notice*, *supra* note 6, 29 FCC Rcd. at 5626 ("Part 8 of Title 47 of the Code of Federal Regulations is amended to read as follows: . . . AUTHORITY: 47 U.S.C. §§ 151, 152, 154(i)–(j), 303, 316, 1302."). Note that section 706 of the Telecommunications Act has been unofficially codified at 47 U.S.C. § 1302.

23. *See Notice*, *supra* note 6, 29 FCC Rcd. at 5564, n.11; 5569, nn.42–48; 5571, nn.58–59; 5574, n.88; 5576, nn.97–100; 5577, n.101; 5579, nn.111, 114; 5580, n.122; 5581, n.125; 5585, n.153; 5593, n.200; 5594, nn.206–12; 5595, n.213; 5596, nn.219, 221, 223; 5599, n.231; 5600, nn.236–37; 5601, nn.238–39, 241–42; 5602, nn.244–47; 5608, n.270; 5610, n.282; 5612, nn.291–94; 5613, n.296; 5615, n.309.

24. *Notice*, *supra* note 6, 29 FCC Rcd. at 5626–27 (Appendix A: Proposed Rules).

25. Although the general Internet conduct rule does claim that it should not be read to constitute common carriage *per se*, the *Order* concedes that the rule "represents our interpretation of these 201 and 202 obligations in the open Internet context," Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling, and Order*, FCC 15-24, para. 295 (rel. Mar. 12, 2015) [hereinafter *Order*], which is to say that it too is premised on reclassification.

26. *Id.* at paras. 113–15.

27. *Id.* at para. 125.

28. *Id.* at para. 119.

29. *Id.* at paras. 133, 136.

Order,[30] invoking sections 201 and 202 of Title II along with sections 3, 10, 301, 332, 403, 501, and 503 of the Communications Act.[31] Nor is it surprising that the final rules purport to rely on twenty sections of the Communications Act that were not included in the original proposal, including several sections not discussed even once in the *Notice*.[32]

In sum, the *Notice* proposed "the terms . . . of the proposed rule" and a "reference to the legal authority under which the rule is proposed."[33] But the *Order* adopts something completely different. That's not what the Administrative Procedure Act envisions.

B. An Unanticipated Reversal

None of this is to say that the Commission had to adopt the exact same rules under the precise rationale proposed in the *Notice*. Of course, the adopted rules may be the "logical outgrowth" of the original proposal.[34] But the *Order*'s decision to reclassify, to forbear, and to adopt rules grounded in Title II is a reversal of the proposals and tentative conclusions in the *Notice*, not a natural evolution.

The standard is whether all interested parties "*should have* anticipated" the final rule.[35] The question "is one of fair notice"[36]: whether "persons are sufficiently alerted to likely alternatives so that they know whether their interests are at stake."[37] In other words, "general notice that a new standard will be adopted affords the parties scant opportunity for comment"—the "agency's obligation is more demanding."[38]

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30. *Id*. at para. 583.

31. Act of June 19, 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–720 (2012 & Supp. 2013)).

32. *Compare Notice*, *supra* note 6, 29 FCC Rcd. at 5626 ("Part 8 of Title 47 of the Code of Federal Regulations is amended to read as follows: . . . AUTHORITY: 47 U.S.C. §§ 151, 152, 154(i)–(j), 303, 316, 1302"), *with Order* at Appendix A ("The authority citation for part 8 is amended to read as follows: AUTHORITY: 47 U.S.C. §§ 151, 152, 153, 154, 201, 202, 208, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 503, 522, 536, 548, 1302."). The *Notice* made no mention whatsoever of sections 218, 251, 256, 257, 301, 304, 307, 403, 503, 522, and 536.

33. 5 U.S.C. §§ 553(b)(2)–(3) (2012).

34. *See, e.g.*, Crawford v. FCC, 417 F.3d 1289, 1295 (D.C. Cir. 2005).

35. Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam) (emphasis added) (citations and internal quotation marks omitted); *see also* Council Tree Commc'ns v. FCC, 619 F.3d 235, 256 (3d Cir. 2010) ("[E]ven if some sophisticated observers would have seen the connection between the stricter compliance that had been noticed and the lower standards eventually announced, the proper question under the APA was whether the agency had provided notice to all 'interested parties.' . . . [T]he inferential notice purportedly provided . . . did not satisfy that standard." (quoting Wagner Elec. Corp. v. Volpe, 466 F.2d 1013, 1019 (3d Cir. 1972))).

36. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007).

37. Time Warner Cable Inc. v. FCC, 729 F.3d 137, 170 (2d Cir. 2013) (internal quotation marks omitted).

38. Horsehead Res. Dev. Co., Inc. v. Browner, 16 F.3d 1246, 1268 (D.C. Cir. 1994).

Although the agency dutifully recites that standard,[39] at points it seems to apply a different one: something akin to asking whether parties *could have* anticipated the final rule.[40] In essence, the *Order* suggests an agency may adopt *any* rule unless it was impossible for anyone to anticipate that rule. No court, to my knowledge, has ever endorsed such a standard. And it's easy to see why: Such a standard would give an agency a tremendous incentive to outline its proposals in broad and vague terms to expand the realm of possibility. Notices of proposed rulemaking could be nothing more than a single sentence: "We propose to regulate XYZ."

Here's an illustration of how those standards differ. Say you and a friend are in Kansas. The two of you have been talking every day for months about how wonderful it would be to visit San Francisco. One day, your friend brings up San Francisco yet again and says "Say, we've talked enough about this. I propose we go on a cross-country drive. Do you want to come?" Eager to go west, you say yes. You get in the car, fall asleep for a few hours, and wake up to find that . . . you're heading east toward Boston! "Wait," you protest, "I thought we were heading to San Francisco!" Your friend replies: "Well, I proposed merely that we go on a cross-country drive. I know we'd been talking every day for months about San Francisco, but you could have realized that I had Boston in mind." Deflated, you retort: "But *should* I have? Shouldn't you have told me we were heading to Boston and given me a chance to say yes or no before we hit the road?"

Here's another one. Say a government agency seeks competitive bids to build a suspension bridge. The request for proposals (RFP) details how the suspension bridge should be built but reserves the right to build another type of bridge instead. Could a bidder anticipate that the government will hire someone to build an arch bridge through this RFP? Perhaps. But what should bidders expect? That if the agency decides not to build the proposed suspension bridge, it will issue a new RFP. Otherwise, a serious bidder would be obligated to draw plans and submit a proposal for each and every type of bridge feasible—thus reducing the quality of each response since every bidder would need to spread its resources anticipating possibilities rather than focusing on the proposal at hand.

Indeed, courts have repeatedly held that "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal."[41] And so when a notice of

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39. *Order*, *supra* note 25, at para. 539.

40. *Compare, e.g.*, *id.* at para. 37 ("[O]ur forbearance approach results in over 700 codified rules being inapplicable . . . ."), *with id.* at para. 540 (claiming notice for such a result based on two sentences seeking general comment "on the extent to which forbearance from certain provisions of the Act or our rules would be justified"); *see also id.* at n.1671 (arguing that the FCC used "slightly different wording to the same effect" when it had previously endorsed a "could have anticipated" standard).

41. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983).

proposed rulemaking has "clearly stated that the FCC intended to adopt [a proposed rule]" and "even recited the rationale for the proposed rule," the courts have reversed the Commission when "the final rule took a contrary position."[42]

The *Order*'s primary retort appears to be that—alongside its section 706-based proposals and tentative conclusions—the *Notice* sought comment on alternatives.[43] As the *Order* puts it, the *Notice* "proposed to rely on section 706 of the Telecommunications Act of 1996, but at the same time stated that it would 'seriously consider the use of Title II of the Communications Act as the basis for legal authority.' The [*Notice*] sought comment on the benefits of both section 706 and Title II, and emphasized its recognition that 'both section 706 and Title II are viable solutions.'"[44]

It's true that the *Notice* sought comment on reclassification. Here is that entire discussion:

> *Title II—Revisiting the Classification of Broadband Internet Access Service*. In a series of decisions beginning in 2002, the Commission has classified broadband Internet access service offered over cable modem, DSL and other wireline facilities, wireless facilities, and power lines as an information service, which is not subject to Title II and cannot be regulated as common carrier service. In 2010, following the D.C. Circuit's *Comcast* decision, the Commission issued a Notice of Inquiry (*2010 NOI*) that, among other things, asked whether the Commission should revisit these decisions and classify a telecommunications component service of wired broadband Internet access service as a "telecommunications service." The Commission also asked whether it should similarly alter its approach to wireless broadband Internet access service, noting that section 332 requires that wireless services that meet the definition of "commercial mobile service" be regulated as common carriers under Title II. In response, the Commission received substantial comments on these issues. We now seek further and updated comment on whether the Commission

42. Nat'l Black Media Coal. v. FCC, 791 F.2d 1016, 1022 (2d Cir. 1986).

43. As the *Order* points out, almost every section of the *Notice* included a generic paragraph seeking comment on alternatives. For example, the *Order* points to paragraph 96 of the *Notice*, which spends six sentences discussing possible alternatives for how to define a no-blocking rule and then one sentence asking commenters to "address the legal bases and theories, including Title II, that the Commission could rely on for such a no-blocking rule, and how different sources of authority might lead to different formulations of the no-blocking rule." *Notice*, *supra* note 6, 29 FCC Rcd. at 5595–96, para. 96 (cited by *Order*, *supra* note 25, at note 1100). Such back-of-the-hand mentions are hardly sufficient to apprise commenters on the hows, the whats, and the whys of reclassification, and so I focus on the *Notice*'s most fulsome discussion instead.

44. *Order*, *supra* note 25, at para. 327 (quoting *Notice*, *supra* note 6, 29 FCC Rcd. at 5563, para. 4) (footnotes omitted).

> should revisit its prior classification decisions and apply Title II to broadband Internet access service (or components thereof). How would such a reclassification approach serve our goal to protect and promote Internet openness? What would be the legal bases and theories for particular open Internet rules adopted pursuant to such an approach? Would reclassification and applying Title II for the purpose of protecting and promoting Internet openness impact the Commission's overall policy goals and, if so, how?
>
> . . . What factors should the Commission keep in mind as it considers whether to revisit its prior decisions? Have there been changes to the broadband marketplace that should lead us to reconsider our prior classification decisions? To what extent is any telecommunications component of that service integrated with applications and other offerings, such that they are "inextricably intertwined" with the underlying connectivity service? Is broadband Internet access service (or any telecommunications component thereof) held out "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public?" If not, should the Commission compel the offering of such functionality on a common carrier basis even if not offered as such? For mobile broadband Internet access service, does that service fit within the definition of "commercial mobile service"? We also note that on May 14, 2014, Representative Henry Waxman, Ranking Member of the Committee on Energy and Commerce of the U.S. House of Representatives, sent a letter to Chairman Wheeler proposing an approach to protecting the open Internet whereby the Commission would proceed under section 706 but use Title II as a "backstop authority." We seek comment on the viability of that approach.[45]

If these two paragraphs, tucked into an eighty-five-page document, are sufficient notice to discard the regulatory framework for Internet access services that the Commission has relied on for almost two decades—a framework the FCC has affirmed time[46] and again[47] and again[48] and again[49]

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45. *Notice*, *supra* note 6, 29 FCC Rcd. at 5613–14, paras. 149–50 (footnotes omitted).

46. *See* Federal-State Joint Board on Universal Service, *Report to Congress*, FCC 98-67, 13 FCC Rcd. 11501 (1998) [hereinafter *Stevens Report*] (classifying Internet access service).

47. *See* Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, FCC 96-*Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77, 17 FCC Rcd. 4798 (2002) [hereinafter *Cable Modem Order*] (classifying broadband Internet access service over cable systems), *aff'd sub nom.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

and again[50]—and the myriad of related precedents and agency rules, then the FCC (and likely every federal agency) has been doing notice-and-comment rulemaking wrong for decades. I am not aware of, and the *Order* does not cite, one single notice of proposed rulemaking that the Commission has issued that is so abbreviated. Nor one that would reverse so much precedent with so little analysis. Nor one whose consequences would be so far reaching—and collateral impacts so many—with so little discussion. Just look at the *Notice*'s detailed discussion of the FCC's section 706 authority to see how we normally tee up a proposal.[51] Or look at the eighty-three-paragraph notice of proposed rulemaking that preceded the classification of wireline broadband Internet access service as an information service to see how we normally tee up a new regulatory framework.[52] The contrast could not be starker.[53]

The failure of the *Notice* to properly frame the Title II proposal matters. Indeed, "[a]n agency adopting final rules that differ from its proposed rules is required to issue a new notice when the changes are so major that the original notice did not adequately frame the subjects for discussion. The purpose of the new notice is to allow interested parties a fair opportunity to comment upon the final rules in their altered form."[54]

And given the *Notice*'s framing, I simply cannot understand how any commenter could have anticipated—let alone should have anticipated—the 128 paragraphs of the *Order* that explain the Commission's rationale for reclassification and the ramifications of that decision.[55] Search the *Notice*'s two paragraphs as I might, I cannot ferret out *any discussion* of the three factual changes that led to the Commission's determination—namely,

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48. *See* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al., *Report and Order and Notice of Proposed Rulemaking*, FCC 05-150, 20 FCC Rcd. 14853 (2005) [hereinafter *Wireline Broadband Internet Access Services Order*] (classifying broadband Internet access service over wireline facilities).

49. *See* United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, *Memorandum Opinion and Order*, FCC 06-165, 21 FCC Rcd. 13281 (2006) (classifying broadband Internet access service over power lines).

50. *See* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, FCC 07-30, 22 FCC Rcd. 5901 (2007) [hereinafter *Wireless Broadband Internet Access Order*] (classifying broadband Internet access service over wireless networks).

51. *Notice*, *supra* note 6, 29 FCC Rcd. at 5610–12, paras. 143–47.

52. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers, *Notice of Proposed Rulemaking*, FCC 02-42, 17 FCC Rcd. 3019 (2002).

53. *See, e.g.*, Council Tree Commc'ns v. FCC, 619 F.3d 235, 254 (3d Cir. 2010) (holding that the FCC failed to provide APA notice for a rule after "find[ing] it instructive that the FCC had previously solicited broader comment on" the point covered by the rule "and in much more specific terms than it did here" and observing that "[t]he contrast could not be more stark").

54. Conn. Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 533 (D.C. Cir. 1982).

55. *Order*, *supra* note 25, at paras. 306–433.

"(1) consumer conduct, . . . (2) broadband providers' marketing and pricing strategies . . . and (3) the technical characteristics of broadband Internet access service."[56] Nor can I find any discussion of how Domain Name System (DNS) service, caching, or any other feature of broadband Internet access service falls into the telecommunications system management exception to the definition of information service (or even any discussion of the meaning of that exception).[57] Nor can I find any discussion of the benefits reclassification would have for broadband investment.[58] Nor can I find any discussion of what reclassification means for state or local regulation of broadband services.[59] Nor can I find any mention that the FCC's past "predictive judgments . . . anticipating vibrant intermodal competition" were wrong.[60]

To get to the point: Could someone reading the *Notice* have anticipated the FCC might reject its past proposals and tentative conclusions and instead pursue reclassification? Perhaps. Anything is possible. But *should* the public have anticipated the FCC would move forward with reclassification without issuing a Further Notice of Proposed Rulemaking? Surely not. The *Notice* itself left just too many questions unanswered—and too many questions unasked for that matter.

To be clear, the deficiencies in the *Notice* were not the product of incompetence. Rather, they reflect the fact that the agency was headed in a different direction until political pressure was applied to the Commission last November. Specifically, President Obama's endorsement of Title II forced a change in the FCC's approach.[61] Indeed, the agency was publicly

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56. *Id*. at para. 330; *see also id.* at paras. 346–54.

57. *Id*. at paras. 366–75.

58. *Id*. at paras. 409–25.

59. *Id*. at paras. 430–33.

60. *Id*. at para. 330. To be sure, that last omission is understandable. The FCC could not have mentioned that point until just 22 days before this vote, when the agency decided to hike the standard for what qualifies as broadband Internet access service from 4 Mbps to 25 Mbps, excluding in one fell swoop all wireless and most wireline operators from the market. 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, *2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, FCC 15-10, 30 FCC Rcd. 1375 (rel. Feb. 4, 2015) [hereinafter *2015 Broadband Progress Report*], *available at* http://go.usa.gov/3ay5d. Indeed, the agency still has not published that decision in the Federal Register and the public still has more than a month before the comment period closes on the accompanying notice of inquiry. *Id.* (establishing a deadline for initial comments of March 6, 2015, and a deadline for replies for April 6, 2015).

61. Gautham Nagesh & Brody Mullins, *Net Neutrality: How White House Thwarted FCC Chief*, WALL ST. J., Feb. 4, 2015, *available at* http://on.wsj.com/16FXTcH ("In November, the White House's top economic adviser dropped by the Federal Communications Commission with a heads-up for the agency's chairman, Tom Wheeler. President Barack Obama was ready to unveil his vision for regulating high-speed Internet traffic. The specifics came four days later in an announcement that blindsided officials at the FCC."). It strains credulity to think otherwise; had the agency been on track to adopt the

considering a so-called "hybrid" approach on the day of the President's announcement[62] and was reportedly pursuing such an approach even in the days after that announcement[63]—only to succumb to executive branch entreaties when pen was put to paper.[64]

But the Commission cannot credibly claim APA notice from the White House's November 10 YouTube announcement of "President

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President's plan all along, there would have been no need for him to "la[y] out a plan to do [Title II]" and (critically) "ask[] the FCC to implement it." The White House, *Net Neutrality: President Obama's Plan for a Free and Open Internet* (Nov. 10, 2014), https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality.

62. *FCC Chairman Tom Wheeler's Statement on President Barack Obama's Statement Regarding Open Internet* (Nov. 10, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-330414A1.pdf.

63. *See* Brian Fung, *How Obama's Net Neutrality Comments Undid Weeks of FCC Work*, WASH. POST (Nov. 14, 2014), *available at* http://wapo.st/1alNQed ("Three people who met with [FCC Chairman Tom] Wheeler in the days after the president's statement say he was 'adamant' that all options remain on the table—but they also walked away with the impression that the chairman is still not ready to give up on the agency's hybrid proposal. 'He certainly referred to the hybrid glowingly,' said one official, who met with Wheeler late this week and spoke on condition of anonymity to speak freely about the gathering. 'If we had to bet where he's heading, it's still the hybrid.'").

64. Indeed, the agency did not think it could prohibit paid prioritization—the *bête noire* of net neutrality proponents—under Title II before the President's announcement. As the Chairman testified to Congress less than a week after the Commission adopted the Notice, "[t]here is nothing in Title II that prohibits paid prioritization." Hearing before the Subcommittee on Communications and Technology of the United States House of Representatives Committee on Energy and Commerce, "Oversight of the Federal Communications Commission," Video at 44:56 (May 20, 2014), *available at* http://go.usa.gov/3aUmY. And he was right: Title II makes clear that "different charges may be made for the different classes of communications." Communications Act § 201(b), 47 U.S.C. § 201(b) (2012). And there's more than a century of precedent that common carriers may charge different rates for different services. *See, e.g.*, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service, *Second Report and Order*, FCC 00-242, 15 FCC Rcd. 16720 (2000) (finding Priority Access Service, a wireless priority service for both governmental and non-government public safety personnel, "*prima facie* lawful" under section 202); Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases Of Switched Access Services Offered By Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, FCC 99-206, 14 FCC Rcd. 14221 (1999) (granting dominant carriers pricing flexibility or special access services, allowing both higher charges for faster connections as well as individualized pricing and customers discounts); GTE Telephone Operating Companies Tariff F.C.C. No. 1 et al., Transmittal Nos. 900, 102, 519, 621, *Order*, 9 FCC Rcd. 5758 (Common Carrier Bur. 1994) (approving tariffs for Government Emergency Telephone Service(GETS), a prioritized telephone service, and additional charges therefor); *see also, e.g.*, ICC v. Balt. & O.R. Co., 145 U.S. 263, 283–84 (1892) (noting that common carriers are "only bound to give the same terms to all persons alike under the same conditions and circumstances" and that "any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge").

Obama's Plan for a Free and Open Internet."[65] Although that announcement did (unlike the *Notice*) propose reclassification under Title II[66] and did (again unlike the *Notice*) propose "bright-line" no-blocking, no-throttling, and no-paid-prioritization rules,[67] I can find no record of the FCC voting on that proposal, publishing it in the Federal Register, nor soliciting the public for comment.

Nor, for that matter, can the *Order* point to Chairman Wheeler's February 4 editorial in *Wired* explaining "This Is How We Will Ensure Net Neutrality."[68] Although that announcement did (unlike the *Notice*) propose reclassification under Title II[69] and did (again unlike the *Notice*) propose "bright-line" no-blocking, no-throttling, and no-paid-prioritization rules,[70] I again can find no record of the FCC voting on that proposal, publishing it in the Federal Register, nor soliciting the public for comment.

Some of us at the FCC have seen this movie before. About one month before concluding the FCC's 2006 media ownership proceeding, then-FCC Chairman Kevin Martin published an editorial in *The New York Times* unveiling his own proposal for revising the newspaper/broadcast cross-ownership rule.[71] In its *Prometheus* decision, the Third Circuit explained that the editorial "did not satisfy the APA's notice requirements. The proposal was not published in the Federal Register, the views expressed were those of one person and not the Commission, and the Commission voted days after substantive responses were filed, allowing little opportunity for meaningful consideration of the responses before the final rule was adopted."[72] It then went on: "Although it was clear from [several Commission notices], taken together, that the Commission was planning to overhaul its approach to newspaper/broadcast cross-ownership, they did not contain enough information about what it was planning to do, or the options it was considering, to provide the public with a meaningful

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65. The White House, *Net Neutrality: President Obama's Plan for a Free and Open Internet*, https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality (Nov. 10, 2014).

66. *Id.* ("I believe the FCC should reclassify consumer broadband service under Title II of the Telecommunications Act . . . .").

67. *Id.* ("The rules I am asking for are simple, common-sense steps that reflect the Internet you and I use every day, and that some ISPs already observe. These bright-line rules include: No blocking. . . . No throttling. . . . No paid prioritization.").

68. Tom Wheeler, *FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality*, WIRED, (Feb. 4, 2015, 11:00 AM), http://wrd.cm/1EGifR4 ("[T]he time to settle the Net Neutrality question has arrived. This week, I will circulate to the members of the Federal Communications Commission (FCC) proposed new rules to preserve the internet as an open platform for innovation and free expression.").

69. *Id.* ("I am proposing that the FCC use its Title II authority to implement and enforce open internet protections.").

70. *Id.* ("These enforceable, bright-line rules will ban paid prioritization, and the blocking and throttling of lawful content and services.").

71. Kevin J. Martin, Op-Ed., *The Daily Show*, N.Y. TIMES, Nov. 13, 2007, at A29, *available at* http://www.nytimes.com/2007/11/13/opinion/13martin.html?_r=0.

72. Prometheus Radio Project v. FCC, 652 F.3d 431, 450 (3d Cir. 2011).

opportunity to comment. Until Chairman Martin's November 2007 personal Op-Ed and Press Release, the public did not even know what options he was considering, let alone the Commission."[73] If anything, Chairman Martin provided more notice than has been offered in this proceeding. There, he made public the exact text of his proposed newspaper/broadcast cross-ownership rule. Here, the details of the Chairman's complex proposal have remained shrouded in mystery.

Indeed, it was widely reported that the Commission strongly considered seeking additional comment because of the notice problems.[74] In an email sent to the press, a "commission spokeswoman" described a blog post that Chairman Wheeler published just hours after President Obama called for reclassification and said: "The Chairman said in his statement last Monday that there is more work to do and substantive legal questions to answer." She then added that "[t]he Commission is considering the best way to invite additional comments on those questions."[75] But ultimately, after even more political pressure was put on the agency to move forward without seeking comment,[76] the agency decided to plow ahead.

So here we are. We are moving forward with an *Order* the contours of which no one could have or should have anticipated, considering how drastically different the *Notice*'s proposals were. The FCC proposed to the public a cross-country trip to San Francisco. Only after the car was on the road did the public realize the agency was taking it to Boston.

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73. *Id.* at 451.

74. *See, e.g.*, *Jesse Jackson Urges Wheeler Against Title II*, COMM. DAILY (Nov. 19, 2014) ("Several involved in the net neutrality debate have said in recent days that they expect the agency, in light of Wheeler's statement last week, to seek additional comments in the proceeding."), *available at* 2014 WLNR 32865286; Lydia Beyoud, *Obama's Call for Title II Reclassification Forces Rulemaking Delay*, BLOOMBERG BNA (Nov. 12, 2014), *available at* http://bit.ly/17zHLcC ("Several sources said that [figuring out a way forward] could involve an additional public comment period, whether from a further notice of proposed rulemaking or through a public notice at the bureau level."); Laura Ryan, Brendan Sasso & Dustin Volz, *What's Next in the Never-Ending Net Neutrality Fight*, NAT'L J. (Nov. 11, 2014), http://bit.ly/1AsB4EA ("An FCC official said the chairman hasn't decided yet whether he'll need to issue a further notice of proposed rule-making before moving on to final rules."); *No December Vote: Obama Wants Title II; Wheeler Says There are Issues to Be Resolved*, COMM. DAILY (Nov. 12, 2014), *available at* 2014 WLNR 32111241 ("[S]ome industry attorneys said the agency may seek even more comments."); *id.* ("Some industry attorneys said the commission may open up . . . [the] proceeding . . . to another round of comments to bolster the record for classification.").

75. *Jesse Jackson Urges Wheeler Against Title II*, COMM. DAILY (Nov. 19, 2014), *available at* 2014 WLNR 32865286.

76. *See, e.g.*, Mario Trujillo, *Dems to FCC: 'Time for action' on Web reclassification*, THE HILL (Dec. 18, 2014), *available at* http://bit.ly/1GwPOTF; *see also No December Vote: Obama Wants Title II; Wheeler Says There are Issues to Be Resolved*, COMM. DAILY (Nov. 12, 2014), *available at* 2014 WLNR 32111241 ("Heartened by Obama's statement, Title II advocates pressed the agency to quickly move ahead with approving net neutrality rules involving reclassification.").

C. Three Examples

The failure of notice extends beyond the rules and rationale to discrete decisions littered throughout the *Order*. Rather than cataloging each and every failure, I'll give three examples to illustrate just how far afield the *Order* has strayed from the *Notice*: (1) its application of forbearance to broadband Internet access service; (2) the treatment of Internet traffic exchange (or IP interconnection); and (3) the new definition of the statutory term "the public switched network."

1. Forbearance Applied to Broadband Internet Access Service

Consider the application of forbearance to broadband Internet access service. To be sure, the *Notice* included three paragraphs seeking comment on "the extent to which forbearance from certain provisions of the Act or our rules would be justified in order to strike the right balance between minimizing the regulatory burden on providers and ensuring that the public interest is served,"[77] asked whether forbearance should differ for mobile broadband services,[78] and identified six sections of Title II that might be "excluded from forbearance."[79] But as the courts have told us before, even if it was "clear from those sources, taken together, that the Commission was" considering forbearance, "they did not contain enough information about what it was planning to do, or the options it was considering, to provide the public with a meaningful opportunity to comment."[80]

For one, the *Order*'s forbearance decisions are expansive, encompassing at least forty-nine separate decisions. The *Order* decides, for example, that sections 201 (in part), 202 (in part), 206, 207, 208, 209, 214(e), 216, 217, 222, 224 (including subsection (e)), 225 (but not subparagraph (d)(3)(B)), 229, 230, 251(a)(2), 254 (but not the first sentence of subsection (d) nor subsections (g) or (k)), 255, 257, 276, and 309(b) & (d)(1) of the Communications Act will apply to broadband Internet access service.[81] That's twenty separate sections that will apply in whole or part, fourteen more than mentioned in the *Notice*. The *Order* then goes on to temporarily forbear, in whole or part, from applying fifteen sections[82] and

77. *Notice*, *supra* note 6, 29 FCC Rcd. at 5615–16, para. 153.
78. *Id*. at 5616, para. 155.
79. *Id*. at 5616, para. 154.
80. Prometheus Radio Project v. FCC, 652 F.3d 431, 451 (3d Cir. 2011).
81. *See Order*, *supra* note 25, at paras. 441 (sections 201 and 202); 453 (sections 206, 207, 208, 209, 216, and 217); 463 (section 222); 469 (section 225); 472 (sections 251(a)(2) and 255); 478 (section 224); 481 (section 224(e)); 486 (sections 214(e) and 254); 521 (section 276); 531 (section 257); 532 (section 230(c)); 533 (section 229); 535–36 (sections 309(b) and (d)(1)).
82. *See id*. at paras. 470 (section 225(d)(3)(B)); 488 (section 254(d)'s first sentence); 497 (section 203); 505 (section 204); 506 (section 205); 508 (sections 211, 213, 215, 218, 219, 220); 509–12 (section 214 except for subsection (e)); 513 (section 251 except for subsection (a)(2), section 256); 515 (section 258). The *Order* makes clear that forbearance from each of these provisions is only appropriate "at this time," "for now," or "on this record." *See generally id*.

to permanently forbear, in whole or part, from fourteen more.[83] And that's just the provisions of the Act! The *Order* also forbears from some of the Commission's rules,[84] applies others,[85] forbears from conducting certain further rulemakings,[86] and commits to commencing still others.[87] To suggest that any party could have or should have anticipated the byzantine dictates that the *Order* takes 103 paragraphs over 62 pages to explain,[88] based on three high-level paragraphs in the *Notice*, is simply implausible.

For another, no party could have anticipated the Commission's rationale for forbearing from some provisions but not others based on the *Notice*.[89] The *Notice* gave no rationale for when forbearance might be appropriate under these particular circumstances. Instead, it asked commenters to provide a "justification for the forbearance" and told commenters to "define the relevant geographic and product markets in which the services or providers should receive forbearance."[90] In other words, this isn't even a case where the agency has "simply propose[d] a rule and state[d] that it might change that rule without alerting any of the affected parties to the scope of the contemplated change, or its potential impact and rationale, or any other alternatives under consideration."[91] Here, the *Notice* proposed *nothing at all* and asked commenters for forbearance proposals—and the *Order* now adopts some but not all of those proposals using a rationale never before explained.[92] The "'logical outgrowth' doctrine does not extend to a final rule that finds no roots in the agency's proposal because '[s]omething is not a logical outgrowth of nothing.'"[93]

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83. *See id.* at paras. 492 (sections 254(g), (k)); 507 (section 212); 517–18 (sections 271, 272, 273, 274, 275); 519 (sections 221, 259); 520 (sections 226, 227(c)(3), 227(e), 228, 260).

84. *See id.* at para. 522 (forbearing from applying the Commission's truth-in-billing rules).

85. *See id.* at paras. 472–74 (declining to forbear from the Commission's rules implementing section 255 except "insofar as there is any conflict" with "sections 716–718 and our implementing rules").

86. *See id.* at para. 451 (forbearing from applying sections 201 and 202 to the extent they would enable the Commission to "adopt[] new *ex ante* rate regulation . . . in the future").

87. *See id.* at para. 526 (committing "to commence in the near term a separate proceeding to revisit the data roaming obligations of MBIAS providers in light of our reclassification decisions today").

88. *Id.* at paras. 434–536.

89. To be fair, the *Order* really doesn't make the rationale clearer for many of its decisions. At most, it claims in a footnote that the rationale for forbearance is to "protect and promote Internet openness." *Id.* at n.1673. But like beauty or a public interest standard, what that means is in the eye of the beholder. If notice and comment is to mean anything, commenters must be able to wrestle with a concrete rationale for action, not one so vague that no one could anticipate how it might be applied in any particular circumstance.

90. *Notice*, *supra* note 6, 29 FCC Rcd. at 5616, para. 154.

91. Nat'l Black Media Coal. v. FCC, 791 F.2d 1016, 1023 (2d Cir. 1986).

92. For more on this novel rationale, *see infra* Section III.D.

93. *See* Envtl. Integrity Project v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005) (alteration in original) (quoting Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994)).

And, to put it lightly, this isn't how forbearance usually works. When the Commission has previously forborne as part of a rulemaking, the underlying notice has sought specific comment on whether the FCC should forbear from applying a particular statutory provision to a particular class of carriers and has specified why such forbearance may be appropriate.[94] Indeed, when the FCC first applied forbearance to commercial mobile services, it commenced that proceeding with a detailed notice of proposed rulemaking that examined its new forbearance authority under section 332(c)(1)(A), explained how the Commission's view of competition affected its forbearance analysis, and offered rationales for forbearing or not forbearing from each statutory provision.[95]

The standard for petitioners seeking forbearance is equally high: Petitions must identify "[e]ach statutory provision, rule, or requirement for which forbearance is sought" and "[e]ach geographic location, zone, or area from which forbearance is sought," must "contain facts and argument which, if true and persuasive, are sufficient to meet each of the statutory criteria," and must offer a "full statement of the petitioner's *prima facie* case for relief."[96] The FCC itself never seriously attempted to meet these standards in the *Notice*, thus "present[ing] interested parties with a moving target, which frustrates their efforts to respond fully and early in the process."[97] Or as one party to this proceeding put it: "In essence the Commission is asking the public to shadowbox with itself."[98]

2. Internet Traffic Exchange (also Known as IP Interconnection)

The *Notice* discussed Internet traffic exchange in a single paragraph, tentatively concluding that the FCC should maintain the approach it had previously taken so that the Part 8 "Open Internet" rules would not apply "to the exchange of traffic between networks, whether peering, paid peering, content delivery network (CDN) connection, or any other form of inter-network transmission of data, as well as provider-owned facilities that are dedicated solely to such interconnection."[99] In the *Order*, the FCC followed through on that tentative conclusion and concluded that

94. *See, e.g.*, Lifeline and Link Up Reform and Modernization et al., *Notice of Proposed Rulemaking*, FCC 11-32, 26 FCC Rcd. 2770, 2862–64, paras. 303–09 (2011) (seeking comment on forbearing from the Act's facilities requirement for resellers that want to participate in the FCC's Lifeline program since that requirement appeared only relevant to participants in the FCC's high-cost program).

95. Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Notice of Proposed Rulemaking*, FCC 93-454, 8 FCC Rcd. 7988, 7998–8001, paras. 49–68 (1993).

96. *See* 47 C.F.R. §§ 1.54(a), (b), (e) (2014).

97. Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance under Section 10 of the Communications Act of 1934, as Amended, *Report and Order*, FCC 09-56, 24 FCC Rcd. 9543, 9550, para. 12 (2009).

98. Letter from Earl Comstock et al., Counsel for Full Service Network and TruConnect, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 10-127, 14-28, at 10 (Feb. 3, 2015), *available at* http://go.usa.gov/3aUDR.

99. *Notice*, *supra* note 6, 29 FCC Rcd. at 5582, para. 59.

application of the Part 8 rules to Internet traffic exchanged "is not warranted."[100]

But the *Order* then went quite a bit further and adopts a "regulatory backstop prohibiting common carriers from engaging in unjust and unreasonable practices,"[101] subjecting Internet traffic exchange arrangements like those mentioned immediately above to "sections 201 and 202 on a case-by-case basis."[102] With this authority, the Commission can order an Internet service provider "to establish physical connections with other carriers, to establish through routes and charges applicable thereto . . . , and to establish and provide facilities and regulations for operating such through routes."[103] In other words, the *Order* classified Internet traffic exchange as a Title II telecommunications service in everything but name.

The *Notice* proposed nothing like this. As one commenter has observed: "Nowhere did the Commission remotely indicate that it was considering classifying the distinct *wholesale* Internet traffic-exchange services that ISPs provide to other network owners as Title II telecommunications services."[104] To add to the list, nowhere did the *Notice* propose applying sections 201 or 202 of the Act to Internet traffic exchange, and nowhere did the *Notice* suggest that the FCC might order physical connections, through routes, or appropriate charges in response to an IP interconnection dispute.[105]

And when the Commission adopted the *Notice*, the Chairman himself disclaimed that Internet traffic exchange would be part of this proceeding: "Separate and apart from this connectivity is the question of interconnection ('peering') between the consumer's network provider and the various networks that deliver to that ISP. That is a different matter that is better addressed separately. The FCC's proposal is all about what happens on the broadband provider's network and how the consumer's connection to the Internet may not be interfered with or otherwise compromised."[106] When the Chairman of the Commission—the agency's "chief executive officer"[107]—says that the proposal is "all about"

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100. *Order*, *supra* note 25, at para. 195, 206 ("To be clear, we are not applying the open Internet rules we adopt today to Internet traffic exchange.").

101. *Id.* at para. 203.

102. *Id.* at para. 205.

103. Communications Act § 201(a), 47 U.S.C. § 201(a) (2012).

104. Letter from Matthew A. Brill, Counsel for the National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 8 (Jan. 14, 2015), *available at* http://go.usa.gov/3aUDF; *see id.* ("[T]he portions of the NPRM seeking comment on the application of Title II are focused on the potential reclassification of *retail* broadband Internet access service as a telecommunications service.").

105. *See generally Notice*, *supra* note 6.

106. *Id.* at 5647 (Statement of Chairman Tom Wheeler).

107. Communications Act § 5(a), 47 U.S.C. § 155(a) (2012).

something other than interconnection, why should parties have anticipated the opposite?

To claim, as the *Order* does, that these are just "regulatory consequences" flowing from other decisions in the *Order* is no defense.[108] Not once in the *Notice* did the Commission suggest that Internet traffic exchange was a "component" of broadband Internet access service, as the *Order* now claims.[109] If anything, the *Notice* disclaimed that notion, tentatively concluding to "retain" the definition of broadband Internet access service from the 2010 *Open Internet Order* "without modification."[110] As the *Notice* stated, the rules based on that definition were "not intended 'to affect existing arrangements for network interconnection'" and "did not apply beyond 'the limits of a broadband provider's control over the transmission of data to or from its broadband customers.'"[111] The *Notice* then confirmed that any edge-provider-facing service it recognized would "include the flow of Internet traffic on the broadband providers' own network[s], *and not how it gets to the broadband providers' networks*."[112]

Nor can the *Order* plausibly claim that "numerous submissions in the record . . . illustrate that the Commission . . . gave interested parties adequate notice" of the Title II-based backstop adopted here.[113] Although many parties discussed Internet traffic exchange during the comment period, they did so because the *Notice* asked if the FCC should change course and apply the Part 8 rules to IP interconnection, a proposal the *Order* squarely rejected. The submissions during the comment period say nothing about a Title II-based backstop—and even a cursory review of those filings shows that no party anticipated the approach the *Order* now adopts.[114]

3. Redefining the Public Switched Network

Consider the *Order*'s new definition for the statutory term "the public switched network."[115] As background, section 332 of the Communications Act bars the FCC from

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108. *Order*, *supra* note 25, at para. 206 ("[C]ertain regulatory consequences flow from the Commission's classification of BIAS, including the traffic exchange component, as falling within the 'telecommunications services' definition in the Act.").

109. *See id.* at note 521 ("Internet traffic exchange is a component of broadband Internet access service, both of which meets the definition of 'telecommunications service.'").

110. *Notice*, *supra* note 6, 29 FCC Rcd. at 5581, para. 55.

111. *Id*. at 5582, para. 59 (quoting Preserving the Open Internet; Broadband Industry Practices, , *Report and Order*, FCC 10-201, 25 FCC Rcd. 17905, 17944, n.209 (2010) [hereinafter *Open Internet Order*], *aff'd in part, vacated and remanded in part sub nom.* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014); *id.* at 17933, n.150).

112. *Notice*, *supra* note 6, 29 FCC Rcd. at 5615, para. 151 (emphasis added).

113. *Order*, *supra* note 25, at para. 206.

114. *Compare Notice*, *supra* note 6, 29 FCC Rcd. at 5582, para. 59, *with Order*, *supra* note 25, at paras. 202–06.

115. *Id*. at para. 391; *see also id.* at Appendix A (amending the definition of "public switched network" in rule 20.3).

treating any mobile service—such as mobile broadband Internet access service—as a telecommunications service unless that mobile service is interconnected with the public switched network.[116] By redefining the term "the public switched network" to include services that use "public IP addresses,"[117] the *Order* argues that mobile broadband Internet access service now meets the definition for commercial mobile service and thus can be treated as a telecommunications service.[118]

But the *Notice* never proposed a new definition for the public switched network. Appendix A of the *Notice* did not include such a definition in the list of "proposed rules."[119] The text of the *Notice* did not seek comment on redefining the term.[120] Indeed, the *Notice* never even mentioned the term "the public switched network" or the portion of the FCC rule that currently defines it. Instead, the new definition came from Vonage Holdings Corp. in its comments two full months after the Commission adopted the *Notice*.[121] Although the Commission can address comments in the record (and must respond to significant ones), an agency "must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment."[122]

The *Order* attempts to establish notice for this new definition by pointing to several other questions asked in the *Notice*,[123] such as "whether

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116. Communications Act § 332(c)(2), 47 U.S.C. § 332(c)(2) (2012) ("A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act . . . ."); Communications Act § 332(d)(3), 47 U.S.C. § 332(d)(3) (2012) ("[T]he term 'private mobile service' means any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service . . . ."); Communications Act § 332(d)(1), 47 U.S.C. § 332(d)(1) (2012) ("[T]he term 'commercial mobile service' means any mobile service . . . that is provided for profit and makes interconnected service available"); Communications Act § 332(d)(2) , 47 U.S.C. § 332(d)(2) (2012) ("[T]he term 'interconnected service' means service that is interconnected with the public switched network . . . .").

117. *Order*, *supra* note 25,at para. 391.

118. *Id*. at paras. 391–99, 402 (applying the new definition).

119. *See Notice*, *supra* note 6, 29 FCC Rcd. at 5626–27 (Appendix A: Proposed Rules).

120. *See id*. at 5614, para. 150.

121. Comments of Vonage at 43–44, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521705875.

122. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983) (emphasis in original); *see also* Prometheus Radio Project v. FCC, 652 F.3d 431, 450 (3d Cir. 2011) (explaining that a proposal "not published in the Federal Register" expressing the views of a party but "not the Commission" does not satisfy the APA's requirements).

123. *See Order*, *supra* note 25, at para. 391. The *Order* also points to various questions in the *2010 Notice of Inquiry*—but even that item did not propose a new definition for the public switched network and used the term only once in an utterly unrelated context. *See* Framework for Broadband Internet Service, *Notice of Inquiry*, FCC 10-114, 25 FCC Rcd. 7866, 7871 n.24 (2010) [hereinafter *2011 NOI*]. What is more, I do not see how the *Order* can credibly point to the *2010 NOI* for APA notice when it does not incorporate the record produced by that notice into this proceeding. *See Order*, *supra* note 25, at 1 (listing GN Docket No. 14-28 (the docket of the *Notice*) but not GN 10-127 (the docket of the *2010*

the Commission should revisit its prior classification decisions and apply Title II to broadband Internet access service"[124] and "the extent to which forbearance should apply, if the Commission were to classify mobile broadband Internet access service as a CMRS service subject to Title II."[125] But even the most specific question the *Order* points to—"does [mobile broadband Internet access] service fit within the definition of 'commercial mobile service'?"[126]—falls short of putting the public on notice, since that question takes the definition of commercial mobile service (and hence public switched network) as a given. As the courts have told us before, "[e]ven if this *was* the FCC's intent, 'an unexpressed intention cannot convert a final rule into a 'logical outgrowth' that the public should have anticipated.'"[127]

Notably, the *Order* relies on these same passages as providing notice that the FCC would amend its rules to define mobile broadband Internet access service as the "functional equivalent of a commercial mobile service."[128] But, again, the *Notice* never proposed to amend this rule. Appendix A of the *Notice* did not include any change to this rule in the list of "proposed rules."[129] And the text of the *Notice* did not mention the term "functional equivalent" even once in the context of classifying mobile broadband Internet access service.[130] Nor does the *Notice* anywhere mention the FCC rule that delineates the framework that the agency has long used to determine whether a service is a "functional equivalent" of a commercial mobile service.[131] Yet the *Order* fashions and applies a novel and entirely different framework for doing so.

With the *Notice* silent on all of these points, the first filing to address "functional equivalency" came thirty-two days after the comment period had closed on the *Notice*, following a private meeting between FCC officials and CTIA.[132] Just as the Commission cannot "bootstrap notice

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NOI)). The Commission cannot have it both ways: Either the *2010 NOI* and its associated record is part of this proceeding (and the agency must address the full record against reclassification compiled therein) or it is not (and the agency cannot claim notice based on the *2010 NOI*).

124. *See Notice*, *supra* note 6, 29 FCC Rcd. at 5614, para. 149.

125. *See id.* at 5616, para. 155.

126. *See id.* at 5614, para. 150.

127. Council Tree Commc'ns v. FCC, 619 F.3d 235, 254 (3d Cir. 2010) (quoting Shell Oil Co. v. EPA, 950 F.2d 741, 751 (D.C. Cir.1991)).

128. *See Order*, *supra* note 25, at paras. 404, 406; *see also id.* at Appendix A (amending the definition of "commercial mobile radio service" to include mobile broadband Internet access service as a "functional equivalent" in rule 20.3).

129. *See Notice*, *supra* note 6, 29 FCC Rcd. at 5626–27 (Appendix A: Proposed Rules).

130. *See id.* at 5614, para. 150.

131. *See* 47 C.F.R. § 20.9(a)(14) (2014).

132. *Compare* Letter from Scott Bergmann, Vice President – Regulatory Affairs, CTIA – The Wireless Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-137 (Oct. 17, 2014), *available at* http://go.usa.gov/3aUW9, *with* Wireline Competition Bureau Extends Deadline for Filing Reply Comments in the Open Internet and Framework for Broadband Internet Service Proceedings, GN Docket Nos. 14-28, 10-127, *Public Notice*,

from a comment,"[133] it cannot use *ex parte* meetings to inform select members of the public of the Commission's thinking and then claim notice from such meetings.[134] The Administrative Procedure Act's notice-and-comment provisions were intended to ensure a robust debate among *all* parties, not just those invited to participate.

What is more, the lack of notice for these rule amendments prejudices even those who are not party to this proceeding. After all, the statutory bar on common carrier treatment applies to *any* mobile service not interconnected with the public switched network.[135] Thus, before the *Order*, online innovators could be sure that mobile applications that did not interconnect with the public switched telephone network could *not* be regulated as telecommunications services. That statutory safe harbor is now gone, even though the FCC never alerted those innovators that such a change could be coming.

D. Improper Procedure

In sum, the Commission issued the *Notice* in May when it was heading in one direction (a section 706 solution). It shifted course in November after the President urged the agency to implement a very different plan (a reclassification regime). Rather than following the proper procedure and issuing a further notice, the FCC charged ahead at the behest of activists who were suspicious of the Commission's commitment to their cause and thus demanded that agency adopt rules without delay. That is neither what the Administrative Procedure Act demands nor what the American people deserve.

II. DEFECTS IN SUBSTANCE

The legal flaws with this *Order* are not limited to improper procedures; they extend into substance as well.

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29 FCC Rcd. 9714 (Wireline Comp. Bur. 2014) (extending the close of the comment cycle to September 15, 2014).

133. Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983).

134. The *Order* specifically relies on a conversation the FCC's general counsel had with Public Knowledge for its contention that "Interested parties should have reasonably foreseen and in fact were aware that the Commission would analyze the functional equivalence of mobile broadband . . . . Indeed, several parties have submitted comments on this question." *Order*, *supra* note 25, at para. 406.

135. Communications Act § 332(c)(2), 47 U.S.C. § 332(c)(2) (2012) ("A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act . . . .").

A. Reclassification (Title II)

One of the most basic of those flaws is the FCC's determination that it can reclassify broadband Internet access service as a Title II telecommunications service. Neither the text of the Communications Act nor our precedent condones such a decision. And while the *Order* invokes changed circumstances to justify its reversal of course, the cited circumstances are neither changed nor otherwise adequate to justify applying Title II to broadband Internet access services. In short, this decision is unlawful.

Start with the text of the Communications Act, and specifically the term "information service," which was added through the Telecommunications Act of 1996. Congress defined the term to mean:

> [T]he 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.[136]

Internet access service comfortably fits within this framework. Can an ISP's subscriber generate, store, and make available information via telecommunications? Of course—Internet users do that every day on Facebook. Can such a subscriber acquire, retrieve, and process information via telecommunications? Yes—just check out Google Translate. Can such a subscriber transform and utilize information via telecommunications? Absolutely—just try one of the Internet's hundreds of video editing sites. Would such a subscriber have these capabilities without Internet access service? Obviously not.

Indeed, Congress itself called on the Commission to treat Internet access service as an unregulated, information service elsewhere in the Communications Act.[137] Section 230, added to the Act in 1996, established the "policy of the United States . . . 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."[138] That section went on to define "interactive computer service" as "any information service . . . provider that provides or enables computer access

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136. Communications Act § 3(24), 47 U.S.C. § 153(24) (2012).

137. Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442 (2014) ("Thus, an agency interpretation that is inconsistent with the design and structure of the statute as a whole . . . does not merit deference." (internal quotation marks and brackets omitted)).

138. Communications Act § 230(b)(2), 47 U.S.C. § 230(b)(2) (2012) (emphasis added); *see also* Communications Act § 230(a)(1), (a)(3), (a)(4), (b)(1), (b)(3) (all using the phrase "Internet and other interactive computer services").

by multiple users to a computer server, *including specifically a service or system that provides access to the Internet . . . .*"[139] In other words, Congress directly addressed the question of whether an ISP offered an information service—and answered with a resounding "Yes."

So it's no wonder that every time the Commission has previously confronted the question of whether an Internet access service is an information service, it too has answered yes.[140] And it's no wonder that when the Supreme Court reviewed the FCC's determination that broadband Internet access service over cable facilities was an information service, that decision went "unchallenged."[141]

1. The Stevens Report.

The Commission's first major decision in this regard—the 1998 *Stevens Report*—is particularly instructive regarding why this is so.[142] That report came at the behest of Congress to review "the definitions of 'information service' . . . [and] 'telecommunications service,'" along with "the application of those definitions to mixed or hybrid services . . . including with respect to Internet access."[143] The *Stevens Report* then exhaustively reviewed the text and legislative history of the

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139. Communications Act § 230(f)(2), 47 U.S.C. § 230(f)(2) (2012) (emphasis added). To respond, as the Commission does, that section 230 does not "classify broadband Internet access service, as we define that term herein, as an information service" misses the point. *Order*, *supra* note 25, at para. 386. When Congress adopted section 230 as part of the Telecommunications Act of 1996, of course it did not anticipate the precise definition the FCC would adopt almost 20 years later—but it could and did broadly define "interactive computer service" to envelop "*any*" information service provider, and "specifically a service or system that provides access to the Internet." Communications Act § 230(f)(2), 47 U.S.C. § 230(f)(2) (2012) (emphasis added). The *Order* cannot and does not dispute that Internet service providers squarely fall within the definition. At most, it argues that other services also fall within that definition, *Order*, *supra* note 25, at n.1097, which seems rather obvious given how broadly the statute is written.

140. *See Stevens Report*, *supra* note 46, 13 FCC Rcd. at 11536, para. 74; *Cable Modem Order*, *supra* note 47, 17 FCC Rcd. at 4802, para .7; *Wireline Broadband Internet Access Services Order*, *supra* note 48, 20 FCC Rcd. at 14858, para. 5; *BPL Internet Access Order*, *supra* note 49, 21 FCC Rcd. at 13285–88, paras. 8–11; *Wireless Broadband Internet Access Order*, *supra* note 50, 22 FCC Rcd. at 5908–09, para. 18.

141. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 987 (2005).

142. Although the *Order* now claims the *Stevens Report* was "not a binding Commission order," *Order*, *supra* note 25, at para. 315, our precedent has repeatedly treated it as such. *See, e.g.*, Communications Assistance for Law Enforcement Act, *Second Report and Order*, FCC 99-229, 15 FCC Rcd. 7105, 7120 n.70 (1999); *Cable Modem Order*, *supra* note 47, 17 FCC Rcd. at 4799, n.2; *Wireline Broadband Internet Access Services Order*, *supra* note 50, 20 FCC Rcd. at 14862, para. 12. Nor does the *Order* offer any reason to dismiss the considered views of five Commissioners reporting to Congress about how to construe the classification provisions of the Telecommunications Act.

143. Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 623, 111 Stat. 2440, 2521 (1998).

Telecommunications Act, along with the agency's own administrative precedent and the courts' administration of antitrust law, to answer these questions. Here are the highlights:

First, the *Stevens Report* found that Congress intended to incorporate judicial precedent into the term "information service"—specifically, the Modification of Final Judgment breaking up the Bell system.[144] The court had prohibited the Bell operating companies from providing any "information service,"[145] and the Telecommunications Act's definition paralleled the court's definition almost word for word.[146] Most relevant here, the court explained that the term covered "two distinctly different types" of services: both "data processing and other computer-related services" and "electronic publishing services," such as news and entertainment.[147]

Second, the *Stevens Report* found that Congress intended to incorporate administrative precedent into the term "information service"—specifically, the Commission's development of the concept of "enhanced service" in its *Computer Inquiries* proceeding.[148] Under that precedent, the Commission had eschewed the idea that it could divide up an integrated service into its component parts: "[N]o regulatory scheme could 'rationally distinguish and classify enhanced services as either communications or data processing,' and any dividing line the Commission drew would at best 'result in an unpredictable or inconsistent scheme of regulation' as technology moved forward."[149] In other words, even though enhanced services were "offered '*over* common carrier transmission facilities,' [they] were themselves not to be regulated under Title II of the Act, *no matter how extensive their communications components*."[150]

Third, the *Stevens Report* found that the "functions and services associated with Internet access," such as "the provision of gateways (involving address translation, protocol conversion, billing management, and the provision of introductory information content) to information services" and "[e]lectronic mail, like other store-and-forward services," were all "classed as 'information services' under the [Modified Final

144. *Stevens Report*, *supra* note 46, 13 FCC Rcd. at 11520, para. 39.

145. United States v. AT&T, 552 F. Supp. 131, 227 (D.D.C. 1982).

146. *Compare* Communications Act § 3(24), 47 U.S.C. § 153(24) (2012), *with AT&T*, 552 F. Supp. at 229. The only difference? The Telecommunications Act added the phrase "and includes electronic publishing."

147. *AT&T*, 552 F. Supp. at 179–80 (emphasis added)(capitalizations omitted).

148. *Stevens Report*, *supra* note 46, 13 FCC Rcd. at 11520, para. 39.

149. *Id.* at 11513, para. 27 (citations omitted) (quoting Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), *Final Decision*, 77 FCC 2d 384, 425, 428, paras. 107–08, 113 (1980)).

150. *Id.* at 11514, para. 27 (emphasis added) (quoting Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), *Final Decision*, 77 FCC 2d 384, 428, paras. 114 (1980)).

Judgment]."[151] Similarly, the "Commission has consistently classed such services as 'enhanced services.'"[152]

Fourth, the *Stevens Report* concluded that "address[ing] the classification of Internet access service *de novo*" led to the same conclusion: Internet access service is an information service according to the statute.[153] The question was "whether Internet access providers merely offer transmission . . . or whether they go beyond the provision of a transparent transmission path."[154] And the report concluded that "the latter more accurately describes Internet access service"[155] since Internet access services "combine computer processing, information provision, and other computer-mediated offerings with data transport."[156] The fact that data transport was a component of the service was irrelevant[157]—what mattered was that "[s]ubscribers can retrieve files from the World Wide Web, and browse their contents, *because* their service provider offers the 'capability for . . . acquiring, . . . retrieving [and] utilizing . . . information.'"[158]

In other words, the *Stevens Report* endorsed the view of a bipartisan group of Senators—John Ashcroft, Wendell Ford, John F. Kerry, Spencer Abraham, and Ron Wyden—that "[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services."[159] And it

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151. *Id.* at 11536–37, para. 75.

152. *Id.* at 11543, paras. 97–98 (1980) (citing Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), *Final Decision*, 77 FCC 2d 384, 420–21, paras. 97–98 (1980)).

153. *Id.* at 11536–37, para. 75.

154. *Id.* at 11536, para. 74; *id.* at 11520, para. 39 (finding a service to be a telecommunications service only if it offers "a simple, transparent transmission path, without the capability of providing enhanced functionality"); *id.* at 11520–21, para. 40 ("[A]n entity is *not* deemed to be providing 'telecommunications,' notwithstanding its transmission of user information, in cases in which the entity is altering the form or content of that information."); *id.* at 11511, para. 21 ("Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'").

155. *Id.* at 11536, para. 74.

156. *Id.* at 11536, para. 73.

157. *Id.* at 11539–40, para. 80.

158. *Id.* at 11538, para. 76 (emphasis added); *id.* at 11537, para. 76 ("Internet access providers typically provide their subscribers with the ability to run a variety of applications, including World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients, Telnet applications, and others." (footnotes omitted)).

159. *Id.* at 11520, para. 38 (quoting Letter from Senators John Ashcroft, Wendell Ford, John Kerry, Spencer Abraham, and Ron Wyden to the Honorable William E. Kennard, Chairman, FCC (Mar. 23, 1998) (*Five Senators Letter*), *available at* http://apps.fcc.gov/ecfs/document/view?id=2038710001); *see also Five Senators Letter* ("[W]ere the FCC to reverse its prior conclusions and suddenly subject some or all information service providers to telephone regulation, it seriously would chill the growth and development of advanced services to the detriment of our economic and educational well-being.").

essentially agreed with Senator John McCain that "[i]t certainly was not Congress's intent in enacting the supposedly pro-competitive, deregulatory 1996 Act to *extend* the burdens of current Title II regulation to Internet services, which historically have been excluded from regulation."[160]

Indeed, the *Stevens Report* noted that while the 1996 Telecommunications Act's "explicit endorsement of the goals of competition and deregulation represents a significant break from the prior statutory framework,"[161] the Commission's review of the statute and its legislative history revealed no similar intent to effect a "major change" with respect to the regulatory treatment of enhanced services like Internet access service.[162] And if anything, it found the goals of the Telecommunications Act to "promote competition and reduce regulation"[163] supported the Commission's classification decisions, since making Internet access and other enhanced services "presumptively subject to the broad range of Title II constraints [] could seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry."[164] Indeed, in passing the 1996 Telecommunications Act, Congress made this clear by declaring it the policy of the United States "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."[165]

2. Recent Developments.

Developments in the marketplace since the *Stevens Report* make it even more clear that ISPs do not "merely offer transmission" between points of the user's choosing but instead offer a highly complex information service.

Take the most basic example of visiting a webpage via a browser. When the user types a domain name into a browser, the browser typically queries the ISP's Domain Name System (DNS) service for the proper IP address to send that information. The DNS service determines whether that information is stored on the local server; if so, it returns that IP address to the user, and if not, it queries another DNS server. Such DNS servers are typically arranged in a hierarchy and searched recursively; once the URL is found, the appropriate information is forwarded and stored by each DNS

160. *Stevens Report*, *supra* note 46, 13 FCC Rcd. at 11519, para. 37 (quoting Letter from Senator John McCain to the Honorable William E. Kennard, Chairman, FCC).

161. *Id.* at 11511, para. 21.

162. *Id.* at 11524, para. 45.

163. Telecommunications Act of 1996, as amended, preamble. Pub. L. No. 104-104, 110 Stat. 56.

164. *Stevens Report*, *supra* note 46, 13 FCC Rcd. at 1524, para. 46.

165. Communications Act § 230(b)(2), 47 U.S.C. § 230(b)(2) (2012).

server in the chain. These functionalities—caching information and storing and forwarding information—are classic enhanced services.[166]

It gets even more complicated. For one, there is no necessary one-to-one correlation between domain names and IP addresses.[167] So if an Internet user in California and a user in New York City both seek the IP address for www.yahoo.com, an ISP could return different IP addresses to each user. The assignment could be random (to balance the load the server at each IP address must handle). Or the ISP could make the decision based on any number of factors, such as the physical proximity of the servers to the user (to reduce the latency of the connection).

For another, even with an IP address, an ISP may not connect a user with a particular end point. Instead, ISPs regularly cache popular content—anything from simple text to streaming video—so that when a subscriber requests such content it can be retrieved more quickly (and with less load on the network) than would occur if the request were sent to its specified destination.[168] And it's not just an ISP's own servers that cache content; an entire industry of content delivery networks have sprung up to move content closer to Internet users to improve performance.[169]

And there's still more: ISPs are eliminating viruses and other malicious attacks on their networks, including by (1) implementing DNS Security Extensions to verify the integrity of the DNS information retrieved for subscribers, (2) erecting firewalls and other screening mechanisms to prevent denial-of-service attacks and the effectiveness of botnets, and (3) monitoring network traffic patterns to ensure early detection of security threats.[170] They are using network address translation to establish non-

166. Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), *Final Decision*, 77 FCC 2d 384, 421, para. 97 & n.35 (1980).

167. To rebut this point, the *Order* notes that it "is not uncommon in the toll-free arena for a single number to route to multiple locations." *Order*, *supra* note 25, at para. 361. But the FCC expressly found that the management of toll-free numbers is "*not* a common carrier service" in 1996 and that "Resporgs" that manage toll-free numbers "do not need to be carriers." 800 Data Base Access Tariffs and the 800 Service Management System Tariff; Provision of 800 Services, *Report and Order*, FCC 96-392, 11 FCC Rcd. 15227, 15248–49, paras. 44–45 (1996) (emphasis added).

168. Reply Comments of AT&T at 54, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7522634753; Reply Comments of Bright House at 6–7, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7522584517.

169. Comments of Akamai at 3, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521479697; *see also* Netflix, Netflix Open Connect Content Delivery for ISPs *available at* http://nflx.it/1wpo0jw ("Unlike traditional content caches which retrieve new content when a user requests an object that is not currently present in the cache, new and popular content is pushed from Netflix to the [Netflix-supplied Open Caching Appliances at interconnection points] on a nightly basis over peering or IP transit.").

170. ACA Comments at 54–60; AT&T Comments at 48–49; CenturyLink Comments at 44–45; Charter Comments at 14–15; Comcast Comments at 57; NCTA Comments at 34–35;

public IP addresses for their subscribers.[171] And they are processing protocols to bridge the gap between IPv4 and IPv6.[172]

The end result of all this? Even for the most basic web browsing functions, an ISP is doing more than merely offering transmission between points of the user's choosing. Indeed, as one commenter put it, "it is literally *impossible* for a broadband user to specify the 'points' of an Internet 'transmission' on the web" since the user is really just "specifying the original *source of the information* the user wants to retrieve" and the ISP then uses that information to choose the endpoint among several alternatives.[173] Or as the *Stevens Report* put it, Internet access service enables subscribers "to access information with no knowledge of the physical location of the server where that information resides,"[174] not "between or among points specified by the user."[175]

The contrary conclusion—that Internet access service is a telecommunications service and that DNS service, caching, and "a variety of new network-oriented, security-related computer processing capabilities"[176] all fall within the telecommunications system management exception[177]—is in error. These capabilities serve the interests of subscribers, not ISPs. For instance, DNS service doesn't facilitate an ISP's "management . . . of a telecommunications system or . . . service"; it allows a subscriber's request for access to particular content to be translated into an IP address. And in any case, these capabilities are not telecommunications services unless the underlying service itself is a telecommunications service—which, as explained above, it is not.

Moreover, the notion that these capabilities might fall within the management exception to the definition of information services would have been unthinkable to the Congress that enacted the Telecommunications Act. Had Internet access service been a basic service, dominant carriers

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T-Mobile Comments at 20; Time Warner Cable Comments at 12; USTelecom Comments at 26–27; USTelecom Reply at 29; Verizon Comments at 59–60.

171. *See, e.g.*, Broadband Internet Technical Advisory Group, Report on Port Blocking at 6 (2013), *available at* http://www.bitag.org/documents/Port-Blocking.pdf.

172. Reply Comments of Comcast at 22, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7522598141; Comments of Verizon at 60–61, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521507614.

173. Fred B. Campbell, Center for Boundless Innovation in Technology, Broadband Transmissions Are Not "Telecommunications," GN Docket No. 14-28, at 30 (Feb. 18, 2014), *available at* http://go.usa.gov/3aUWA.

174. *Stevens Report*, *supra* note 46, 13 FCC Rcd. at 11532, para. 64.

175. Communications Act § 3(50), 47 U.S.C. § 153(50) (2012) (defining "telecommunications").

176. *Order*, *supra* note 25, at para. 373.

177. Communications Act § 3(24), 47 U.S.C. § 153(24) (2012) (defining the term "information service" and noting that it "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").

could have offered it—and all related computer-processing functionality—outside the parameters of the *Computer Inquiries*. Had Internet access service been a telecommunications service, Bell operating companies could have offered it themselves under the Modified Final Judgment. But I cannot find a single suggestion that anyone in Congress, anyone at the FCC, anyone in the courts, or anyone at all thought this was the law during the passage of the Telecommunications Act.[178] Statutory interpretation "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[179] And it is highly unlikely that Congress drew upon historical sources to define a statutory term, but then intended to give the FCC the discretion to reach the exact opposite result.[180]

Furthermore, given the increasing use of computer processing in the networking, I do not see how "[c]hanged factual circumstances" could lead the FCC to revisit the classification of Internet access service.[181] Although the FCC's prior determinations rested on "a factual record compiled over a decade ago,"[182] the *Order* does not identify any actual change.

First, the *Order* points to "consumer conduct"[183] to show that consumers use the Internet "today primarily as a conduit for reaching modular content, applications, and services that are provided by unaffiliated third parties."[184] "Examples include 350–400 million visits a day to Google and Yahoo!'s 'popular alternatives to the email services provided' by ISPs, Go Daddy providing 'website hosting,' and Apple, Dropbox, and Carbonite operating 'cloud-based' storage.'"[185]

But the availability and popularity of third-party content is hardly new. Yahoo! Mail went online in 1997.[186] HoTMaiL (the original web-

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178. Despite the *Order*'s claim to the contrary, *Order*, *supra* note 25, at para. 356 n.975, this line of reasoning does not contradict the Court's holding in *Brand X*, since the last-mile transmission service discussed there (and which I discuss below) is just not the same service as the Internet access service that the *Order* claims is a telecommunications service here. And one need look no further than section 230 of the Communications Act along with the legislative history reviewed in the *Stevens Report*—all described above—to find compelling evidence that Congress did in fact think that Internet access service was an information service.

179. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

180. *Cf.* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.").

181. *Order*, *supra* note 25, at para. 330.

182. *Id.* at para. 330.

183. *Id.* at para. 330.

184. *Id.* at para. 350.

185. *Id.* at para. 348.

186. Internet Archive Wayback Machine: Yahoo!, (Oct. 15, 1997), http://bit.ly/18xSlB5.

based email) launched in 1996.[187] GeoCities, a website-hosting service, launched in 1994 and was the third most-visited site on the web in 1999.[188] And Amazon.com was selling books, music, and videos before the turn of the century, and began offering cloud-based Amazon Web Services in 2002.[189] Were the most successful sites back then as large as the most successful sites today? Of course not. The number of broadband Internet connections has skyrocketed from 4.3 million in 2000 (at speeds of 200 kbps) to 122 million (at speeds of 10 Mbps)[190]—and a rising tide lifts all ships (or most, except alas for GeoCities).

And the FCC was certainly aware that consumers were visiting third-party sites and using third-party applications in its previous classification decisions. The *Cable Modem Order* itself noted that "cable modem service subscribers, by 'click-through' access, may obtain many functions from companies with whom the cable operator has not even a contractual relationship. For example, a subscriber to Comcast's cable modem service may bypass that company's web browser, proprietary content, and e-mail. The subscriber is free to download and use instead, for example, a web browser from Netscape, content from Fox News, and e-mail in the form of Microsoft's 'Hotmail.'"[191] So what has changed? Nothing legally relevant. New automotive makes, models, and functions have arrived since 2005; that doesn't change the fact that what we are doing is driving. LED bulbs are replacing incandescent bulbs by the millions; that doesn't change the fact that we're using something to light up a room. We access and use the capabilities that Internet access service provides in new and novel ways; that doesn't change the fact that we're accessing and using the Internet.

Next, the *Order* points to "broadband providers' marketing and pricing strategies."[192] Some "advertisements . . . emphasize transmission speed as the predominant feature that characterizes broadband Internet access service offerings," such as AT&T's claim that it offers the "[n]ation's most reliable 4G LTE network" with "speeds up to 10x faster

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187. Internet Archive Wayback Machine: HoTMaiL, (Dec. 20, 1996), http://bit.ly/1887bOB.

188. Rosalie Marshall, Yahoo closing GeoCities web hosting service, vnunet.com (Apr. 24, 2009), *available at* http://bit.ly/198SoVg; JULIA ANGWIN, STEALING MYSPACE: THE BATTLE TO CONTROL THE MOST POPULAR WEBSITE IN AMERICA 51 (2009); *see also* Internet Archive Wayback Machine: GeoCities, (Feb. 22, 1997), http://bit.ly/1B0pV9E.

189. Mark W. Johnson, *Amazon's Smart Innovation Strategy*, BUSINESSWEEK, Apr. 12, 2010, *available at* http://www.businessweek.com/innovate/content/apr2010/id20100412_520351.htm; Internet Archive Wayback Machine: Amazon.com, (Oct. 13, 1999), http://bit.ly/198StZ0.

190. *Compare* FCC, High-Speed Services for Internet Access: Subscribership as of June 30, 2000, at 2 (Oct. 2000), *available at* http://go.usa.gov/3aUZe, *with* FCC, Internet Access Services: Status as of December 31, 2013, at 4 (Oct. 2014), *available at* http://go.usa.gov/3aUBH.

191. *Cable Modem Order*, *supra* note 47, 17 FCC Rcd. at 4816, para. 25.

192. *Order*, *supra* note 25, at para. 330.

than 3G."[193] Others "link higher transmission speeds and service reliability with enhanced access to the Internet at large," such as RCN's claim that its "110 Mbps High-Speed Internet" offering is "ideal for watching Netflix."[194] And ISPs "price and differentiate their service offerings on the basis of the quality and quantity of data transmission" with higher prices for faster speeds.[195]

But again, this is nothing new. In 1999, Qwest asked customers "Could your business use the bandwidth to change everything?" and advertised service fast enough to access "every movie ever made in any language anytime, day or night."[196] In 2001, Charter was offering "Internet Light" (256 kbps service for $24.95 per month) and "Residential Classic" (1024 kbps for $39.95 per month) as part of its "Charter Pipeline" service.[197] Even America Online in 1999 was advertising how it "spent over $1 billion to build the world's largest high-speed network—now with 56k, connections are faster than ever!"[198]

And again, the FCC knew this when it decided the *Cable Modem Order*. In the Commission's *Second Broadband Deployment Report* in 2000, the FCC noted the prices for broadband Internet access service, from "low-end ADSL service" priced at $39.95 to $49.95 per month, to "[f]aster ADSL services" at $99.95 to $179.95 per month, and "symmetric DSL . . . well-suited to applications . . . such as videoconferencing" and priced at $150 to $450 per month.[199]

But more to the point, contemporary marketing doesn't suggest that a wheel's been invented. Deploying last-mile facilities generally has long been the biggest cost of broadband. As a result, the way in which broadband providers have competed is product/service differentiation. So of course broadband providers today advertise their speeds and their prices—that's a large part of what makes each distinct. But it doesn't mean that their last-mile transmission service *by itself* is what they're selling—I

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193. *Id*. at para. 351 (citing Comments of Public Knowledge, Benton Foundation & Access Sonoma Broadband, at Appendix A-2, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014) [hereinafter Public Knowledge Comments], *available at* http://apps.fcc.gov/ecfs/document/view?id=7521480282).

194. *Id*. at para. 352 (citing Public Knowledge Comments, *supra* note 193, at Appendix A-3).

195. *Id*. at para. 353 (citing Public Knowledge Comments, *supra* note 193, at Appendix A-1).

196. Qwest, Qwest Commercial 1999 – Every Movie, https://www.youtube.com/watch?v=xAxtxPAUcwQ (last visited May 1, 2015).

197. Charter, Charter Pipeline (2001), http://bit.ly/1EQV19H.

198. America Online, AOL Commercial from 1999, https://www.youtube.com/watch?v=MQcCnPWHlLk (last visited May 1, 2015).

199. 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, *Second Report*, FCC 00-290, 15 FCC Rcd. 20913, 20931, paras. 36–37 (2000).

don't know many consumers lining up for fast transmission to a cable headend or central office but not actual access to the Internet.

Lastly, the *Order* argues that "the predictive judgments on which the Commission relied in the *Cable Modem Declaratory Ruling* anticipating vibrant intermodal competition for fixed broadband cannot be reconciled with current marketplace realities."[200] One problem is that this argument doesn't address the reclassification question at all. The statute doesn't classify a service based on the quantity of providers, so it doesn't matter whether there are 4,462 (like there are for Internet access service) or just one (like there is for telegraph service).

The greater problem is this assertion comes up empty too.[201] Alongside the high-speed broadband Internet access service offered by cable operators and telephone companies, 98% of Americans now live in areas covered by 4G LTE networks (*i.e.*, networks capable of delivering 12 Mbps mobile Internet access),[202] wireless ISPs are using unlicensed spectrum to offer new, cheaper services, and new entrants like Google are bringing 1 Gbps service to areas around the country. Indeed, it's no wonder that the *Order* offers no factual support for this assertion. To the contrary, the Commission itself has repeatedly recognized that "current marketplace realities" reflect intermodal competition[203]—including in this very *Order*![204]

In short, all the facts point in the same direction: Broadband Internet access service is an information service.

3. Broadband Internet Access Transmission Services

Nor can the Commission seek refuge in the Commission's past identification of a transmission service as a component of broadband Internet access service. Even if a broadband Internet access service provider could be said to offer a separable transmission service (and it can't), the transmission service discussed in our precedent is very different from the broadband Internet access service that the FCC classified in the *Order*.

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200. *Order*, *supra* note 25, at para. 330.

201. Despite the *Order*'s suggestion to the contrary, the *Cable Modem Order* did not limit its prediction to "fixed broadband." *See generally Cable Modem Order*, *supra* note 47.

202. *2015 Broadband Progress Report*, *supra* note 60, at para. 109.

203. *See id.* at paras. 15–16 (observing that "[p]rivate industry continues to invest billions of dollars to expand America's broadband networks" and explicitly comparing cable, telco, wireless, Google Fiber, and municipal broadband investments).

204. *Order*, *supra* note 25, at para. 76 & n. 114 (noting "the remarkable increases in investment and innovation seen in recent years" and citing as evidence of robust broadband infrastructure investment cable, telco, wireless incumbent investment and new entrants like Google Fiber).

Start with the precedent. In the *Advanced Services Order*, the Commission examined digital subscriber line (DSL) technology, which allowed "transmission of data over the copper loop at vastly higher speeds than those used for voice telephony or analog data transmission" between each "subscriber's premises" and "the telephone company's central office."[205] For this service, a DSL access multiplexer would direct the traffic onto a carrier's packet-switched data network, where it could then be routed to a "location selected by the customer" like a "gateway to a . . . set of networks, like the Internet."[206] The FCC then classified only the *last-mile transmission service* between the end user and the ISP as a telecommunications service, while observing that the Internet access service itself was still an information service.[207]

Similarly, the Commission identified "broadband Internet access transmission service" as a possible telecommunications service in the *Wireline Broadband Internet Access Services Order*.[208] Again, however, that service was the *last-mile transmission service* between the end user and the ISP, and one the carrier could choose to offer as common carriage or private carriage.[209] And it is these last-mile transmission services that many rural carriers still offer as a telecommunications service (in large part in order to receive subsidies from our legacy universal service program, which funds the regulated costs of high-cost loops used to provide telecommunications services).[210]

It was this potential last-mile transmission service that was at issue in the *Brand X* case. As the Commission reasoned, this service was not a separable telecommunications service because the "consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access."[211]

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205. Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-188, 13 FCC Rcd. 24012, 24026–27, para. 29 (1998).

206. *Id.* at 24027, paras. 30–31.

207. *Id.* at 24030, para. 36.

208. *Wireline Broadband Internet Access Services Order*, *supra* note 48, 20 FCC Rcd. at 14899, para. 86.

209. *Id.* at 14899–900, paras. 86–88 (describing this as a service that both end users and ISPs would purchase).

210. *Id.* at 14900–03, paras. 89–95; Comments of NTCA at 9, Protecting and Promoting the Open Internet, FCC GN Docket No. 14-28 (rel. May 15, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521701730. Notably, rural carriers exercising this option do *not* treat the Internet access service itself as a Title II telecommunications service and generally offer that service through a separate, affiliated ISP that purchases the last-mile transmission service from the carrier. To the extent the *Order* suggests otherwise, *see Order*, *supra* note 25, at para. 422, it is incorrect.

211. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 988 (2005).

don't know many consumers lining up for fast transmission to a cable identified in his dissent as being a telecommunications service. As he put it: "Since . . . the broad-band connection between the customer's computer and the cable company's computer-processing facilities[] is downstream from the computer-processing facilities, there is no question that it merely serves as a conduit for the information services that have already been 'assembled' by the cable company in its capacity as ISP."[212] He analogized to a pizzeria, arguing that a delivery service was being offered *after* the pie was baked:

> If, for example, I call up a pizzeria and ask whether they offer delivery, both common sense and common "usage," would prevent them from answering: "No, we do not offer delivery—but if you order a pizza from us, we'll bake it for you and then bring it to your house." The logical response to this would be something on the order of, "so, you *do* offer delivery."[213]

In contrast, consider the broadband Internet access service at issue in this proceeding. It is not limited to the last-mile transmission service between a customer and an ISP's point of presence. It extends into the ISP's network all the way to "the exchange of traffic between a last-mile broadband provider and connecting networks"[214]—a scope that necessarily extends onto the Internet's backbone, since that's where many networks interconnect. And the *Order* reclassifies Internet access service for "all providers of broadband Internet access service . . . regardless of whether they lease or own the facilities used to provide the service."[215]

To extend the pizzeria analogy, this *Order* does not only cover the delivery of a baked pie. Instead, the *Order* reaches the exchange of ingredients between a pizzeria and its suppliers, since all those ingredients must be "delivered" to the pizzeria. To the extent a pizzeria stores popular ingredients, that's just an adjunct to the delivery services that came before and afterwards. To the extent a pizzeria processes the ingredients, that's just an adjunct too.[216]

In other words, when the *Order* claims that "[t]here is no disputing that until 2005, Title II applied to the transmission component of DSL

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212. *Id.* at 1010 (Scalia, J., dissenting).
213. *Id*. at 1007.
214. *Order*, *supra* note 25, at para. 204.
215. *Id*. at para. 337.
216. *Id*. at paras. 366–75. The *Order* misunderstands the analogy when it supposes that "the pizzeria owners discovered that other nearby restaurants did not deliver their food and thus concluded that the pizza-delivery drivers could generate more revenue by delivering from any neighborhood restaurant (including their own pizza some of the time). Consumers would clearly understand that they are being offered a delivery service." *Id*. at para. 45. Of course they would. And if someone offered a last-mile transmission service available to any ISP, of course that would be a telecommunications service. But that's not what any broadband Internet access service provider is offering, and so the analogy utterly fails.

service,"[217] it is being intentionally misleading. The service the FCC reclassified is different in kind from the last-mile transmission services that were at issue in prior FCC orders. And so the *Order*'s claim that it is just returning things to how they were ten years ago is just wrong. In fact, the *Order* overturns three decades of precedent—indeed, all the precedent we've ever had on the subject.[218]

4. Heightened Scrutiny

Not only does the FCC lack the authority to classify broadband Internet access service as a Title II telecommunications service; it also, in any event, fails to supply a reasoned basis for departing from decades of agency precedent that determined it is an information service.[219]

The agency faces one further obstacle in its quest to reclassify broadband Internet access service: heightened judicial scrutiny. When an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account,"[220] an agency decision to reverse course is subject to heightened or more searching review.[221] Both circumstances are present here.

First, as discussed above, the Commission's decision to reclassify broadband Internet access service rests upon a series of factual findings that run directly contrary to those it made in all prior classification decisions.

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217. *Id.* at para. 313.

218. The *Order* objects in a footnote that "the service we define and classify today *is* the same transmission service as that discussed in prior Commission orders." *Id.* at note 1257. But it undermines that argument just one sentence before, when it describes the service as one with "the capability to send and receive packets to all or substantially all Internet endpoints." *Id.* The transmission service the FCC previously recognized was not and is not so expansive—it's a last-mile transmission service connecting customers to computer-processing facilities for Internet access. That's why the *Wireline Broadband Internet Access Services Order* recognized that ISPs would be customers of such service. *See supra* note 48, 20 FCC Rcd. at 14902, para. 92 (describing the transmission service offered to "end user and ISP customers"). And that's why even today the tariffs of the National Exchange Carrier Association describe Digital Subscriber Line (DSL) as a local point-to-point service. *See, e.g.*, NECA Tariff FCC No. 5, 20th Revised Page 8-1, *available at* http://bit.ly/1wkvPH8 (effective through Mar. 1, 2015) (describing DSL Access service as a transmission service "over local exchange service facilities . . . between customer designated premises and designated Telephone Company Serving Wire Centers"). To return to the pizzeria analogy: Before, the Commission regulated the delivery from the pizzeria to the customer; now, the Commission wants to regulate that delivery plus the delivery of all or substantially all of the ingredients to the pizzeria. The one thing is not like the other.

219. *See, e.g.*, Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 (1983).

220. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (citing Smiley v. Citibank (South Dakota), N. A., 517 U.S. 735, 742 (1996)).

221. *Id.* at 513–16.

Second, if there ever could be a case where an agency has engendered serious reliance interests, this is it. After the passage of the 1996 Telecommunications Act and the confirmation that Internet access service was an information service in the *Stevens Report*, the FCC trumpeted the multi-billion investments that AT&T, MCI, Qwest, Level 3, UUNet Technologies, Sprint, and others were making in the Internet backbone, noting that bandwidth on the backbone was doubling every four to six months.[222] Starting the year after the *Stevens Report*, broadband providers have invested over $1.125 *trillion* in their networks.[223] To suggest these providers did not rely on the FCC's decision not to subject Internet access services—broadband or otherwise—to Title II is absurd.

Indeed, look just at the wireless industry as an example. In 2007, when the Commission classified wireless broadband Internet access service as an information service, FCC Chairman Kevin Martin stated that "[t]oday's classification eliminates unnecessary regulatory barriers for wireless broadband Internet access service providers and will further encourage investment and promote competition in the broadband market."[224] It certainly did. Between that decision and now, wireless providers alone have invested over $175 billion.

Regardless of whether the heightened or more traditional standard applies, the *Order* fails to offer an adequate basis for changing course. Indeed, given that neither the material facts nor relevant laws have changed, it is quite plain that the only reason the FCC is departing from prior precedent is because the President told the agency to do so.[225] But courts have been quite clear that this is not a lawful basis for shifting course, with the D.C. Circuit stating that "an agency may not repudiate precedent simply to conform with a shifting political mood."[226] As a result, the FCC's attempt to offer a reasoned basis for turning heel on decades of agency precedent falls far short of meeting APA requirements.

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222. 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, *Report*, FCC 99-5, 14 FCC Rcd. 2398, 2416–17, para. 38 (1999).

223. *See, e.g.*, USTelecom, Broadband Investment, Historical Broadband Provider Capex (2015) (data through 2013), *available at* http://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex.

224. *Wireless Broadband Internet Access Order*, *supra* note 48, 22 FCC Rcd. at 5926 (Statement of Chairman Kevin J. Martin).

225. *See supra* Part I.

226. Nat'l Black Media Coal. v. FCC, 775 F.2d 342, 356 n.17 (D.C. Cir. 1985); *see also Fox*, 556 U.S. at 537 (Kennedy, J., concurring in part and concurring in the judgment) ("Congress passed the Administrative Procedure Act (APA) to ensure that agencies follow constraints even as they exercise their powers. One of these constraints is the duty of agencies to find and formulate policies that can be justified by neutral principles and a reasoned explanation.").

B. The Mobile Broadband Hurdle (Section 332)

Section 332 of the Communications Act independently bars the FCC from reclassifying mobile broadband Internet access service as a Title II telecommunications service.

In section 332, Congress added a mobile gloss onto the definition of telecommunications service originally formulated for wireline carriers. Pursuant to the statute, providers of "commercial mobile service" are common carriers, and thus telecommunications carriers.[227] By contrast, providers of "private mobile service" are not.[228]

In order to understand why mobile broadband Internet access service is a private mobile service and thus cannot be classified as a Title II service, it is necessary to begin by running through a number of definitions. First, a "commercial mobile service," in relevant part, is any mobile service that "makes interconnected service available."[229] "[I]nterconnected service," in turn, means a "service that is interconnected with the public switched network"[230] and "gives subscribers the capability to communicate to or receive communication from all other users on the public switched network."[231] "[P]ublic switched network," for its part, means the public switched telephone network, *i.e.*, the "common carrier switched network . . . that use[s] the North American Numbering Plan in connection with the provision of switched services."[232] And "private mobile service" is the reverse of commercial mobile service: "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service."[233]

Given these definitions, it's no surprise that the FCC back in 2007 classified mobile broadband Internet access service as a private mobile service—and hence recognized that it could not be treated as a common-carriage, telecommunications service.[234] As the Commission put it: "[M]obile wireless broadband Internet access service does not fit within the definition of 'commercial mobile service' because it is not an 'interconnected service.'"[235] That's because it does not interconnect with the public switched telephone network but instead a different network—the

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227. Communications Act § 332(c)(1)(A), 47 U.S.C. § 332(c)(1)(A) (2012) ("A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier.").

228. *Id.* § 332(c)(2) ("A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose.").

229. *Id.* § 332(d)(1).

230. *Id.* § 332(d)(2).

231. 47 C.F.R. § 20.3 (2014).

232. *Id.*

233. Communications Act § 332(d)(3), 47 U.S.C. § 332(d)(3) (2012).

234. *Wireless Broadband Internet Access Order*, *supra* note 50, 22 FCC Rcd. at 5901.

235. *Id.* at 5916, para. 41.

Internet.[236] The Commission reaffirmed that finding four years later when it held that "commercial mobile data service," which, as relevant here, is the equivalent of retail mobile Internet access service, "is not interconnected with the public switched network."[237]

Courts have repeatedly confirmed this view. The D.C. Circuit in *Cellco* explained that, "providers of 'commercial mobile services,' such as wireless voice-telephone service, are common carriers, whereas providers of other mobile services are exempt from common carrier status."[238] The court recognized what it described as section 332's "statutory exclusion of mobile-internet providers from common carrier status."[239] And it noted that, when read in conjunction with the Communications Act's separate prohibition on treating information service providers as common carriers, mobile broadband Internet access service providers are "statutorily immune, perhaps twice over, from treatment as common carriers."[240] The D.C. Circuit in *Verizon* put it even more bluntly: The "treatment of mobile broadband providers as common carriers would violate section 332."[241]

This regulatory framework creates major problems for the task that President Obama specifically assigned the Commission: reclassifying mobile broadband Internet access service as a Title II telecommunications service.[242] And so the Commission only makes a half-hearted attempt to work within it. In two short paragraphs, the *Order* claims that because mobile broadband Internet access service enables the use of VoIP and similar applications, it "gives subscribers the capability to communicate with all North American Numbering Plan (NANP) endpoints"[243] and is thus an interconnected service, a commercial mobile service, and a telecommunications service.

But this isn't a new argument—the Commission squarely addressed it and rejected it seven years ago.[244] A service is classified based on its *own* functions and properties,[245] and there is no question that a subscriber to

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236. *Id.* at 5916, 5917, paras. 41, 45 & n.118.

237. Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Second Report and Order*, FCC 11-52, 26 FCC Rcd. 5411, 5431, para. 41 (2011).

238. Cellco Partnership v. FCC, 700 F.3d 534, 538 (D.C. Cir. 2012).

239. *Id.* at 548.

240. *Id.* at 538; *see also id.* (recognizing that the Communications Act's definition of the term "common carrier" has been "interpreted . . . to exclude providers of 'information services'").

241. Verizon v. FCC, 740 F.3d 623, 650 (D.C. Cir. 2014).

242. The White House, Net Neutrality: President Obama's Plan for a Free and Open Internet https://web.archive.org/web/20150204034321/http://www.whitehouse.gov/net-neutrality (Nov. 10, 2014) ("I believe the FCC should make these rules fully applicable to mobile broadband as well.").

243. *Order*, *supra* note 25, at paras. 400–01.

244. *Wireless Broadband Internet Access Order*, *supra* note 50, 22 FCC Rcd. at 5917–18, para. 45.

245. *See, e.g.*, Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the

mobile broadband Internet access service, without interconnected VoIP service, *cannot* reach the public switched telephone network. In other words, interconnected VoIP service and mobile broadband are distinct services,[246] so while VoIP might be an interconnected service, mobile broadband is not.[247]

The *Order* offers no reasoned basis for departing from these precedents, nor for concluding that VoIP service and mobile broadband Internet access service are now a single, unified service. Yes, mobile users can now communicate with different types of networks; but they could do that in 2007. Yes, there are more subscribers to mobile broadband Internet access service now than in 2007; but that has nothing at all to do with whether VoIP and mobile broadband are distinct services. And while the FCC may assert that "changes in the marketplace have increasingly blurred the distinction between services using NANP numbers and those using public IP addresses,"[248] that's just an *ipse dixit*; no consumer that I know types a phone number into a web browser to make a call, and no one tries to dial a URL into their phone.

What is more, the *Order*'s attempted conflation makes no sense. If mobile broadband Internet access service could lose its status as a distinct service and blend into another merely because it enables access to interconnected VoIP service, then it truly is a regulatory chameleon. Is it a cable service because consumers can use apps to watch cable programming? Is it a radio service because people can use apps to listen to an FM station? Is it food delivery service because some apps let you order pizza from your phone? Obviously not.

Implicitly recognizing these problems with its approach, the *Order* next attempts to jettison the whole regulatory framework and replace it with one far more amenable to the outcome it desires—first by redefining the meaning of public switched network, next by redefining the meaning of functional equivalence, and finally by summoning a "statutory contradiction" into being. None of these attempts withstands scrutiny.

Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55, *Memorandum Opinion and Order*, 22 FCC Rcd. 3513, 3521–22, paras. 15–16 (Wireline Comp. Bur. 2007) (noting the "regulatory classification of the [VoIP] service provided to the ultimate end user has no bearing on" the regulatory status of the entities "transmitting [the VoIP] traffic").

246. *Wireless Broadband Internet Access Order*, *supra* note 50, 22 FCC Rcd. at 5918, para. 45 (stating that "users of a mobile wireless broadband Internet access service need to rely on another service or application, such as certain voice over Internet Protocol (VoIP) services . . . to make calls").

247. *Id.* at 5917–18, paras. 45–46.

248. *See Order*, *supra* note 25, at para. 401.

1. Redefining the Public Switched Network

The Commission's first move is to broaden the definition of the public switched network to include not only services that use NANP but also those that use "public IP addresses."[249] In other words, the public switched network would now encompass the Internet in addition to the traditional public switched telephone network.

But that's not what the statute allows. A "fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[250] In the case of a term of art, that ordinary meaning is determined based on common usage among those practiced in the art.

And in the years preceding the passage of section 332(d)(2), the FCC and the courts repeatedly used the term "the public switched network" to refer to the traditional, circuit-switched network that AT&T and local exchange carriers had built to offer telephone service, *i.e.*, the public switched telephone network. In 1981, the Commission noted that "the public switched network interconnects all telephones in the country."[251] In 1982, the D.C. Circuit noted that wide area telecommunications service "calls are switched onto the interstate long distance telephone network, known as the *public switched network*, the same network over which regular long distance calls travel."[252] In 1985, the Federal-State Joint Board on Separations noted that the "costs involved in the provision of access to the public switched network[] are assigned . . . on the same basis as . . . [t]he local loop used by subscribers to access the switched telephone network."[253] And in 1992, the FCC characterized its cellular service policy as "encourag[ing] the creation of a nationwide, seamless system, interconnected with the public switched network so that cellular and landline telephone customers can communicate with each other on a universal basis."[254]

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249. *Id*. at para. 391.

250. Perrin v. United States, 444 U.S. 37, 42 (1979); *see also Evans v. United States*, 504 U.S. 255, 260 n.3 (1992) (Where a "'word is obviously transplanted from another legal source, whether common law or other legislation, it brings the old soil with it.'" (quoting Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

251. Applications of Winter Park Tel. Co., *Memorandum Opinion and Order*, 84 FCC 2d 689, 690, para. 2 n.3 (1981).

252. Ad Hoc Telecomms. Users Comm. v. FCC, 680 F.2d 790, 793 (D.C. Cir. 1982).

253. MTS and WATS Market Structure; Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72, 80-286, *Order Inviting Further Comments*, 50 Fed. Reg. 31749, 41749, para. 3 (Fed.-State Jt. Bd. 1985).

254. Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, *Report and Order*, FCC 91-400, 7 FCC Rcd. 719, 720, para. 9 (1992); *see also* Provision of Access for 800 Service, *Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking*, FCC 91-249, 6 FCC Rcd. 5421, 5421 n.3 (1991) ("800

So it's no wonder that when the FCC first defined "the public switched network," it expressly rejected calls to decouple that concept from the traditional public switched telephone network. Commenters had asked the Commission to broaden the scope of the term to include the then-emerging "network of networks."[255] Still others teed up defining the term to "include all networks."[256] But the Commission said no, and tied its definition of the public switched network to "the traditional local exchange or interexchange switched network."[257] In other words, the agency recognized that "Congress intended [the term] to have its established meaning,"[258] which in this case means the public switched telephone network—not the Internet.[259]

In the twenty years since the FCC defined the term, Congress has amended the Communications Act—and section 332—numerous times.[260] On every occasion, it has chosen not to disturb the Commission's interpretation. As the Supreme Court has explained, this "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."[261]

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numbers generally must be translated into [plain old telephone service] numbers before 800 calls can be transmitted over the public switched network."); Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals, and the Americans with Disabilities Act of 1990, *Notice of Proposed Rulemaking*, FCC 90-376, 5 FCC Rcd. 7187, 7190, para. 20 (1990) (noting that "subscribers to every telephone common carriers' interstate service, including private line, public switched network services, and other common carrier services, will contribute"); Letter from Scott Bergmann, CTIA to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-137, at 7 n.2 (Dec. 22, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001010832 (collecting authorities).

255. Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, *Second Report and Order*, FCC 94-31, 9 FCC Rcd. 1411, 1434, para. 53 (1994) [hereinafter *CMRS Second Report and Order*].

256. *Id.*

257. *Id.* at 1436–37, para. 59. To support its action here, the Commission cites commenters that called on the FCC in 1994 to broaden the scope of the term "the public switched network" to include the "network of networks," or otherwise separate the term entirely from the traditional public switched telephone network. *See Order*, *supra* note 25, at note 1145. Again, this ignores that the Commission *rejected* those commenters' calls to so fundamentally alter the term "the public switched network" and made clear that, consistent with section 332, it was limiting the term to covering services that are "interconnected with the traditional local exchange or interexchange switched network." *CMRS Second Report and Order*, *supra* note 255, 9 FCC Rcd. at 1436–37, para. 59.

258. McDermott Intern., Inc. v. Wilander, 498 U.S. 337, 342 (1991).

259. Indeed, section 332's legislative history confirms that Congress used the terms interchangeably. Although both the House and Senate versions of the legislation used the term "the public switched network," the Conference Report characterized the House version as requiring interconnection with "the Public switched *telephone* network." H.R. REP. NO. 103-213, at 495 (1993) (Conf. Rep.) (emphasis added), *as reprinted in* 1993 U.S.C.C.A.N. 1088, 1184.

260. *See, e.g.*, Telecommunications Act § 704(b) (amending section 332 of the Communications Act).

261. Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 846 (1986) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 274–275 (1974)); *see also* Cottage Sav. Ass'n

And Congress itself has distinguished between "the public switched network" on the one hand and the "public Internet" on the other. In the Spectrum Act of 2012, for example, Congress assigned the First Responder Network Authority certain responsibilities, including developing for public safety users a "core network" that "provides connectivity" to "the public Internet or the public switched network, or both."[262] This provision makes clear that Congress knows the difference between "the public switched network" and the "public Internet." The Commission must respect that distinction.[263]

There's another problem with the Commission's attempt to expand the definition of "the public switched network" to include the Internet: Congress used the definite article "the" and the singular term "network" in section 332(d)(2)—suggesting Congress was referring to a single, integrated network. And the Commission followed that lead when it defined interconnected service as giving "subscribers the capability to communicate to or receive communication from *all other users* on the public switched network."[264] Here, the *Order* impermissibly attempts to define "the public switched network" to be two networks. Furthermore, expanding the definition of the public switched network to encompass two distinct networks—the public switched telephone network and the public Internet—means that *no mobile service* would be interconnected since no service offers interconnection with substantially all of each network. For example, mobile voice service would no longer be an interconnected service nor a commercial mobile service nor a telecommunications service since it unquestionably does not give consumers a way of dialing up websites. And so the one service that everyone agrees Congress intended to be a commercial mobile service would not be one.[265]

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v. Comm'r, 499 U.S. 554, 561 (1991) ("'[I]nterpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.'" (quoting United States v. Correll, 389 U.S. 299, 305–06 (1967))); City of Pleasant Grove v. United States, 479 U.S. 462, 468 (1987) (Where Congress is aware of an administrative interpretation when it revises a statute, it "implicitly approve[s] it.").

262. 47 U.S.C. § 1422(b)(1) (2012) (originally enacted by Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6202, 126 Stat. 156).

263. *See, e.g.*, Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (applying the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning" to a single term used in two separate, but related, statutes (internal quotation marks omitted)).

264. 47 C.F.R. § 20.3 (2014) (emphasis added).

265. In an effort to try to avoid this absurdity, the *Order* says in a footnote that it is making a "conforming change to the definition of Interconnected Service in section 20.3 of the Commission's rules." *Order*, *supra* note 25, at n. 1175; *see also* 47 C.F.R. § 20.3 (2014) (defining interconnected service as one "[t]hat is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from *all* other users on the public switched network") (emphasis added). That change? Deleting the word "all" from the definition of interconnected service! *Order*,

In light of all this evidence that the term "the public switched network" in section 332(d)(2) does not include the Internet, the Commission's contrary interpretation is neither reasonable nor credible.

How does the Commission respond? The *Order*'s primary argument is that Congress "expressly delegated authority to the Commission to define the term 'public switched network,'" and that, in doing so, "Congress expected the notion to evolve and therefore charged the Commission with the continuing obligation to define it."[266] But that's just wishful thinking. Nothing in the text of section 332 nor in its legislative history supports the view that Congress intended the term "the public switched network" to be capable of such an amazing feat of mutation that it could swallow today's Internet.

The actual text makes that clear. The referenced delegation appears in section 332's definition of the term "interconnected service."[267] It states: "the term 'interconnected service' means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending."[268]

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supra note 25, at Appendix A. There are many words one could use to describe this amendment. "Conforming" (or "minor") is not one of them. Under this change, every user of Network A (say, the public switched telephone network) could lack the capability to communicate with any user of Network B (say, the Internet) and vice-versa, but, because of the FCC's definitional change, Network A and Network B would now be a single, interconnected network. That is plainly at odds with the entire structure of section 332 and any reasonable understanding of the concept of an interconnected network and interconnected services.

Indeed, the FCC never proposed such a change, has no record on which to do so, and nowhere explains how the change can be squared with the text, purpose, or history of section 332, including the Commission's own view that the purpose of the interconnected services definition is to ensure that those services are "broadly available." *See Order*, *supra* note 25, at para. 402. Although the *Order* tries to bolster its approach by contending that the definition of "interconnected service" and the *CMRS Second Report and Order* recognize that a service can be interconnected even if access is limited in some ways, *Order*, *supra* note 25, at para. 402 & n.1172, this effort fails because the FCC there was focusing on phenomena such as service providers intentionally limiting users' access to the public switched network to certain hours each day, for the sole purpose of avoiding classification as a commercial mobile service. *See, e.g.*, *CMRS Second Report and Order*, 9 FCC Rcd. at 1435, para. 55. That is the apple to the *Order*'s orange, given that the Commission here is attempting to deem two networks and services "interconnected" even though they never interconnect.

266. *Order*, *supra* note 25, at para. 396.

267. Communications Act § 332(d)(2), 47 U.S.C. § 332(d)(2) (2012).

268. *Id.* § 332(d)(2). Compare, too, the parenthetical language in section 332(d)(2) with the parallel statutory provisions that nest around the definition of "interconnected service." In both section 332(d)(1), which defines "commercial mobile service," and section 332(d)(3), which defines "private mobile service," the parallel parentheticals state "(as defined in section 153 of this title)." So rather than providing evidence that the phrases are not terms of art or that Congress was delegating the FCC unbounded discretion to define the relevant terms, it is both a far more modest delegation, as explained above, and one that simply recognizes that Congress itself had not codified the relevant terms.

This language simply cannot bear the weight the Commission places on it. The idea that this limited interpretative authority means that the Commission has the authority to redefine the traditional public switched network as incorporating today's Internet simply proves too much. Surely, the FCC could not define the public switched network as something that is not the public switched network, whether it be an apple or a turnip. Even when Congress delegates interpretive authority to an agency, that agency must abide by traditional norms of statutory interpretation. So "[w]here Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow."[269]

All this delegation recognizes is the uncontroversial notion that the Commission has *some* authority to interpret the relevant terms. Indeed, the Commission previously exercised that limited interpretive authority, and that precedent undermines the Commission's position here. In the *CMRS Second Report and Order*, for example, the Commission defined "the public switched network" as including those switched common carrier services and networks that themselves interconnect with and are thus part of the traditional public switched telephone network.[270] In doing so, the Commission rejected all calls to define the terms so expansively as to include the Internet or otherwise fundamentally alter them.[271]

Relatedly, the *Order* suggests that the Commission's decision in the *CMRS Second Report and Order* to codify the term "the public switched network," rather than the "'technologically based term 'public switched telephone network,'" supports the agency's new position.[272] But this claim also misses the mark. The FCC in 1994 did not broaden the scope of "the public switched network" beyond the traditional local exchange or interexchange switched network.[273] Instead, it made clear that when a provider offers a switched common carrier—yet, non-telephone—service that nonetheless interconnects with the public switched telephone network, that service cannot avoid treatment as a commercial mobile service simply because it is not offering "telephone" service.[274] The Commission could

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269. City of Arlington, Tex. v. FCC, 133 S.Ct. 1863, 1874 (2013); *see also* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

270. *CMRS Second Report and Order*, *supra* note 255, 9 FCC Rcd. at 1436, para. 59.

271. *See id.* at 1433–34, para. 53.

272. *Order*, *supra* note 25, at paras. 391, 396, & note 1145 (citing *CMRS Second Report and Order*, *supra* note 255, 9 FCC Rcd. at 1436, para. 59).

273. *CMRS Second Report and Order*, *supra* note 255, 9 FCC Rcd. at 1433–34, para. 53.

274. *See CMRS Second Report and Order*, *supra* note 255, 9 FCC Rcd. at 1431–37, paras. 50–60; *id.* At 1434, para. 54 ("The purpose underlying the congressional approach, we conclude, is to ensure that a mobile service that gives its customers the capability to communicate to or receive communication from other users of the public switched network should be treated as a common carriage offering (if the other elements of the definition of commercial mobile radio service are also present[.])"); *id.* at 1433, para. 52 ("Several parties caution that making distinctions based on technologies could encourage mobile service

have had any number of non-"telephone" switched common carrier services or networks in mind. This becomes quite plain when one reads this portion of the *CMRS Second Report and Order* in context, including its statement that it was adopting an "approach to interconnection with the public switched network [that] is analogous to the one" it used previously.[275] Thus, this precedent undermines, rather than supports, the Commission's view that it can define the term "the public switched network" in a way that includes services or networks that are not interconnected with the traditional public switched telephone network.

Indeed, the Commission does not really dispute this point.[276] The FCC's discretion to define non-telephone switched common carrier services as part of the public switched network, when those services are interconnected with the network, is of no relevance here because mobile broadband Internet access is not such a service. As explained above—and as the *Order* never seriously argues otherwise—mobile broadband Internet access service itself is not a switched offering that interconnects with the traditional public switched network.[277]

In sum, it is clear that the Commission lacks authority to define the public switched network as including the Internet.

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providers to design their systems to avoid commercial mobile radio service regulation."); *see also Wireless Broadband Internet Access Order*, *supra* note 50, 22 FCC Rcd. at 5918, para. 45 n.119 (describing the *Second CMRS Report and Order* and stating that, "[i]n fact, the Commission found that 'commercial mobile service' must still be interconnected with the local exchange or interexchange switched network as it evolves").

275. *See CMRS Second Report and Order*, *supra* note 255, 9 FCC Rcd. at 1432, 1435, paras. 52, 57 (discussing Establishment of Satellite Systems Providing International Communications, CC Docket No. 84-1299, *Report and Order*, 101 FCC 2d 1046, 1101, para. 114 (1985) (discussing various "switched message services such as MTS, telex, TWX, telegraph, teletext, facsimile and high speed switched data services"); *see also id.*at 1454–59, paras. 100–15 (identifying then-existing common carrier services).

276. *See Order*, *supra* note 25, at n.1145 (noting that the *Second CMRS Report and Order* recognized that non-telephone common carrier switched services and networks that themselves interconnect with the traditional public switched network are considered part of that network for purposes of section 332).

277. The *Order* attempts to evade this argument when it contrasts the "millions of subscribers" to mobile broadband Internet access service with the fact that private mobile service "includes services not 'effectively available to a substantial portion of the public.'" *Order*, *supra* note 25, at para. 398. But the statute poses a three-part test: To be a commercial mobile service, a service must be provided for a fee, available to the public, *and* an interconnected service. So a service *is* a private mobile service if it isn't interconnected with the public switched network—even if it's provided for a fee and made available to a substantial portion of the public (or even every single American). Any other reading of the statute would render one part of the statutory test surplusage. Indeed, the Commission has made this very point. *See CMRS Second Report and Order*, *supra* note 255, 9 FCC Rcd. at 1450–51, paras. 88–93 (concluding that most specialized mobile radio services meet the first two parts of the test so that the classification of any particular specialized mobile radio service thus "turns on whether they do, in fact, provide interconnected service as defined by the statute"). Again, the problem for the *Order* is that mobile broadband Internet access service falls squarely into the non-interconnected camp and thus cannot be classified as a commercial mobile service.

2. Redefining Functional Equivalence

Alternatively, the Commission claims that it can classify mobile broadband Internet access as a commercial mobile service by finding that it is the "functional equivalent" of that service.[278] But as the Commission's own decisions make clear, section 332(d)(3)'s functional equivalency standard does not give the Commission nearly enough leeway to make that determination. Indeed, the Commission does not even attempt to satisfy the relevant standard. Instead, it invents an entirely new method of determining functional equivalency that turns the statutory framework on its head.

The Commission has an established framework for determining whether a service is the functional equivalent of a commercial mobile service.[279] What is the first tenet of that framework? A mobile service that does not meet the literal definition of a commercial mobile service "is presumed to be a private mobile service."[280]

What is the one way that this presumption can be overcome? By showing, through a petition-based process and specific allegations of fact supported by affidavits, that the mobile service in question is the functional equivalent of a commercial mobile radio service based on an evaluation of a variety of factors, expressly including: "consumer demand for the service to determine whether the service is closely substitutable for a commercial mobile radio service; whether changes in price for the service under examination, or for the comparable commercial mobile radio service would prompt customers to change from one service to the other; and market research information identifying the targeted market for the service under review."[281]

So does the *Order* apply the required presumption when determining whether mobile broadband Internet access service is the functional equivalent of commercial mobile service? No. Does the *Order* evaluate the required factors? No. Did the Commission provide APA notice before jettisoning this required framework? Of course not.

And why does the Commission fail to do any of this? The answer to that is clear. Because there are no facts in the record—let alone ones supported by affidavit—that could overcome the presumption or otherwise show that the two services are close substitutes. The Commission doesn't apply the law because the law prevents it from reaching the outcome demanded by the White House.

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278. *See Order*, *supra* note 25, at paras. 404–05.

279. *See* 47 C.F.R. § 20.9(14) (2014); *see also CMRS Second Report and Order*, *supra* note 255, 9 FCC Rcd. at 1442–48, paras. 71–80 (adopting the current framework for determining whether a service may be deemed the functional equivalent of a commercial mobile service).

280. *See* 47 C.F.R. § 20.9(14)(i) (2014).

281. *See* 47 C.F.R. § 20.9(14)(ii)(B) (2014).

While not disputing any of this directly, the *Order* suggests that the two services are useful as substitutes because consumers of mobile broadband Internet access service can use VoIP services to place calls to the public switched telephone network.[282] But at most, that observation goes to whether VoIP services are the functional equivalent of commercial mobile services. It has nothing to do with whether the separate mobile broadband Internet access service is.[283]

The fact that mobile broadband Internet access service does not meet the functional equivalency test is not just some quirk in the law. The FCC has been clear that, in light of Congress's determinations in section 332, "very few mobile services that do not meet the definition of CMRS will be a close substitute for a commercial mobile radio service."[284] But the Commission's new test for determining functional equivalency, which consist of just one question—namely, whether the new service "enables ubiquitous access to the vast majority of the public"—completely eviscerates the statutory scheme.[285] Sure, it's more efficient to ask just one question, rather than applying the required framework. And it does make it easier to reach predetermined outcomes. But it upends the statutory scheme Congress put in place. And it's also impermissible here because the Commission did not provide notice that it might abandon that framework.

3. Statutory Contradiction

Finally, the Commission trots out what it says is an independent basis for reclassifying mobile broadband Internet access as a section 332 commercial mobile service.[286] The Commission says that it must be able to reclassify the service because, if it were otherwise, there would be a "statutory contradiction" between section 332(d)(2), which prohibits the Commission from applying common carrier requirements to private mobile services, and the Commission's decision to treat mobile broadband Internet

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282. *See Order*, *supra* note 25, at paras. 400–01, 405, 407.

283. That the FCC classifies a service based on the nature of the service itself is well established. The Commission has found as much in this very context. *See, e.g.*, *Wireless Broadband Internet Access Order*, *supra* note 50, 22 FCC Rcd. at 5917–18, paras. 45–46 (recognizing that the regulatory classification of VoIP services is irrelevant to the regulatory classification of the separate mobile broadband Internet access service); *see also* Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55, *Memorandum Opinion and Order*, 22 FCC Rcd. 3513, 3520–21, paras. 15–16 (Wireline Comp. Bur. 2007) (noting the "regulatory classification of the [VoIP] service provided to the ultimate end user has no bearing on" the regulatory status of the entities "transmitting [the VoIP] traffic").

284. *CMRS Second Report and Order*, *supra* note 255, 9 FCC Rcd. at 1447, para. 79.

285. *See Order*, *supra* note 25, at para. 407.

286. *See id*. at para. 403.

access service as a telecommunications service subject to common carriage requirements.[287]

But this argument is just silly. The Commission is simply complaining that it must be able to interpret a statutory provision one way because otherwise it will not able to interpret a second statutory provision as it would like. It is like saying that we must call all dogs "cats" because, if we did not, we could not declare dogs to be feline. Any contradiction here does not lie with the statute. Rather, it is the product of the Commission's attempt to twist the statutory language into a pretzel in order to advance a preferred policy outcome. But no matter how the Commission tries to manipulate the statute, one fact remains: Section 332 prevents the Commission from treating providers of mobile broadband Internet access service as providers of telecommunications services subject to common carriage requirements.[288]

C. The Telecommunications Act (Section 706)

The Commission also relies on section 706 of the Telecommunications Act, claiming that Congress expressly delegated authority to the FCC through this provision.[289] This is simply wrong. The text, statutory structure, and legislative history all make clear that Congress intended section 706 to be hortatory—not delegatory—in nature.

In pertinent part, subsections (a) and (b) of section 706 read:

> (a) . . . 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 . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.
> (b) . . . If the Commission's determination [of whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion] is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment

287. *See id.* at para. 403 (citing Communications Act § 332, 47 U.S.C. § 332 (2012) (prohibiting the common carrier treatment of private mobile service providers) and Communications Act § 3, 47 U.S.C. § 153 (2012) (requiring the common carrier treatment of providers of telecommunications services)).

288. Recall, too, that a provider of private mobile service "shall not . . . be treated as a common carrier for any purpose." Communications Act § 332(c)(2), 47 U.S.C. § 332(c)(2) (2012). One of those purposes is certainly treating it as such for the purpose of avoiding manufactured "statutory contradictions."

289. *See, e.g.*, *Order*, *supra* note 25, at paras. 275–82.

> and by promoting competition in the telecommunications market.[290]

Although each of these subsections suggests a call to action ("shall encourage," "shall take immediate action"), neither reads like nor is a delegation of authority. For one, neither subsection expressly authorizes the FCC to engage in rulemaking. Congress knows how to confer such authority on the FCC and has done so repeatedly: It has delegated rulemaking authority to the FCC over both specific provisions of the Communications Act (*e.g.*, "[t]he Commission shall prescribe regulations to implement the requirements of this subsection"[291] or "the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section"[292]), and it has done so more generally (*e.g.*, "[t]he Commission[] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e Communications] Act"[293]). Congress did not do either in section 706.

For another, neither subsection expressly authorizes the FCC to prescribe or proscribe the conduct of any party. Again, Congress knows how to empower the Commission to prescribe conduct (*e.g.*, "the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge"[294]) and to proscribe conduct (*e.g.*, "the Commission is authorized and empowered . . . to make an order that the carrier or carriers shall cease and desist"[295]). And again, Congress has repeatedly empowered the FCC to direct the conduct of particular parties (*e.g.*, "[t]he Commission may at any time require any such carrier to file with the Commission an inventory of all or of any part of the property owned or used by said carrier,"[296] or "the Commission shall have the power to require by subpoena the attendance and testimony of witnesses"[297]). Congress did not do any of this in section 706.

For yet another, neither subsection expressly authorizes the FCC to enforce compliance by ordering payment for noncompliance. Where Congress has authorized the Commission to impose liability it has always done so clearly: For forfeitures, the Communications Act directs that "[a]ny person who is determined by the Commission . . . to have . . . failed to

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290. Telecommunications Act §§ 706(a)–(b), 47 U.S.C. §§ 1302(a)–(b) (2012).
291. Communications Act § 227(b)(2), 47 U.S.C. § 227(b)(2) (2012).
292. *Id.* § 251(d)(1).
293. *Id.* § 201(b) ("The Commissioner [*sic*] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."); *see also id.* § 303(r) ("Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall— . . . [m]ake such rules and regulations and prescribe such restrictions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . .").
294. *Id.* § 205(a).
295. *Id.* § 205(a).
296. *Id.* § 213(b).
297. *Id.* § 409(e).

comply with any of the provisions of this Act . . . shall be liable to the United States for a forfeiture penalty"[298] and "[t]he amount of such forfeiture penalty shall be assessed by the Commission . . . by written notice."[299] And for other liabilities, the Communications Act directs that "the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled."[300]

The lack of express authority to issue rules, order conduct, or enforce compliance should be unsurprising, however, since section 706's subsections lay out precisely *how* Congress expected the FCC to "encourage . . . deployment" and "take action": Congress expected the FCC to use the authority it had given the agency elsewhere. The FCC already had the authority to adopt "price cap regulation" since it had started converting carriers from rate-of-return regulation to price-cap regulation in the early 1990s.[301] The Telecommunications Act established the FCC's "regulatory forbearance" authority.[302] The Telecommunications Act also authorized the FCC to "remove barriers to infrastructure investment," specifically barriers to entry created by state or local laws,[303] and instructed it to identify and eliminate market entry barriers.[304] And as for "promoting competition in the telecommunications market," the Telecommunications Act added a whole second part to Title II of the Communications Act, titling it "Development of Competitive Markets."[305] In other words, Congress did in fact "invest[] the Commission with the statutory authority to carry out those acts" described in section 706[306]—it just did so through provisions other than section 706.

The structure of federal law confirms this reading. Although Congress directed that many provisions of the Telecommunications Act be inserted into the Communications Act,[307] section 706 was not one of them.

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298. *Id.* § 503(b)(1).

299. *Id.* § 503(b)(2)(E).

300. *Id.* § 209.

301. Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, FCC 90-314, 5 FCC Rcd. 6786 (1990).

302. Telecommunications Act § 401 (titled "Regulatory Forbearance" and inserting section 10 into Title I of the Communications Act).

303. *Id.* § 101 (inserting section 253 into Title II of the Communications Act).

304. *Id.* § 101 (inserting section 257 into Title II of the Communications Act).

305. *Id.* § 101 (inserting Part II, §§ 251–61, into Title II of the Communications Act).

306. *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014) (quoting *Open Internet Order*, *supra* note 111, 25 FCC Rcd. at 17969, para. 120).

307. Telecommunications Act § 1(b) ("[W]henever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 *et seq.*)."); *see also* Telecommunications Act § 101 ("Establishment of Part II of Title II. (a) Amendment.—Title II is amended by inserting after section 229 (47 U.S.C. 229) the following new part: . . . ."). Notably, all of the provisions at issue in the Supreme Court case *AT&T v. Iowa Utils. Bd.* were in fact inserted into the Communications Act, and thus the Court could plausibly claim that

Instead, it was left as a freestanding provision of federal law.[308] As such, the provisions of the Communications Act that grant rulemaking authority "under this Act" (like section 201(b)), that grant prescription-and-proscription authority "[f]or purposes of this Act" (like section 409(e)), and that grant enforcement authority for violations of "this Act" (like section 503) simply do not apply to section 706 of the Telecommunications Act. Indeed, the so-called subject-matter jurisdiction of the FCC under section 2 applies, by its own terms, only to "provisions of this Act"[309]—and so the "most important[]" limit the *Verizon* court thought applied to section 706 does not in fact exist.[310] In other words, the statutory superstructure that normally undergirds Commission action just does not exist for section 706 of the Telecommunications Act.

What is more, reading section 706 as a grant of authority outside the bounds of the Communications Act yields absurd results. As the Commission recognized in the *Advanced Services Order* with respect to "regulatory forbearance," reading section 706 as an "independent grant of authority . . . would allow us to forbear from applying" certain provisions in the Act even when section 10 would not let us do so.[311] That same logic applies to every "regulating method" specified in section 706. If Congress had intended to grant the FCC almost limitless authority for "price cap regulation," "removing barriers," or "promoting competition," what was the point of specifying limited authority in the Telecommunications Act's actual amendments to the Communications Act?[312]

And the problems proliferate as you dig into each subsection. Subsection (a) is directed not just at the FCC but also to "each State commission with regulatory jurisdiction over telecommunications services."[313] So whatever authority subsection (a) grants the FCC, it also grants state commissions. Such coterminous authority is a statutory oddity to say the least. The Communications Act draws lines between interstate

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"Congress expressly directed that the 1996 Act . . . be inserted into the Communications Act." *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 377 (1999).

308. For other examples, *see* Telecommunications Act §§ 202(h), 704(c).

309. Communications Act § 2(a), 47 U.S.C. § 152(a) (2012).

310. *Verizon v. FCC*, 740 F.3d 623, 640 (D.C. Cir. 2014).

311. Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-188, 13 FCC Rcd. 24012, 24046, para. 73 (1998) [hereinafter *Advanced Services Order*].

312. The *Verizon* court asked the wrong question when it noted that it "might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting principle." Verizon v. FCC, 740 F.3d 623, 639 (D.C. Cir. 2014). The question is not whether section 706 of the Telecommunications Act contains some "intelligible principle" and thus does not violate the non-delegation doctrine. *Cf. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001). Instead, the question is one of congressional intent: Did Congress really intend to put specific limits on the Commission's forbearance authority in one place (section 10 of the Communications Act) only to largely eliminate them in another (section 706 of the Telecommunications Act)? Such an interpretation doesn't make sense.

313. Telecommunications Act § 706(a), 47 U.S.C. § 1302(a) (2012).

and intrastate regulatory authority.[314] It empowers States to act but reserves authority for the FCC when they fail to do so.[315] It authorizes the FCC to preempt state authority.[316] And it even authorizes States to preempt the FCC.[317] But nowhere does the Communications Act contemplate state action coterminous with, or even at cross-purposes with, the FCC. And it is strange to think that a state commission could forbear from the federal statutory scheme or price regulate broadband Internet access service so long as it thought doing so would encourage broadband deployment.

Perhaps recognizing the problems such a reading would create, the *Order* does not read the authority of state commissions this way—far from it. Instead, the *Order* suggests that States cannot regulate broadband Internet access service because that service is "jurisdictionally interstate for regulatory purposes" [318] and that the Commission will preempt States that impose "obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme."[319] In other words, the *Order* seems to suggest that section 706(a) gives state commissions no authority over broadband (or "advanced telecommunications capability" to use the statutory term) at all![320] But the plain text of the statute does not permit the Commission to have it both ways and invent a scheme that has no basis in the text of the statute. Either subsection (a) delegates authority to the FCC and the state commissions or it does not.

Subsection (b) creates other problems. That subsection is triggered only if the FCC determines that broadband is not being reasonably and timely deployed to all Americans in its annual report. So what happens when the determination is affirmative? Poof—it's gone.

The consequences of such a light-switch delegation of authority are hard to fathom. One would assume that once the delegation switched off, any adjudications or enforcement actions being taken by the FCC under that subsection would have to be dismissed, since we'd have lost the authority to prosecute them. But if we've preempted a state law using subsection (b), would it still remain preempted? If we've forborne from federal law using subsection (b), would we then need to start enforcing it again? Or if we've adopted rules using subsection (b), would they remain

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314. *See, e.g.*, Communications Act § 2(a), 47 U.S.C. § 152(a) (2012) ("The provisions of this Act shall apply to all interstate and foreign communication . . . ."); § 2(b) ("[N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service . . . .").

315. *See* Communications Act §§ 214(e)(6), 252(e), 47 U.S.C. §§ 214(e)(6), 252(e) (2012).

316. *See id*. §§ 10(e), 253(d), 47 U.S.C. §§ 160(e), 253(d) (2012).

317. *See id*. § 224(c), 47 U.S.C. § 224(c) (2012).

318. *Order*, *supra* note 25, at para. 431.

319. *Id.* at para. 433.

320. To be fair, the *Order* suggests that States might have some role to play, at least with data collection, *see id.* at notes 708 & 1276, but such a role hardly squares with hardy "regulating methods" like "price cap regulation" and "regulatory forbearance" that the Commission claims for itself.

on the books—unenforceable—until a negative determination is again reached? Could we even repeal rules passed using subsection (b) during a period in which subsection (b) has not been triggered? And how would our authority change if, as happened last year, the FCC failed to issue a timely determination under section 706(b)?

Unsurprisingly, the *Order* does not attempt to answer these questions.[321] Nor could it. Absurd results lie behind every possible answer premised on subsection (b) being an independent grant of authority.

Lastly, the history of section 706 confirms its hortatory nature. For years after 1998's *Advanced Services Order*, the Commission consistently interpreted the section to direct the agency to "use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services."[322] And so the Commission has consulted section 706 in resolving one forbearance petition[323] after another[324] after another.[325] The Commission has also looked to section 706 when employing its authorities under the Communications Act to promote local competition[326] and to remove barriers to infrastructure investment (such as the Commission's)

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321. Relying on a statement contained in a *dissenting* opinion by a U.S. Supreme Court Justice, the *Order* speculates that "Commission actions adopted pursuant to a negative section 706(b) determination would not simply be swept away by a future positive section 706(b) finding." *Order*, *supra* note 25, at n. 714. But what authority would the Commission have to enforce a section 706(b) rule without section 706(b) authority? Indeed, if Congress gave the Federal Emergency Management Agency (FEMA) authority to act during a hurricane, would anyone think that FEMA could continue that course once the storm had passed, sunny skies had returned, and recovery efforts were over? Of course not. So too here. But more to the point, even asking this question is sure to trap the agency in the labyrinth of section 706(b)'s on-off authority; the only way to escape is not to enter. Here, that means not interpreting section 706 to provide the Commission with authority in the first place.

322. *Advanced Services Order*, *supra* note 311, 13 FCC Rcd. at 24047, para. 77.

323. Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, *Memorandum Opinion and Order*, FCC 05-170, 20 FCC Rcd. 19415, 19469, para. 107 (2005), *aff'd sub nom.* Qwest Corp. v. FCC, 482 F.3d 471 (D.C. Cir. 2007).

324. Petition of ACS of Anchorage, *Memorandum Opinion and Order*, FCC 07-149, 22 FCC Rcd. 16304, 16356, para. 118 (2007).

325. Petition of the Embarq Local Operating Companies for Forbearance et al. *Memorandum Opinion and Order*, FCC 07-184, 22 FCC Rcd. 19478, 19503–04, para. 46 (2007), *aff'd sub nom.* Ad Hoc Telecomms. Users Comm. V. FCC, 572 F.3d 903 (D.C. Cir. 2009).

326. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, FCC 99-238, 15 FCC Rcd. 3696, 3840, para. 317 (1999) ("Our overriding objective, consistent with the congressional directive in section 706, is to ensure that advanced services are deployed on a timely basis to all Americans so that consumers across America have the full benefits of the 'Information Age.'"); Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,, *Memorandum Opinion and Order*, FCC 04-267, 19 FCC Rcd. 22404, 22426–27, paras. 36–37 (2004).

authority over pole attachments).[327] In other words, our own history shows that we can meet section 706's goals without relying on it as an independent grant of authority.

Section 706's legislative history clinches the point. Recall that the *Verizon* court looked to the Senate Report's description of the provision as a "necessary fail-safe intended to ensure" that the bill achieves its intended infrastructure objective.[328] That was a mistake because the provision described in the Senate Report was *not* the section 706 that Congress enacted. When the Senate passed in 1995 the bill that became the Telecommunications Act of 1996, that legislation contained a precursor to section 706(b) that authorized the FCC to "preempt State commissions that fail to act to ensure [the] availability [of advanced telecommunications capability to all Americans]."[329] In other words, the Senate version would have let the FCC step into the shoes of the state commissions and exercise their authority under federal law if they failed to act. That's a "fail-safe." But the enacted version contained, as the Conference Report dryly put it, "a modification" to that section: This preemptory language was excised.[330] In other words, Congress contemplated giving the FCC fail-safe authority in section 706, but then expressly decided not to do so.

Whether one looks at the statute's text, structure, or history, only one conclusion is possible: Congress did not delegate substantive authority to the FCC in section 706 of the Telecommunications Act. Instead, that statutory provision is a deregulatory admonition. Accordingly, the agency's attempt to adopt these Part 8 rules under section 706 must fail.

III. CONCLUSION

We often forget that within a generation—a blink of history's eye—the Internet has fundamentally transformed how people in the United States and around the globe live. This digital miracle, made possible by the free market, has lifted quality of life, spirits, incomes, and horizons for people from every background. And it simply wasn't broken, as even the FCC conceded.

This is why I have called net neutrality a solution that won't work to a problem that doesn't exist. And this is why, in my view, the FCC's regulations are not a model for the future. They are a relic of the past. Time

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327. Implementation of Section 224 of the Act; A National Broadband Plan for Our Future; *Report and Order and Order on Reconsideration*, FCC 11-50, 26 FCC Rcd. 5240, 5317, 5330, paras. 173, 208 (2011); Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, *Notice of Proposed Rulemaking*, FCC 07-187, 22 FCC Rcd. 20195, 20209, para. 36 (2007).

328. S. REP. NO. 104-23, at 50–51 (1995); *see* Verizon v. FCC, 740 F.3d 623, 639 (D.C. Cir. 2014).

329. *See* S. 652, 104th Cong. § 304(b) (1995) (contained in "Title III—An End to Regulation").

330. S. REP. NO. 104-230, at 210 (1996).

will tell whether these regulations are deemed to comport with the law. But we can already draw an unfortunate policy lesson: the bipartisan era in which the Internet was seen as a vibrant and competitive free market, unfettered by heavy-handed regulation, has come to an end.

The FCC's Knowledge Problem: How to Protect Consumers Online

Hon. Maureen K. Ohlhausen*

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* Commissioner, Federal Trade Commission. I would like to thank Neil Chilson for his contributions to this essay. The views expressed here are solely my own and do not necessarily represent the views of the Commission or any other individual Commissioner. Portions of this essay were adapted from a keynote address at the MaCCI Law and Economics Conference on the Future of the Internet. Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, The Open Internet: Regulating to Save the Unregulated Internet?, Remarks Before the MaCCI Law and Economics Conference on The Future of the Internet (Oct. 26, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/open-internet-regulating-save-unregulated-internet/121026mannheim_0.pdf. In addition, in 2006, while Director of the Office of Policy Planning at the FTC, I spearheaded a task force to research and evaluate issues surrounding Internet access and network neutrality. See Fed. Trade Comm'n, Broadband Connectivity Competition Policy, FTC Staff Report (2007), *available at* http://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf.

The Federal Communication Commission (FCC) has long searched for a legally sustainable way to adopt and enforce network neutrality regulation. The U.S. Court of Appeals for the District of Columbia Circuit added another detour on this path with its January 2014 decision in Verizon v. FCC, [1] and the FCC responded in February 2015 with a controversial action that, among other things, reclassifies broadband as a common carrier service subject to utility-style regulation under Title II of the Communications Act of 1934. Over the course of the FCC's journey, much has changed in broadband technology and the broadband marketplace. The Verizon decision offered policymakers a chance to take stock of these changes and to consider alternatives to regulation – a chance the FCC rejected. Imposing a set of prescriptive regulations—whether involving speeds or prices—on the dynamic and robust online environment is problematic and, ironically, could impede deployment of the Internet and harm consumers. To protect consumers online, we need informed, flexible, and fact-based enforcement supplemented with self-regulation using technical standards developed through consensus-based, multi-stakeholder organizations of engineers, consumers, and businesspeople. To the extent the government is involved, the Federal Trade Commission (FTC) model of enforcement, advocacy, and industry and consumer education is the better approach that will allow market forces to maximize consumer welfare.

Below, I first describe a framework for thinking about regulation of fast-changing industries and compare and contrast the FCC and the FTC's approaches. Next, I briefly summarize the history of the net neutrality issue, including the FCC's 2010 Open Internet Order,[2] the subsequent Verizon decision striking it down, and the most recent action to reclassify broadband as a Title II service.[3] Lastly, I offer some observations about the reclassification decision and its aftermath and suggest a path forward for protecting consumers online.

I. A FRAMEWORK FOR THINKING ABOUT REGULATION: COMPARING THE FCC AND THE FTC

All regulatory agencies face a fundamental knowledge problem, but they use different strategies to deal with that problem, with varying levels of

1. 740 F.3d 623 (D.C. Cir. 2014).

2. *See* Preserving the Open Internet, *Report and Order*, FCC 10–201, 25 FCC Rcd 17905 (2010) [hereinafter *2010 Open Internet Order*], *aff'd in part, rev'd in part sub nom.* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

3. *See* Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, FCC 15-24 (Mar. 12, 2015).

success. Before analyzing how different regulatory paradigms could affect the net neutrality issue, I will first explore the knowledge problem itself and compare how the FCC and the FTC each approaches that problem.

A. The Regulator's Knowledge Problem

A regulation dictates how the regulated entity is to act, or not act, in specific situations. For example, the *Open Internet Order* prohibited wireline broadband service providers from blocking subscribers' access to content, except in limited circumstances.[4] When regulators regulate, they are making decisions for others by either prohibiting or requiring certain actions by market participants. Regulators make these decisions based, at least in part, on the relevant information they can gather about the "circumstances of time and place" these entities may face now or in the future.[5] As a result, all regulators encounter a significant knowledge problem.[6] As economist and Nobel laureate F. A. Hayek pointed out in his famous essay, *The Use of Knowledge in Society*, such centralized decision-makers have difficulty gathering the knowledge necessary to make good decisions for others, for several reasons.[7]

First, such knowledge is "initially dispersed among many different individuals."[8] Each regulated entity faces unique circumstances and must make choices and evaluate tradeoffs among its options, based on the information it has at hand.[9] And every regulated entity holds unique information relevant to its specific situation at that time. Gathering even a static snapshot of all this dispersed knowledge is logistically impossible except perhaps in the smallest and simplest domains. As such, regulators attempt to compensate for the difficulty of collecting all the relevant information by extrapolating from sampled, averaged, or aggregated data.[10]

A second difficulty facing centralized decision makers is that many types of relevant knowledge are latent and therefore not amenable to collection or summarization.[11] Individuals may not realize that the information they possess is important to the solution of a larger issue and therefore may not provide the information. Or they may not be able to detail

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4. *See 2010 Open Internet Order*, *supra* note 2, at 17942, para. 63, *aff'd in part, rev'd in part sub nom.* Verizon v. FCC, 740 F.3d 623, 636–42 (D.C. Cir. 2014).

5. F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521 (1945).

6. Although I address agency regulators specifically in this essay, legislators face similar challenges in their efforts to create legislation. *See* 1 F. A. HAYEK, *Rules and Order*, *in* LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 124 (1973).

7. Hayek, *supra* note 5, at 523. Hayek's goal in that essay was to explain the general economic problem of allocating resources to their best uses, and he demonstrated how prices serve as a coordinating mechanism that resolves that problem. *See generally id.*

8. *Id.* at 521.

9. *Cf. id.*

10. *See id.* at 523–24 (discussing economists' preoccupation with statistical aggregates).

11. *Id.* at 524.

such information in a timely manner. For example, think about your current job: If you were promoted tomorrow and had to leave detailed instructions on how to do your job, how long would those instructions take you to write? How much information would not be captured? How likely is it that you would forget something that might be important to the next person? Even the simplest jobs require significant on-the-job training because it is too difficult to capture—or even recognize—every important day-to-day requirement.[12] Complex and abstract roles are even harder to summarize. For example, a network engineer's decision-making process about when to rebalance traffic loads on various servers may be the product of years of experience and may be difficult for even the engineer to explain. Regulation cannot capture such latent knowledge.[13]

Third, and perhaps most significantly, regulators make decisions that affect future behavior, where the "particular circumstances of time and place" lie temporally beyond the regulator's grasp.[14] Regulation is necessarily based on information about the past and predictions about the future. Thus, the regulator's knowledge problem is most acute when regulating in a fast-changing factual environment—when guesses about the future are more likely to be incorrect.[15] In such a situation, the collected knowledge quickly becomes stale. Indeed, if the regulator collects knowledge more slowly than the environment changes, even continuous information gathering cannot stop the regulator's knowledge from growing obsolete over time.[16] This problem is especially acute when regulating industries that are characterized by disruptive change, because it is even more difficult to predict future effects when industry structures and paradigms transform over time.

Different regulatory bodies deal with these knowledge problems in different ways, based on a wide range of factors including workload, organizational structure, leadership, personnel, culture, political pressure, and perhaps most fundamentally, the guidance of their enabling statute.[17] We

12. Yale Professor James C. Scott uses the Greek term "mētis" to describe this "practical knowledge," or "the wide array of practical skills and acquired intelligence in responding to a constantly changing natural and human environment." JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 313 (1998).

13. *Id.* at 310 ("Formal order …. is always and to some considerable degree parasitic on informal processes, which the formal scheme does not recognize, without which it could not exist, and which it alone cannot create or maintain.").

14. Hayek, *supra* note 5, at 521.

15. *See* Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841, 1849 (2011) ("The problem is that, with so little known about the industry, issuing specific rules based on guesses about the future runs a grave risk of creating a bad law, or at least a law that is much worse than one issued after more development.").

16. *See id.* at 1848.

17. For a discussion of the factors influencing bureaucratic decision-making, see JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989).

can see these differences by looking at the very different approaches of the FCC and the FTC.

B. The FCC's Prescriptive, Ex Ante Regulatory Approach

The FCC historically has taken a segmented approach to regulating different communications media, as contemplated by the Communications Act of 1934.[18] Title I of the Act gives the FCC general jurisdiction over certain communications, but offers the agency little specific jurisdictional guidance.[19] The other titles of the Act spell out more clearly the agency's authority and its treatment of communications based on their method of transmission. Thus, the Act classifies business models and outlines different requirements based on whether the business provides landline telephony (Title II),[20] radio transmission, including broadcast television, radio, and cellular telephony (Title III);[21] or "cable services" like cable television (Title VI).[22] Certain business offerings, including those classified under Title II, are considered "common carriage" and therefore face significant regulation, including rate regulation. With the convergence of various technologies—for instance, Voice over Internet Protocol (VoIP) competing with circuit-switched telephony or Internet Protocol Television (IPTV) competing with broadcast and cable—this siloed approach to regulation is increasingly out of step with reality.[23] In particular, the Communications Act of 1934, not surprisingly, did not contemplate the most extensive and widely-used communications network of today, the Internet.[24]

When the FCC implements a statutory requirement or seeks to address a policy problem, it typically exercises its Administrative Procedure Act rulemaking authority,[25] under which it details, ex ante, the procedures that

18. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–620 (2012 & Supp. 2013)).

19. Communications Act of 1934 tit. I, §§ 1–12 (codified as amended at 47 U.S.C. §§ 151–162).

20. *Id.* tit. II, §§ 201–276 (codified as amended at 47 U.S.C. §§ 201–276).

21. *Id.* tit. III, §§ 301–399B (codified as amended at 47 U.S.C. §§ 301–399b).

22. *Id.* tit. VI, §§ 601–653 (codified as amended at 47 U.S.C. §§ 521–573).

23. *See* Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L.J. 103, 104–10 (2006).

24. The most significant revision to the Communications Act, the Telecommunications Act of 1996, included some provisions related to broadband and Internet services, but clearly did not anticipate the dominance of the Internet platform nor foresee how it would make obsolete the siloed approach. *See generally* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 15 and 47 U.S.C.).

25. *See* 5 U.S.C. § 553 (2012).

various types of regulated entities must follow.[26] The scope of such rulemakings is limited by the FCC's statutory authority.[27]

The history of the FCC can be fairly described as a series of regulatory attempts (typically rulemakings) to fit new technologies and business models into an increasingly out-of-date regulatory model.[28] Starting with the 1913 Kingsbury Commitment,[29] through the 1996 Telecommunications Act and its subsequent implementation,[30] Congress and the FCC constructed a regulatory framework that distinguishes among services based on their physical platform, business model, and geographic characteristics—distinctions that are increasingly irrelevant.[31] Consequently, when considering the converging technologies and overlapping business models of an IP-based world, the FCC has struggled to deploy its prescriptive ex ante regulation tool in a manner that is both effective and legally sustainable.[32]

This struggle should not be surprising. The FCC's prescriptive ex ante regulatory approach requires the agency to acquire significant knowledge about the present state and future trends of a very complex and rapidly evolving industry that, for the last thirty years (at least back to the breakup of Ma Bell), has been characterized by disruption. Statutory, procedural, and resource constraints make it impossible for the FCC to continually update the rules; thus, its rules are constantly falling out of sync with technological

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26. F. A. Hayek, who closely examined the interaction between laws and liberty, would call these types of rules "commands" or "rules of organizations." Such rules of organizations differ from "rules of spontaneous orders," such as common law, that arise organically and evolve over time. *See* F.A. HAYEK, *supra* note 6, at 48–51.

27. *See generally*, Communications Act of 1934.

28. Thus, many of the FCC's regulatory actions are examples of what I have referred to as the Procrustean problem with prescriptive regulation. *See* Maureen K. Ohlhausen, The Procrustean Problem with Prescriptive Regulation, March 18, 2014, *available at* https://www.ftc.gov/system/files/documents/public_statements/291361/140318fsf.pdf; Maureen K. Ohlhausen, Three Regulatory Principles to Promote Innovation (Mar. 2, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/627591/150302ppiregreform.pdf.

29. The Kingsbury Commitment is the agreement settling an antitrust investigation of AT&T and is captured in a 1913 letter from AT&T Vice President Nathan Kingsbury to U.S. Attorney General James McReynolds. The Kingsbury Commitment "paved the way for the company's monopolization of the telephone industry." *See e.g.*, GERALD W. BROCK, THE TELECOMMUNICATIONS INDUSTRY: THE DYNAMICS OF MARKET STRUCTURE 155 (1981); Ajit Pai, Comm'r, FCC, Remarks at TechFreedom's Forum on the 100th Anniversary of the Kingsbury Commitment (Dec. 19, 2013), *available at* http://www.fcc.gov/document/pai-remarks-100th-anniversary-kingsbury-commitment.

30. Telecommunications Act of 1996.

31. May, *supra* note 23, at 110–12.

32. *See* Richard S. Whitt, *Adaptive Policymaking: Evolving and Applying Emergent Solutions for U.S. Communications Policy*, 61 FED. COMM. L.J. 483, 555–58 (2009) (chronicling the FCC's challenges in regulating industries under archaic silos of authority).

change—and, worse, forcing business and technological innovation to slow down to stay compliant.[33]

Additionally, because the FCC's ex ante regulations are an attempt at the almost impossible task of predicting the future, some harms will occur that the agency never anticipated. For example, FCC-mandated payment rates to certain rural telephone companies, combined with advances in VoIP technology, incentivized so-called "traffic pumping" practices that cost national carriers (and ultimately, their customers) an estimated $330 to $440 million per year.[34] Conversely, regulations may prevent harmless or even beneficial practices. Examples of absent benefits are obviously hard to provide.[35] However, beneficial developments in the wake of deregulation in several industries provide some evidence that prescriptive regulation stunted such developments.[36] For example, the FCC's move toward flexible use spectrum allocations created a wave of innovation, including the rise of wireless telephone technologies, suggesting that the previous limited use regime was hindering innovation.[37]

In other cases, overly prescriptive ex ante rules simply impose costs with little consumer benefit. For example, in 2003, the FCC required every high-definition cable set-top box to include an IEEE 1394 (FireWire) port

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33. *See, e.g.*, Kevin Werbach, *No Dialtone: The End of the Public Switched Telephone Network*, 66 FED. COMM. L.J. 203, 207 (2014) (describing the IP transition's potential to reduce the costs associated with operating the legacy PSTN).

34. *See* Connect Am. Fund, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 11-161, 26 FCC Rcd. 17663, 17876, para. 664 (2011) (citing Verizon estimate; another party estimated total cost of access stimulation at $2.3 billion from 2006 to 2011).

35. *See* Susan E. Dudley, *Administrative Law & Regulation: Prospects for Regulatory Reform in 2011*, 11 ENGAGE 7 (2011), *available at* https://www.fed-soc.org/library/doclib/20110603_DudleyEngage12.1.pdf.

36. *See generally* ROBERT W. CRANDALL, BROOKINGS INST., EXTENDING DEREGULATION: MAKE THE U.S. ECONOMY MORE EFFICIENT (2007), *available at* http://www.brookings.edu/~/media/research/files/papers/2007/2/28useconomics%20crandall%20opp08/pb_deregulation_crandall.

37. *See, e.g.*, Amendment of the Comm'ns Rules to Permit Flexible Serv. Offerings in the Commercial Mobile Radio Servs., *First Report and Order and Further Notice of Proposed Rule Making*, FCC 96-283, 11 FCC Rcd. 8965, 8975–76, paras. 21–22 (1996) ("[T]he market is the best predictor of the most desirable division of this spectrum . . . . [W]e are concerned that regulatory restrictions on use of the spectrum could impede carriers from anticipating what services customers most need, and could result in inefficient spectrum use and reduced technological innovation."); Press Release, FCC, Wireless Bureau Chief Daniel Phythyon Hails Success of Market-Based Spectrum Policies (Sept. 11, 1997), *available at* http://transition.fcc.gov/Bureaus/Wireless/News_Releases/1997/nrwl7037.html ("The FCC's market-based spectrum policies have unleashed unprecedented competition and innovation in the wireless communications market . . . .") (internal quotation marks omitted); Amendment of the Comm'n's Rules with Regard to Commercial Operations in the 1695–1710 MHz, 1755–1780 MHz, and 2155–2180 MHz Bands, *Report and Order*, FCC 14-31, 29 FCC Rcd. 4610, 4625, para. 29 (2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-31A1_Rcd.pdf ("[O]ur secondary markets and flexible use policies are designed to facilitate the configuration of licenses in their most productive economic use.").

for media transfers and network connectivity, at the estimated cost of $5 per set-top box.[38] Although consumers never embraced the IEEE 1394 standard—in part because it was soon eclipsed by USB, Ethernet, and other standards—the requirement remained in place for approximately seven years, costing consumers millions of dollars.[39]

In addition to preventing beneficial practices and imposing unnecessary costs, prescriptive ex ante regulations can also chill innovation. For example, if an innovative (and therefore, by definition, likely unanticipated) new product or service does not easily fit within an existing statutory or regulatory classification or framework, the innovator may be uncertain about how to comply with the law. This additional regulatory risk can be a significant barrier to venture capital investment.[40]

The FCC has sought to address its knowledge problems by emphasizing, at various times, its intent to adopt "technologically neutral," "performance-based," and "flexible" regulation in a number of policy areas.[41] These are all attempts to reduce the prescriptiveness of regulation in

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38. Intel Corporation's Petition for Waiver of 47 C.F.R. § 76.640(b)(4), *Petition for Waiver*, CS Docket No. 97-80, at 5 (Oct. 7, 2009), *available at* http://apps.fcc.gov/ecfs/document/view?id=7020041020.

39. *See id.* The rule was adopted in October 2003 and removed in October 2010. *See* Implementation of Section 304 of the Telecomms. Act of 1996, *Fourth Further Notice of Proposed Rulemaking*, FCC 10-61, 25 FCC Rcd. 4303, 4311, para. 20 (2010), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-61A1_Rcd.pdf; *see also* Implementation of Section 304 of the Telecomm. Act of 1996, *Third Report and Order and Order on Reconsideration*, FCC 10-181, 25 FCC Rcd. 14657, 14678–79, para. 43 (2010), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-181A1_Rcd.pdf.

40. Sen. Rob Portman, Op-Ed., *The Regulatory Cliff Is Nearly as Steep as the Fiscal One*, WALL. ST. J., Aug. 16, 2012, *available at* http://online.wsj.com/articles/SB10000872396390444772404577587310951310628.

41. *See, e.g.*, Promoting Interoperability in the 700 MHz Commercial Spectrum, *Report and Order and Order of Proposed Modification*, FCC 13-136, 28 FCC Rcd. 15122, 15152 n.192 (2013), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-136A1_Rcd.pdf; FCC, BRINGING BROADBAND TO RURAL AMERICA: REPORT ON A RURAL BROADBAND STRATEGY, DA 09-2258, 24 FCC Rcd. 12791, 12850 n.330 (2009), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-09-2258A1_Rcd.pdf (citing Federal-State Joint Board on Universal Service, *Report and Order*, FCC 97-157, 12 FCC Rcd. 8776, 8801–02, paras. 46–48 (1997), for the proposition that "[t]he Commission adopted the additional principle that federal support mechanisms should be competitively and technologically neutral."); The Commercial Mobile Alert System, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 08-164, 23 FCC Rcd. 10765, 10765–66 (2008), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-164A1.pdf (stating that the goal of the order is to implement the WARN Act in a technologically neutral manner); The Proposed Extension of Part 4 of the Comm'n's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers, *Notice of Proposed Rulemaking*, FCC 11–74, 26 FCC Rcd. 7166, 7221, para. 45 (2011), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-74A1_Rcd.pdf ("[T]he choice of performance-based, as opposed to design-based, degradation characteristics . . . and the corresponding thresholds chosen to trigger the outage reporting will not unduly burden smaller entities.").

order to better accommodate technological change. However, these approaches still struggle with disruptive change that upsets industry structures. Even technology neutral, performance-based, flexible regulation can only flex so far. Furthermore, even with its best efforts, the FCC is ultimately constrained by the outdated silo structure of the Communications Act itself.[42]

C. The FTC's Flexible, Ex Post Enforcement-Based Approach

The FTC model is quite different from the FCC's. Instead of mandating regulatory silos, section 5 of the FTC Act—the agency's enabling statute—directs the FTC to prevent and punish "unfair methods of competition" and "unfair and deceptive acts or practices" across all industries (with a few exceptions).[43] Although the FCC's regulations generally set the boundaries of what certain types of entities can do, the FTC is more general and normative in its design.[44] The FTC Act prohibits deceptive or unfair practices for all entities (except those specifically carved out of its jurisdiction, such as common carriers and banks),[45] but generally permits everything else. Additionally, the FTC's process is enforcement-centric rather than rulemaking-centric.[46] As such, it is ex post rather than ex ante—case-by-case rather than one-size-fits-all.

Because an enforcement action requires a complaint to move ahead, the FTC typically focuses on actual, or at least specifically alleged, harms, rather than trying to predict future harms more generally.[47] Specifically, staff investigations into consumer complaints or a merger filing can serve as the basis for an initial theory of harm, which is then investigated, analyzed using the best available legal and economic tools, tested against the evidence, modified, and re-tested. With this evidence-based process, the FTC may conclude either that the initial theory and subsequent iterations were deficient and drop the matter, or decide there is reason to believe a violation of law exists and pursue the matter further. This enforcement paradigm allows the FTC to approach each complaint or issue anew and to apply broad norms to the facts before it. It also allows the FTC the prosecutorial flexibility to try to maximize consumer welfare.

These structural differences make the FTC's enforcement process less vulnerable to the systemic knowledge problems of the FCC's prescriptive, ex ante rulemaking approach. First, rather than having to collect detailed knowledge about an entire industry, the FTC need only gather enough

42. *See supra* notes 23–32 and accompanying discussion.

43. 15 U.S.C. § 45(a)(1) (2012).

44. *See* S. REP. NO. 63-597, at 13 (1914) (in drafting FTC Act, Senate Committee on Interstate Commerce "le[ft] it to the commission to determine what practices were unfair").

45. 15 U.S.C. § 45(a)(2) (2012).

46. *See* 15 U.S.C. § 57b-3 (2012) (imposing requirements on FTC rulemaking that are far more stringent than APA's requirements for informal agency rulemaking).

47. 15 U.S.C. §45(b) (2012).

information about the specific parties to the dispute and their behaviors in the relevant market. And the FTC has significant investigatory authority to gather such information.[48] Second, collecting such information is simpler because much of the necessary information will be in the hands of the parties to the case. Third, even in rapidly changing industries, the FTC's decision to move forward on a case will directly affect only those parties to the specific case.[49] When the FTC encounters future matters, it can at that point consider any relevant changes in the environment. Thus, the FTC can apply its longstanding consumer protection and competition principles to new situations in an evolutionary, common-law-like approach.[50]

There is another significant benefit to the FTC's structure and approach. The agency's broad mandate and case-by-case approach, in renowned political scientist James Q. Wilson's words, "permit[s] the agency to behave in ways that would not stimulate the formation of a hostile interest group."[51] In particular, because the FTC's case-by-case enforcement approach avoids taking on entire industries, it creates little incentive for industry-wide efforts to influence policy outcomes through rent-seeking or other behavior. This point is proven in the breach: as Wilson points out, when the FTC stepped beyond this approach in the 1970s by issuing industry-wide prescriptive rules such as the Funeral Industry Practice Rule[52] and the Used Car Rule,[53] those actions did face active, hostile, and powerful opposition.[54]

Thus, the FTC's approach facilitates what technology policy scholar Adam Thierer calls "permissionless innovation," or the "anti-precautionary principle," more effectively than a prescriptive rulemaking approach.[55] Indeed, as the Internet has become an increasingly integral part of society, the FTC's enforcement-centric approach has enabled it to serve an increasingly large role in protecting consumers and competition online even while the industry has continued to innovate. In fact, the FTC is already addressing major Internet-centric concerns, including new issues in privacy, fraud, advertising and other consumer protection issues, along with competition issues. The FTC also has reviewed Internet-related mergers and

48. *See, e.g.*, 15 U.S.C. § 57b–1 (2012) (empowering the FTC to serve civil investigative demands with respect to unfair or deceptive acts or practices).

49. The FTC's actions will, however, indirectly affect other parties who may change their behavior or future plans to avoid liability for conduct similar to that conduct the Commission challenged.

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

51. WILSON, *supra* note 17, at 82.

52. Funeral Industry Practices Rule, 16 C.F.R. §§ 453.1–453.9 (2013).

53. Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. §§ 455.1–455.7 (2013).

54. WILSON, *supra* note 17, at 83 (citing THE FEDERAL TRADE COMMISSION SINCE 1970 169–73 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981)).

55. *See generally*, ADAM THIERER, PERMISSIONLESS INNOVATION: THE CONTINUING CASE FOR COMPREHENSIVE TECHNOLOGICAL FREEDOM (2014).

acquisitions such as Google's acquisition of AdMob,[56] enforced legislation such as the Children's Online Privacy Protection Act,[57] and investigated competition issues relating to Internet search.[58]

The FTC's settlement with TracPhone and a similar pending case against AT&T provide particularly apt examples of the FTC's ability to apply longstanding consumer protection principles to protect consumers from harmful practices by broadband ISPs.[59] The complaints in these cases alleged that the companies unfairly and deceptively throttled mobile data speeds for customers to whom it had promised "unlimited" data.[60] According to the complaints, the companies would slow a subscriber's data speeds by up to 90%, not based on network congestion but simply whenever that subscriber exceeded an arbitrary data use threshold in a single billing cycle.[61] The FTC filed this case after gathering the relevant facts using its civil investigative demand authority, analyzing these facts to understand the throttling practices, and performing an economic analysis of the resulting consumer harm.

These examples demonstrate that the FTC's flexible, normative, and rigorously fact-based approach to enforcement is a good fit for overseeing the dynamic Internet and related industries.

II. NET NEUTRALITY AND THE FCC: A CASE STUDY IN REGULATORY DIFFICULTY

Having outlined the general regulatory challenge and highlighted the differences between the FCC and the FTC's regulatory approaches, I now turn to the specific topic of net neutrality. The FCC's history in addressing

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56. FED. TRADE COMM'N, STATEMENT OF THE COMMISSION CONCERNING GOOGLE/ADMOB, FTC Docket No. 101-0031 (2010), *available at* http://www.ftc.gov/sites/default/files/documents/closing_letters/google-inc./admob-inc/100521google-admobstmt.pdf.

57. 15 U.S.C. §§ 6501–6508 (2012); *see also* Children's Online Privacy Protection Rule, 16 C.F.R. §§ 312.1–.13 (2013).

58. *See, e.g.*, FED. TRADE COMM'N, STATEMENT OF THE FEDERAL TRADE COMMISSION - IN THE MATTER OF MOTOROLA MOBILITY LLC AND GOOGLE INC., FTC Docket No. 121-0120 (2014), https://www.ftc.gov/system/files/documents/public_statements/410931/130103googlemotorolastmtofcomm.pdf.

59. FED. TRADE COMM'N, PREPAID MOBILE PROVIDER TRACFONE TO PAY $40 MILLION TO SETTLE FTC CHARGES IT DECEIVED CONSUMERS ABOUT 'UNLIMITED' DATA PLANS, Jan. 28, 2015, https://www.ftc.gov/news-events/press-releases/2015/01/prepaid-mobile-provider-tracfone-pay-40-million-settle-ftc; FED. TRADE COMM'N, FTC SAYS AT&T HAS MISLED MILLIONS OF CONSUMERS WITH 'UNLIMITED' DATA PROMISES, Oct. 28, 2014, http://www.ftc.gov/news-events/press-releases/2014/10/ftc-says-att-has-misled-millions-consumers-unlimited-data

60. Complaint at 4, paras. 15-16, *FTC v. AT&T Mobility LLC*, No. 14-cv-04785 (N.D. Cal. Oct. 28, 2014).

61. *Id.* at 5, para. 20.

net neutrality concerns is a case study in the difficulties of regulating a dynamic industry through ex ante, prescriptive regulation.

A. What is Net Neutrality?

The D.C. Circuit's decision in *Verizon v. FCC* is the latest judicial volley in a long-standing public policy debate over the neutrality of the Internet, or "net neutrality." Net neutrality as a policy goal is notoriously difficult to define, in part because the goal has evolved substantially over the course of the debate. Several authors have comprehensively documented this shifting definition of net neutrality, which I will not duplicate here.[62] In broad terms, however, net neutrality is the concept that access to the Internet should be provided on equal, nondiscriminatory terms for all content providers and consumers.[63] In 2007, as Director of the FTC's Office of Policy Planning, I led the FTC's inquiry into net neutrality and the release of the subsequent report, "Broadband Connectivity Competition Policy."[64] Based in part on my experience in leading that effort, I will briefly explain the concerns that animate each side in this debate.

1. Proponents of Net Neutrality Regulation

Net neutrality advocates focus on certain characteristics of the early Internet and express fears that the Internet of the future will be worse for lacking those characteristics. Specifically, they emphasize the Internet's "end-to-end architecture," which carries content between users and servers at the "edge" of the Internet on a "first-in, first-out" or "best efforts" basis. Advocates describe this approach as not just an engineering solution, but also a fundamental philosophical principle.[65] Professors Mark Lemley and Lawrence Lessig explain this viewpoint as follows: "While the e2e [end-to-end] design principle was first adopted for technical reasons, it has important social and competitive features as well. E2e expands the competitive horizon

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62. *See, e.g.*, Christopher S. Yoo, *Network Neutrality and the Need for a Technological Turn in Internet Scholarship* (Pub. L. & Legal Theory Research Paper Series, Research Paper No. 12-35 2012), *available at* http://ssrn.com/abstract=2063994; *see also* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 145 (2003) (defining a "neutral network" as one that does not "favor one application . . . over others").

63. *See* Wu, *supra* note 62, at 145.

64. FED. TRADE COMM'N, BROADBAND CONNECTIVITY COMPETITION POLICY, FTC STAFF REPORT 5 (2007) [hereinafter FTC NET NEUTRALITY REPORT], *available at* http://www.ftc.gov/reports/broadband/v070000report.pdf.

65. *See* David D. Clark, *The Design Philosophy of the DARPA Internet Protocols*, 18 COMPUTER COMM. REV. 106, 106-07 (1988), *available at* http://nms.csail.mit.edu/6829-papers/darpa-internet.pdf; FTC NET NEUTRALITY REPORT, *supra* note 64; *see also* J.H. Saltzer et al., *End-to-End Arguments in System Design*, 2 ACM TRANSACTIONS ON COMPUTER SYS. 277 (1984).

by enabling a wider variety of applications to connect to and to use the network."[66]

Network neutrality advocates see the success of content and applications providers like Google, Netflix, and Facebook as contingent on these fundamental design principles, and especially the Internet's end-to-end architecture.[67] In particular, many successful "edge" providers are concerned that owners of the underlying infrastructure could engage in anticompetitive hold-up, either by cutting off access to users or to other networks, by charging high prices for transport, or by providing better services to one content provider instead of its competitor either for a fee or because of a business affiliation.[68] As explained in the FTC broadband report, content providers worry about "(1) blockage, degradation, and prioritization of content and applications; (2) vertical integration by ISPs [Internet service providers] and other network operators into content and applications; . . . and (3) the diminution of political and other expression on the Internet."[69] These concerns over vertical integration in the industry are the main force propelling the FCC's efforts toward prescriptive, rule-based net neutrality regulations.[70]

Net neutrality advocates generally support a "strong presumption in favor of preserving the architectural features that have produced this extraordinary innovation."[71] They want government to protect these core design attributes by prohibiting certain types of behavior by network infrastructure owners.

2. Opponents of Net Neutrality Regulation

Opponents of net neutrality regulation question the validity of the narrative told by advocates. [72] They describe how the Internet has never

66. 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, 931 (2001).

67. *See, e.g.*, Brett M. Frischmann & Barbara Van Schewick, *Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo*, 47 JURIMETRICS J. 383, 428 n.7 (2007).

68. Lawrence Lessig, *The Internet Under Siege*, FOREIGN POL'Y (Nov. 16, 2009), http://foreignpolicy.com/2009/11/16/the-internet-under-siege/.

69. FTC NET NEUTRALITY REPORT, *supra* note 64, at 5.

70. *2010 Open Internet Order*, *supra* note 4, at 17918, para. 23, states that:

> [A] broadband provider may act to benefit edge providers that have paid it to exclude rivals (for example, if one online video site were to contract with a broadband provider to deny a rival video site access to the broadband provider's subscribers). End users would be harmed by the inability to access desired content, and this conduct could lead to reduced innovation and fewer new services.

71. Lemley & Lessig, *supra* note 66, at 929.

72. *See* Richard Bennett, *Designed for Change: End-to-End Arguments, Internet Innovation, and the Net Neutrality Debate* (Info. Tech. & Innovation Found., 2009), *available at* http://www.itif.org/files/2009-designed-for-change.pdf; Douglas A. Hass, *The*

really been "neutral" in the sense that advocates portray the concept.[73] They also argue that "best-effort delivery" of information is not neutral in effect—certain types of services are harmed more than others by such a rubric.[74] Furthermore, they argue, the end-to-end architecture and the other design principles were engineering solutions to specific historical problems; as the problems have changed, it is appropriate for engineering solutions also to change.[75]

Opponents of net neutrality rules are concerned that regulation, by its nature, is inflexible and would penalize innovation in an attempt to maintain the original design principles of the Internet.[76] They argue that Internet innovation has depended upon the latitude to experiment with new and different business models.[77] They point out that many pioneering Internet businesses were vertically integrated and thus would arguably violate modern network neutrality regulation were they still in business today.[78] They further argue that adopting rigid network neutrality rules would freeze the existing business environment in place and potentially prevent experimentation with different technologies and types of vertically-integrated businesses or business practices.[79] Regulation could also reduce many of the efficiencies of vertical integration (like eliminating double marginalization problems) and skew investment incentives.[80] Instead of allowing the market to guide investment dollars where needed and businesses to charge based on the best use of potentially scarce resources, like bandwidth, net neutrality opponents fear the effect of the government dictating many of these critical decisions.[81] Thus, rather than prescriptive rules, opponents advocate more fact-intensive and flexible enforcement of widely acknowledged legal and economic norms, such as antitrust law and

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Never-Was-Neutral Net and Why Informed End Users Can End the Net Neutrality Debates, 22 BERKELEY TECH. L.J. 1565 (2007).

73. Hass, *supra* note 72, at 1575–77.

74. *See id.* at 1633.

75. Bennett, *supra* note 72, at 22–23.

76. *See id.* at 1567.

77. Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767, 770 (2012); *see also* Christopher S. Yoo, *What Can Antitrust Contribute to the Network Neutrality Debate?*, 1 INT'L J. COMM. 493, 517 (2007).

78. *See* Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1888 (2006) ("The failure of early proprietary services provided by America Online, CompuServe, and Prodigy attests to the market's ability to discipline network owners who attempt to impose closed architectures on consumers who prefer open ones.").

79. *Id.*

80. *See, e.g.*, George S. Ford, Thomas M. Koutsky & Lawrence J. Spiwak, *Network Neutrality and Foreclosing Market Exchange: A Transaction Cost Analysis* 19–20 (Phoenix Ctr., Pol'y Paper No. 28, 2007) *available at* http://www.phoenix-center.org/pcpp/PCPP28Final.pdf.

81. *See* Yoo, *supra* note 78, at 1902–04.

consumer protection law.[82] They also question whether a systemic problem requiring expansive solutions even exists.[83]

B. The FCC's History of Broadband Regulation: The Road to Reclassification

1. Broadband as a Title I Information Service

The FCC's earliest regulatory approach to consumer Internet service was to treat it as a common carrier service. Telephone companies were not permitted to ban, tamper with, or differentiate between dial-up telephone ISPs, such as CompuServe or AOL.[84] The FCC used a different approach for always-on cable broadband Internet services. In 2002, it issued the *Cable Modem Order*, which deemed cable modem service to be neither a separate "telecommunications service" under Title II nor "cable service" under Title VI, but instead a largely unregulated "information service" under Title I.[85] The Supreme Court in 2005 upheld this decision and agreed that cable modem access is an interstate "information service" subject only to Title I.[86] The FCC then extended similar treatment to broadband access over telephone-based digital subscriber or "DSL" lines.[87]

These classifications permitted the FCC to, in essence, deregulate Internet access. To maintain the possibility of future regulatory action, the FCC asserted ancillary jurisdiction over broadband providers under provisions like section 4(i) of the Act.[88] In 2005, the FCC acted on this putative authority and issued an Internet Policy Statement outlining certain Internet freedoms "to ensure that broadband networks are widely deployed,

82. *See, e.g.*, FTC NET NEUTRALITY REPORT, *supra* note 64, at 69 n.314 (quoting Timothy Muris, former FTC Chairman).

83. *Id.* at 68–69.

84. Deployment of Wireline Servs. Offering Advanced Telecomm. Capability, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-188, 13 FCC Rcd. 24012, 24017–18, para. 11 (1998) [hereinafter *Advanced Services Order*] (finding that incumbent local exchange carriers are subject to various interconnection obligations under Title II).

85. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77, 17 FCC Rcd. 4798, 4802, para. 7, 4822–23, paras. 38–39 (2002) [hereinafter *2002 Cable Modem Order*], *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.pdf.

86. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000 (2005) (holding the *2002 Cable Modem Order* was a reasonable construction of the Communications Act by the FCC).

87. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, FCC 05-150, 20 FCC Rcd. 14853, 14895–96, para. 79 (2005), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf.

88. 47 U.S.C. § 154(i) (2012).

open, affordable, and accessible to all consumers."[89] In 2008, the Commission alleged Comcast had violated this policy by slowing customers' use of peer-to-peer networking applications and ordered Comcast to cease and desist from the practice.[90] Comcast complied with the order but challenged the FCC's exercise of authority over network management practices.[91] The D.C. Circuit sided with Comcast, concluding the FCC's actions were "flatly inconsistent" with the law, in large part because the agency had linked its ancillary jurisdiction over Comcast's actions to mere statements of policy in the Act rather than to sections of the Act expressly delegating authority.[92]

With its authority to impose net neutrality requirements on broadband providers called into question, then-Chairman Genachowski proposed a "Third Way" to shore up the FCC's position.[93] Under this approach, the agency would reclassify the transmission component of "broadband services" as "telecommunications services," allowing the FCC to exercise direct jurisdiction over network management under Title II.[94] The FCC would then forebear from applying certain Title II obligations on broadband service to lighten the regulatory load.[95] Congress expressed bipartisan, widespread concern with the Third Way proposal, which led the FCC to argue for yet other bases for its network neutrality jurisdiction—Section 706 of the Telecommunications Act of 1996 and ancillary jurisdiction related to additional specific sections of Titles II, III, and VI.[96]

Based on this new theory of authority, the agency adopted the *Open Internet Order* in December 2010 with new network neutrality rules. Those rules provided that: (1) ISPs must be transparent and disclose their network

89. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Policy Statement*, FCC 05-151, 20 FCC Rcd. 14986, 14987–88, para. 4 (2005), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf; *see also* Appropriate Reg. Treatment for Broadband Access to the Internet over Wireless Networks, *Declaratory Ruling*, FCC 07-30, 22 FCC Rcd. 5901, 5901–02, para. 1 (2007), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-07-30A1.pdf.

90. Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp., *Memorandum Opinion and Order*, FCC 08-183, 23 FCC Rcd. 13028, 13050–51, para. 41 (2008), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf, *vacated in part sub nom.* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

91. *Comcast*, 600 F.3d at 644–45; Cecilia Kang, *Court Rules for Comcast over FCC in 'Net Neutrality' Case*, WASH. POST, Apr. 7, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040600742.html.

92. *Comcast*, 600 F.3d at 655, 661.

93. Julius Genachowski, Chairman, FCC, *The Third Way: A Narrowly Tailored Broadband Framework*, (May 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf.

94. *Id.*

95. *See* 47 U.S.C. § 160 (2012) (requiring the FCC to forbear from Title II regulations that, if imposed on common carriers, are not necessary to protect consumers or the public interest).

96. *See* Robert M. McDowell, Op-Ed., *The FCC's Threat to Internet Freedom*, WALL ST. J., Dec. 19, 2010, http://www.wsj.com/articles/SB10001424052748703395204576023452250748540.

management practices; (2) both wireless and fixed network owners may not block lawful applications or services, except for purposes of reasonable network management; and (3) fixed broadband providers may not unreasonably discriminate, including by degrading the quality or speed of a consumer's access or as to particular websites or services.[97]

2. The *Verizon* Decision

Verizon and others challenged the Order before the U.S. Court of Appeals for the D.C. Circuit, which handed down its decision on January 14, 2014, striking the Order down in part.[98] The court agreed that the FCC had the authority under section 706 to regulate broadband traffic to promote broadband deployment. According to the court, the FCC reasonably interpreted the ambiguous texts of sections 706(a) and 706(b) as empowering it to establish rules governing how broadband providers treat Internet traffic.[99] Although the FCC had previously decided that section 706(a) "does not constitute an independent grant of authority,"[100] the court agreed that the Order had "offered a reasoned explanation for its changed understanding of section 706(a)."[101]

Having concluded that the FCC possesses authority to regulate broadband providers under section 706, the court also held that section 706 authorized the particular rules adopted in the *Open Internet Order* because the FCC's rules applied directly to broadband providers and sought to promote the congressional goals of section 706.[102]

The court also found the FCC's conclusion that the *Open Internet Order* would encourage broadband deployment to be rational and supported by substantial evidence. The court thus deferred to the FCC's findings that edge provider innovation drives a virtuous cycle that incentivizes broadband deployment, broadband providers have the incentive and ability to discriminate against edge providers, and the benefits of the rules would outweigh their costs.[103] The court found that these conclusions—all of which

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97. *See 2010 Open Internet Order*, *supra* note 2, at 17906, para. 1; *see also Open Internet*, FCC.GOV, http://www.fcc.gov/openinternet (last visited Mar. 4, 2013); Babette Boliek, *FCC Regulation Versus Antitrust: How Net Neutrality Is Defining the Boundaries*, 52 B.C. L. REV. 1627, 1632 (2011) (citing FCC Commissioner concerns about jurisdiction). The rules treat fixed and wireless providers differently in some respects.

98. *See, e.g.*, Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).

99. *Id.* at 628. This authority rests on the court's determination that the FCC has reasonably explained how regulating broadband practices is a "regulating method[] that remove[s] barriers to infrastructure investment" in "advanced telecommunications capability." *Id.* at 637.

100. *Comcast*, 600 F.3d at 658 (quoting *Advanced Services Order*, *supra* note 84, at 24047, para. 77).

101. *Verizon*, 740 F.3d at 636.

102. *Id.* at 641.

103. *Id.* at 644-49.

are economic in nature—were reasonable based on the evidence the FCC had offered.[104]

Nevertheless, the court struck down the anti-blocking and anti-discrimination provisions as inconsistent with the Communications Act's express prohibition on treating non-common carrier services as common carriers.[105] At the time of the *Open Internet Order*, broadband internet access service was not a common carrier service. And, as the court observed, the Communications Act of 1934 prohibits applying common carrier regulation to entities that are not common carriers.[106] The court found that the language of the anti-discrimination rule "mirrors, almost precisely," the common carrier obligation not to engage in "any unjust or unreasonable discrimination."[107] Furthermore, the anti-discrimination rule, like common carrier obligations, left little or no room for individualized bargaining.[108] The court also struck down the anti-blocking rule because the FCC relied, in the Order and in its briefs, on the same justifications the court found insufficient for the anti-discrimination rule.[109] The court upheld the disclosure requirement, however.[110]

Having struck down the anti-discrimination rule and the anti-blocking rule, and upholding the disclosure rule, the court remanded the case to the FCC for further proceedings.

3. The Aftermath of *Verizon*

In response to the *Verizon* decision, in May 2014 the FCC adopted a Notice of Proposed Rulemaking (NPRM) to establish a variation on the rules adopted in the *Open Internet Order*, in the hopes that these modified rules would pass court review.[111] The NPRM first proposed to enhance the transparency requirements to gather more information about the service offered to consumers.[112] Second, to address the D.C. Circuit's anti-blocking

104. *Id.* at 644–49. As I discuss below, the Order's rules, which amount to a *per se* ban on vertical arrangements, are inconsistent with current economic theory and antitrust law. *See infra* Part III.A.

105. *Id.*

106. *Verizon*, 740 F.3d at 650 (citing 47 U.S.C. §§ 153(51), 332(c)(2) (2012)).

107. *Id.* at 657.

108. *Id.* at 657 (citing Cellco P'ship v. FCC, 700 F.3d 534, 548 (D.C. Cir. 2012) (upholding regulation compelling mobile telephone companies to offer data roaming agreements to each other on "commercially reasonable" terms, finding the rule was not unauthorized common carrier regulation because it preserved "substantial room for individualized bargaining and discrimination in terms.")).

109. *Id.* at 658–59 (discussing an alternate argument which the FCC first proposed at oral argument, but rejecting it because the court is "unable to sustain the Commission's action on a ground upon which the agency itself never relied.").

110. *Id.* at 659.

111. *Protecting and Promoting the Open Internet NPRM*, FCC 14-61, 29 FCC Rcd. 5561, 5569 paras. 23–24 (2014).

112. *Id.* at 5585–93, paras. 66–88.

rule concerns, the NPRM proposed to amend the rule so that it does not preclude broadband providers from negotiating individual arrangements with similarly situated edge providers.[113] Third, the NPRM proposed an anti-discrimination rule that prohibits "commercially unreasonable" practices, but still allows providers to serve customers and carry traffic on an individually negotiated basis.[114]

As an alternative to tweaking the *Open Internet Order* rules, the NPRM includes several paragraphs asking if the FCC should reclassify broadband Internet service as a Title II service, echoing former Chairman Julius Genachowski's unpopular Third Way proposal.[115] However, the general sense was that Chairman Wheeler was focused on adjusting the anti-discrimination and anti-blocking rules to meet the roadmap laid out by the D.C. Circuit.[116]

The debate changed in early November 2014, when President Obama shared his views on how to achieve net neutrality. On November 10, 2014, President Obama issued a press release announcing a website and a YouTube video calling for the FCC to reclassify the Internet as a Title II service.[117] Soon after, Commissioner Wheeler began to emphasize reclassification as his preferred approach.[118]

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113. *Id.* at 5595, para. 95.

114. *Id.* at 5608, para. 136.

115. *Protecting and Promoting the Open Internet NPRM*, FCC 14-61, 29 FCC Rcd. 5561, 5612-15 paras. 148-52 & n. 302 (2014) (citing Framework for Broadband Internet Service, *Notice of Inquiry*, FCC 10-114, 25 FCC Rcd. 7866, 7894, para. 64 (2010)).

116. *See, e.g.*, Doug Brake, *On Net Neutrality, FCC Chairman Had It Right the First Time*, FORBES (Nov. 18, 2014, 4:49 PM) http://www.forbes.com/sites/realspin/2014/11/18/on-net-neutrality-fcc-chairman-tom-wheeler-had-it-right-the-first-time/ ("We need to remember that Wheeler started with compromise. His middle-ground approach split the difference between hands-off antitrust enforcement and common carriage, following the outline of the Commission's jurisdiction laid out in the *Verizon* ruling.").

117. Press Release, White House, Net Neutrality: President Obama's Plan for a Free and Open Internet (Nov. 10, 2014), available at http://www.whitehouse.gov/net-neutrality.

118. *See* Tony Romm, *FCC's Tom Wheeler in Step with Barak Obama on Net Neutrality*, POLITICO (Jan. 7, 2015, 9:41 PM) http://www.politico.com/story/2015/01/tom-wheeler-net-neutrality-114069.html (claiming "FCC Chairman Tom Wheeler offered his strongest endorsement to date of tough net neutrality rules, aligning himself with President Barack Obama's vision for an open Internet."); *see also* Brian Fung, *How Obama's Net Neutrality Comments Undid Weeks of FCC Work*¸ THE WASHINGTON POST (Nov. 14, 2014) http://www.washingtonpost.com/blogs/the-switch/wp/2014/11/14/how-obamas-net-neutrality-comments-undid-weeks-of-fcc-work/ (reporting "[] all of [Chairman Wheeler's hybrid plan] [] was thrown off-track as soon as Obama called for "bright-line rules" backed up by the FCC's most aggressive powers. Now a number of companies who were close to signing onto the "hybrid" plan proposed by Wheeler are in a holding pattern. Demand for a less-compromising stance has increased. And pressure is building on Wheeler and the FCC to decide what it should do.").

C. The Reclassification Ruling and Order on Remand

On February 26, 2015, the FCC decided, on a 3-2 vote, to reclassify broadband internet access service as a Title II common carrier service and apply new regulations to the reclassified service. The lengthy decision[119] takes a number of actions. Most importantly, it:

1. Reclassifies "broadband internet access service," or "BIAS," (a defined term) as a common carrier service subject to Title II of the Communications Act of 1934;[120]
2. Adopts a *per se* ban on blocking, throttling, and paid prioritization;[121]
3. Prohibits BIAS providers from "unreasonably interfering with" or "unreasonably disadvantaging" end users or edge providers – the so-called "general conduct rule"; and[122]
4. Imposes transparency requirements on BIAS providers in addition to those that remain in place from the 2010 Order.[123]

III. THE PRESCRIPTIVE RULES AND PROBLEMATIC RECLASSIFICATION

A. The Order on Remand Continues the FCC's Prescriptive Rulemaking Approach

The *Order on Remand* asserts that the enforcement of the new rules will use "a case-by-case approach."[124] Indeed, Chairman Wheeler has explicitly compared the FCC's proposed approach here with the FTC's enforcement approach.[125]

However, consistent with the FCC's tradition of prescriptive ex ante regulation, the *Order on Remand* establishes a core of prescriptive rules. It includes three per se bans on certain business practices although these bans are economically unjustified; indeed, the FCC itself admits that some of

119. What I refer to colloquially as the "decision" is actually a Report and Order on Remand adopting net neutrality rules, a Declaratory Ruling reclassifying broadband internet access as a Title II common carrier service, and an Order forbearing from applying certain provisions of Title II common carrier regulation to the reclassified service. Together with final rules, various procedural requirements such as a regulatory flexibility analysis, and separate statements from the commissioners (including two lengthy dissents) the "decision" spans 400 pages.

120. *Declaratory Ruling* paras. 306 *et seq.*

121. *Order on Remand* paras. 111-132.

122. *Order on Remand* paras. 133-153.

123. *Order on Remand* paras. 154-185.

124. *Order on Remand* para. 247.

125. Wheeler, Tom, Statement to House, Committee on Energy and Commerce Committee, *FCC Reauthorization: Oversight of the Commission*, Hearing, March 19, 2015 at (1:47:25), *available at* http://www.c-span.org/video/?324931-1/federal-communications-commission-oversight-hearing.

these practices could benefit consumers in some cases. The "general conduct" rule does not alter the core prescriptive nature of the new regulatory regime, but merely adds a penumbra of uncertainty around the core bans. A true case-by-case approach that applied generally accepted legal and economic norms would not prohibit practices that increase consumer welfare but would reduce the "knowledge problem" described above.

1. The Core Rules are a *Per Se* Ban on Certain Forms of Vertical Integration

The *Order on Remand* adopts three prescriptive ex ante rules that prohibit certain business practices. Specifically, the rules prohibit BIAS providers from blocking, throttling, or engaging in paid prioritization of Internet traffic.

These rules are overly prescriptive because they per se prohibit actions that may in many instances benefit consumers. Indeed, the *Order on Remand* adopts rules that are more prescriptive and interventionist than the *2010 Order*. For example, the *2010 Order* established a presumption against paid prioritization but subject it to a case-by-case review.[126] In contrast, the *Order on Remand* bans such arrangements outright.[127] Furthermore, the *2010 Order* did not regulate interconnection agreements between ISPs and transit providers or CDNs (including some edge providers), but the *Order on Remand*, for the first time ever, announces the FCC's intent to regulate the conditions and prices of such agreements.[128]

The sparse economic reasoning offered by the FCC to justify these per se rules runs counter to modern economic and antitrust theory. I will focus on one particular, critically important flaw: the Order's failure to justify the per se ban on paid prioritization.

The *2010 Order* concluded that broadband providers "may have incentives to increase revenues by charging edge providers . . . for access or prioritized access to end users," and that such access fees would be set "inefficiently high."[129] As such, the 2010 Order adopted a presumption that paid prioritization would be unreasonable discrimination.[130] Similarly, the

126. *2010 Open Internet Order*, *supra* note 2, at ___ at paras. 76-77 ("[A]s a general matter, it is unlikely that pay for priority would satisfy the 'no unreasonable discrimination' standard" but "a strict nondiscrimination rule would be in tension with our recognition that some forms of discrimination, including end-user controlled discrimination, can be beneficial.")

127. *Order on Remand*, para. 125 (adopting "a bright line rule against" paid prioritization network practices).

128. *Order on Remand*, para. 31 ("This Order – for the first time – provides authority to consider claims involving interconnection….").

129. *2010 Open Internet Order*, *supra* note 2, at 17919, para. 24.

130. *Id.* para. 76.

Order on Remand found that "broadband providers have incentives to charge for prioritized access to end users."[131] The *Order on Remand* therefore adopts a per se prohibition against paid prioritization.[132]

Yet the record clearly reflects that paid prioritization can have beneficial effects. As the *2010 Order* acknowledges—and the record in the proceeding reflects— "[e]conomic literature recognizes that access charges could be harmful under some circumstances and beneficial under others."[133] The *Order on Remand* also acknowledges that "there are arguments that some forms of paid prioritization could be beneficial."[134] Similarly, in evaluating the FCC's tepid cost-benefit analysis, the *Verizon* court labeled this a case "where 'the available data do[] not settle a regulatory issue."[135] Furthermore, neither the *2010 Order* nor the *Order on Remand* offer any evidence of existing, ongoing harm.[136]

The FCC's per se prohibition of a practice that may in many cases have beneficial effects conflicts with U.S. antitrust law and its underlying rationale. The U.S. Supreme Court limits per se condemnation in the antitrust context to "plainly" or "manifestly" anticompetitive conduct.[137] The Court has been clear that categorical treatment applies only where a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output" instead of "one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'"[138]

In addition to the FCC's own admission that access charges can be beneficial, the facts we see in the Internet ecosystem—growth, innovation,[139]

131. *Reclassification Order* ¶ 82.

132. *Order on Remand*, para. 125.

133. *Id.* at 17921 n.80.

134. Order on Remand ¶ 19. Indeed, the *Order on Remand* finds that other types of prioritization made may be beneficial, but offers no meaningful explanation of why some delivery-enhancing services are per se harmful while others are not. For example, the *Order on Remand* notes that edge providers may continue to "enhanc[e] the delivery" of their services by investing in proprietary backhaul or Content Delivery Networks. *Order on Remand* ¶ 128. The Order also refrains from a blanket ban on sponsored data plans.

135. *Verizon*, 740 F.3d at 649 (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983)).

136. *See id.* at 667 (Silberman, J., concurring in part and dissenting in part). The *Order on Remand* acknowledges that paid prioritization is not widespread, para. 126, and adopts the bright line rule based "on very real concerns about the chilling effects that preferential treatment arrangements *could* have." Para. 127 (emphasis added).

137. Broad. Music, Inc. v. CBS, 441 U.S. 1, 8 (1979); *accord* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977) (noting that per se condemnation is proper only for "conduct that is manifestly anticompetitive.").

138. *Broadcast Music*, 441 U.S. at 19–20; *see also* Christopher S. Yoo, *Net Neutrality, Consumers, and Innovation*, 2008 U. CHI. LEGAL F. 179, 245–47 (2008) (discussing the Supreme Court's antitrust jurisprudence as "a useful framework" for understanding how policy should treat deviations from network neutrality).

139. *See* Hazlett & Wright, *supra* note 77, at 834–39.

procompetitive efficiencies, significant consumer benefits,[140] largely successful industry self-regulation, few reported cases of abuse[141]—strongly suggest we do not have the type of widespread problem here that would merit categorical treatment. Paid prioritization is a vertical issue requiring nuanced rule of reason analysis to balance its benefits and harms to competition and consumers.[142] Courts and antitrust enforcers have spent years investigating and evaluating the competitive implications of vertical restraints, including those on the Internet. They have found vertical relationships very often yield procompetitive benefits, like reducing double marginalization, mitigating free riding, and encouraging investment.[143] Likewise, "with few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons, [and] these practices are unlikely to be anticompetitive in most cases." [144] Notably, a review of the economics literature by current and former FTC and DOJ economists showed that most evaluations of vertical integrations did not present material evidence of net anticompetitive harm.[145] Indeed, both the FTC and DOJ previously advised the FCC to be cautious about imposing rules on broadband Internet providers due to the complexities in evaluating vertical markets.[146]

There are many real world examples of vertically integrated firms that have thrived (or failed) on the Internet and, in the process, contributed to significant advances in the industry. For instance, in the 1990s, America Online (AOL) was an important, user-friendly "on-ramp" for people to first view the Internet. It distributed "'more than 250 million disks bearing AOL software to the mass market.'"[147] At its peak in 2002, AOL had roughly 35 million subscribers.[148] AOL was a closed platform with exclusive content for users. It charged companies like Time Magazine and The New York Times for access to the AOL universe of sites and simultaneously developed and sometimes favored affiliated content, which was a noted part of its

140. *Id.* at 815–16.

141. *Id.* at 811–13.

142. *Id*., at 796-806. Blocking and discrimination are also vertical issues requiring rule of reason analysis.

143. *Id.* at 797–98.

144. Daniel O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *in* REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72-73 (2008)

145. James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 658 (2005).

146. *See generally*, FTC NET NEUTRALITY REPORT, *supra* note 64; *see also* Ex Parte Submission of the United States Department of Justice, Econ. Issues in Broadband , FCC GN Docket No. 09-51 (rel. Jan. 4, 2010), *available at* http://www.justice.gov/atr/public/comments/253393.pdf.

147. Hazlett & Wright, *supra* note 77, at 795 (quoting KARA SWISHER, AOL.COM: HOW STEVE CASE BEAT BILL GATES, NAILED THE NETHEADS, AND MADE MILLIONS IN THE WAR FOR THE WEB 99 (1998)).

148. AOL TIME WARNER, 2002 ANNUAL REPORT 6 (2002), *available at* http://www.kronemyer.com/Warner%20Music%20Group/AOL%20Time%20Warner%202002%20Annual%20Report.pdf.

strategy.[149] And, of course, AOL bought Time Warner in 2001 and fully integrated its content and delivery, something it had been working on for years through strategic relationships with GTE, Ameritech Communications, Bell Atlantic, and other DSL providers.[150] As a powerful, vertically-integrated content and network platform, AOL engaged in exactly the type of content discrimination that arguably would violate the FCC's net neutrality rules. Time Warner has since spun off not only AOL—which has enjoyed little success in recent years—but also Time Warner Cable, the company's cable broadband business.[151]

The AOL example, like many others, confirms what most economists think: that there are procompetitive benefits to vertical integration and that such integration does not necessarily impede innovation, competition, or broadband deployment. Categorical rules prohibiting network discrimination and similar forms of vertical integration therefore are likely to reduce consumer welfare rather than enhance it.[152]

Rather than per se bans, the better way to analyze vertical restraints on the Internet is the rule of reason (or, for vertical combinations, the Clayton Act merger review standards[153]). We should evaluate allegations of vertical integration, foreclosure, or price discrimination on the Internet the same way we do everywhere else—by balancing the procompetitive benefits against the anticompetitive harms of those restraints. The lawfulness of "non-neutral" conduct should depend upon its net effect on competition and consumers.[154] This approach, developed over a century of antitrust cases, will better maximize consumer welfare in the broadband industry than the FCC's per se ban.

2. The "General Conduct" Rule Creates a Penumbra of Uncertainty

In addition to the prescriptive bans on blocking, throttling, and paid prioritization, the *Order on Remand* also adopts a new rule that prohibits BIAS providers from "unreasonably interfer[ing] with or unreasonably

149. *See id.*; Robert Burgelman & Philip Mez, *AOL: The Emergence of an Internet Media Company* 9-12 (Stanford Graduate School of Business, Case No. SM-75, 2001) [hereinafter *AOL Case Study*], *available at* http://www.gsb.stanford.edu/faculty-research/case-studies/aol-emergence-internet-media-company.; Hazlett & Wright, *supra* note 77, at 795.

150. *AOL Case Study*, *supra* note 149, at 3–4 (citations omitted).

151. Aaron Smith, *Time Warner to Split Off AOL*, CNN MONEY, (May 28, 2009, 5:02 PM), http://money.cnn.com/2009/05/28/technology/timewarner_aol/. In an inversion of AOL's purchase of Time Warner, Verizon has recently announced plans to buy AOL. *See* VERIZON, VERIZON TO ACQUIRE AOL, May 12, 2015, *available at* http://www.verizon.com/about/news/verizon-acquire-aol.

152. Hazlett & Wright, *supra* note 77, at 801–02.

153. Clayton Antitrust Act of 1914, ch. 323, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53).

154. *Id.*

disadvantag[ing] the ability of consumers to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet."[155] This no-unreasonable interference/disadvantage rule has been referred to as the "general conduct" rule. According to the *Order on Remand*, this rule is intended to reach "current or future practices that cause the type of harms our rules are intended to address."[156] The *Order on Remand* specifies a non-exhaustive list of six factors that the FCC will use to judge whether conduct violates the interference/disadvantage standard: 1) the effect on end-user control; 2) competitive effects; 3) effect on consumer protection; 4) effects on innovation, investment, or broadband deployment; 5) effects on free expression; 6) whether the conduct is application agnostic; and 7) whether the conduct reflects standard practices. Thus, the general conduct rule mixes competition law, consumer protection law, and first amendment law, along with other factors.

The general conduct rule is decidedly *not* prescriptive. Indeed, it is very difficult to determine what conduct the rule may prescribe. But this lack of prescriptiveness does not make the rule similar to, for example, the FTC's Congressionally granted authority to enforce prohibitions on unfair competition and on unfair or deceptive acts or practices. Over many decades, the FTC has enforced these generally applicable principles on a case-by-case basis to build a body of precedent, including in emerging areas such as data security or privacy.

In contrast, "unreasonable interference" and "unreasonable disadvantaging" are not generally applicable, long established legal antitrust or consumer protection principles. Nor were they established by Congress. These are novel concepts. The *Order on Reconsideration* does attempt to define the scope of the rule by referencing elements of long standing legal principles from competition, consumer protection, and first amendment law. But it offers no insight into which of these factors are most important, how the FCC will resolve inevitable conflicts between these factors, or even if the factors are disjunctive.

In short, the general conduct rule wraps three overly prescriptive but relatively certain rules in a broad penumbra of uncertainty. While this may give the FCC the flexibility to regulate future developments on the Internet, the lack of Congressional direction and weak foundation in legal precedent means that, like FCC Chairman Tom Wheeler, "we really don't know" what the rule means.[157]

Indeed, even strong net neutrality advocates like the Electronic Freedom Foundation have expressed serious concern that the general conduct rule is "hardly the narrow, light-touch approach we need to protect

155. *Order on Remand* ¶ 135; proposed 47 C.F.R. §8.11.

156. *Id.*

157. Clip of Press Conference, FCC Chairman Tom Wheeler, *available at* http://www.c-span.org/video/?c4534447/wheeler-general-conduct-standard.

the open Internet" and "a multi-factor test that gives the FCC an awful lot of discretion, potentially giving an unfair advantage to parties with insider influence."[158]

B. The Effects of Title II Reclassification Go Far Beyond Net Neutrality

Industry, legal, and policy experts have noted a wide range of problems with Title II reclassification, including decreasing investment incentives, rising costs to consumers, and regulatory compliance issues.[159] The effects of such a sweeping regulatory change will remain unknown for some time, but we are already seeing collateral consequences of reclassification that have nothing to do with net neutrality. These consequences are all the more concerning when one considers the unclear scope of the services to which reclassification applies.

1. Collateral Effect on FTC Jurisdiction

One collateral consequence is particularly relevant to this discussion: Title II reclassification could reduce the FTC's authority to protect consumers online. Common carrier—that is, Title II—services are outside of the FTC's jurisdiction.[160] As a result, Title II reclassification makes it more difficult for the FTC to continue its flexible and effective case-by-case, ex post enforcement against deceptive and unfair acts that harm online consumers.

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158. Corynne McSherry, Dear FCC: Rethink The Vague "General Conduct" Rule (Feb. 24, 2015), *available at* https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules.

159. *See, e.g.*, Anna-Maria Kovacs, Regulation in Financial Translation: Investment Implications of the FCC's Open Internet Proceeding (Georgetown Univ. Ctr. for Bus. & Pub. Policy, Oct. 2014), *available at* http://www.gcbpp.org/files/Academic_Papers/AP_Kovacs_OpenInternet10-2014.pdf (describing how "from the perspective of investors, Title II reclassification makes no sense."); James E. Prieger, *Net Neutrality Policy and the Future of Your Internet*, THE HILL (Sept. 14, 2014, 3:00 PM), http://thehill.com/blogs/congress-blog/technology/217564-net-neutrality-policy-and-the-future-of-your-internet (describing how reclassification will raise costs for consumers); Michael O'Rielly, Comm'r, FCC, Thinking the Unthinkable: Imposing the 'Utility Model' on Internet Providers, Remarks at the Free State Foundation's Policy Seminar (Nov. 14, 2014), *available at* http://www.fcc.gov/document/commissioner-oriellys-remarks-free-state-foundation (explaining the difficulty of using forbearance to avoid the most onerous provisions of Title II).

160. 15 U.S.C. § 45(a)(2) (FTC authority does not reach "common carriers subject to the Communications Act of 1934"). "An entity is a common carrier … only with respect to services it provides on a common carrier basis." FTC NET NEUTRALITY REPORT, *supra* note 64, at 38 (citing 47 U.S.C. § 153(44). *See also*, FTC v. AT&T, No. C-14-4785 EMC, Order Denying Defendant's Motion to Dismiss at 23 (Mar. 31, 2015)(holding that the FTC's "common carrier exception applies only where the entity has the status of common carrier and is actually engaging in common carrier activity").

This is problematic because the FTC leads the world in privacy and data security enforcement. We have successfully brought more than 100 privacy and data security cases and more than 130 spam and spyware cases, including cases against some of the largest players on the Internet.[161]

The FTC has used this expertise to protect consumers from the deceptive or unfair behavior of their broadband service providers. For example, in June 2009, the FTC brought a case against Pricewert, a rogue Internet service provider that recruited, knowingly hosted, and actively participated in the distribution of spam, child pornography, and other harmful electronic content. The FTC successfully had this provider shut down by a district court judge. More recently, and as mentioned above, the FTC brought cases against AT&T and TracFone for deceptively and unfairly throttling mobile broadband services. In the TracFone case alone the FTC recovered $40 million in refunds to consumers.[162] Such cases will be more difficult or impossible for the FTC to bring once the FCC's Title II reclassification of broadband takes effect.[163]

Some mistakenly argue that because the FTC has only brought a few cases against traditional ISPs, a loss of jurisdiction over BIAS providers will not harm consumers much. First, the number of cases we have brought against ISPs is quite similar in magnitude to the number of alleged net neutrality violations used to justify the FCC's reclassification and new rules.[164] Second, the FTC brings many cases against companies that have online components. In every case we bring that involves an online component, defendants may possibly argue that they are exempt from FTC jurisdiction. Some of these arguments will no doubt be weak; others, given the troublingly vague language in the FCC's order (see discussion in section

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161. According to most recent information from FTC staff, we have brought 53 general privacy cases and 55 data security cases, the vast majority of which have settled. *See generally*, FTC, Legal Resources, https://www.ftc.gov/tips-advice/business-center/legal-resources?type=case&field_consumer_protection_topics_tid=245&field_industry_tid=All&sort_by=field_date_value&=Apply (last visited July 1, 2015)(displaying 184 cases in the Privacy and Security category); Jessica Rich, Director, Bureau of Consumer Protection, FTC, The FTC's Privacy and Data Security Priorities for 2015, at 10 (Mar. 3, 2015) ("Our work to protect sensitive data also includes 55 cases to date against companies that failed to implement reasonable security protections."), *available at* https://www.ftc.gov/system/files/documents/public_statements/671241/150303sidleyaustin.pdf. *See also*, FTC, Privacy and Data Security Update (2014), https://www.ftc.gov/reports/privacy-data-security-update-2014.

162. *See* Press Release, Prepaid Mobile Provider TracFone to Pay $40 Million to Settle FTC Charges It Deceived Consumers About 'Unlimited' Data Plans (Jan. 28, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/01/prepaid-mobile-provider-tracfone-pay-40-million-settle-ftc.

163. The FCC's order will not affect cases currently in litigation, or future cases about past behavior. *See Order on Remand*, note 792 ("[T]he classification decisions in this Order appropriately apply only on a prospective basis.").

164. The 2010 Order sets out, counting generously, fewer than fifteen instances of violations or potential violations by wireline providers. *2010 Order*, 25 FCC Rcd at 17915-26, paras. 20-37. Only a fraction of these potential violations rose to the level of actual violations pursued by the FCC – the Madison River and Comcast-Bit Torrent cases being the most prominent. *See Order on Remand* note 123.

III(B)(3) below), will drain FTC resources unnecessarily, at the very least, and will slow our ability to stop consumer harm and pursue remedies.

Consequently, removing FTC jurisdiction in the pursuit of net neutrality will not benefit consumers on balance. Reclassification imposes certain costs in exchange for uncertain benefits. The FTC prevents known harms on the Internet and recovers significant amounts of redress for consumers when harms that do occur. Why risk the known, substantial benefits of FTC enforcement to prevent net neutrality violations that are mostly speculative, particularly when the benefits of a Title II approach are marginal compared to other approaches?

2. Issue Creep Spurred by Rent-Seeking Behavior

The effects of reclassification have effects far beyond the goal of net neutrality. The FCC's reclassification subjects BIAS providers to new regulation unrelated to net neutrality. And the FCC is already facing calls to use Title II to promote various business models.

Some of these collateral consequences are intentional. For example, the *Order on Remand* describes the FCC's new authority over interconnection agreements as a "regulatory consequence flow[ing] from the Commission's classification of BIAS" as a Title II common carrier service. Privacy and data security are another example of a regulatory consequence of reclassification. The FCC recently hosted a workshop to "explore the Commission's role in protecting the privacy of consumers that use broadband Internet access service."[165] That broad phrasing, which focuses on the privacy of the consumers, rather than the practices of BIAS providers, ought to concern not just BIAS providers, but edge providers as well. After all, as FCC Enforcement Bureau Chief Travis LeBlanc's noted recently, "all those communications are going through wireless communications carriers … that offer Internet services. So we have to start thinking about what that means for privacy."[166] Based on its workshop, the FCC is reportedly preparing a proposal to detail how Title II privacy regulations designed for telephone providers apply to BIAS providers, and has already issued an advisory indicating that the Enforcement Bureau may bring privacy enforcement actions against BIAS providers in the meantime.[167]

In addition to intentional collateral changes to regulation, the FCC is already facing pressure from interest groups to use the new Title II authority in other ways that do not relate to network neutrality. For example, some are

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165. News Release, FCC, "The Wireline Competition and Consumer & Governmental Affairs Bureaus Schedule Workshop on Broadband Consumer Privacy," March 30, 2015, http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0330/DOC-332753A1.pdf.

166. Alison Grande, FCC To Step Up Broadband Privacy Enforcement, Chief Says, Law360, Mar. 6, 2015, http://www.law360.com/articles/628839/fcc-to-step-up-broadband-privacy-enforcement-chief-says.

167. FCC, Enforcement Advisory, DA 15-603 (May 20, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-15-603A1.pdf.

already calling for the FCC to move toward an unbundling regime, where BIAS providers would have to let competing providers offer Internet subscriptions over the same network.[168] Another advocacy group has filed a formal petition for rulemaking asking the FCC, under the reasoning in its *Order on Remand*, to regulate the privacy practices of edge providers such as Google, Facebook, Amazon, YouTube, LinkedIn and Pandora.[169]

3. Unclear Scope of Reclassification

These unintended consequences are even more concerning when one looks closely at the how the *Declaratory Ruling* reclassifies "broadband internet access service," or "BIAS" as a Title II common carrier service. The scope of Title II service depends entirely on the definition of BIAS and how that definition is interpreted. Concerningly, the broad sweep of that definition could permit the current or a future FCC to expand its reach far beyond traditional ISPs. The new rules define BIAS as:

> *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.***[170]

The emphasized text in the definition leaves a significant amount of ambiguity about what future services will or will not be within Title II. It leaves the FCC (or potentially the Enforcement Bureau, acting independently) with the authority to expand the scope of reclassification as it deems necessary. Indeed, the final clause of definition, applied aggressively, would appear capable of eliminating the special services exemption.

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168. *See* Christopher Sprigman, Forget Net Neutrality. What Americans Need Is Net Competition, BloombergBusiness, *available at* http://www.bloomberg.com/news/articles/2015-04-13/forget-net-neutrality-what-americans-need-is-net-competition ("The one crucial step the FCC could take to get us [to competition] would be to mandate local loop unbundling.... The best reason for the FCC to mandate local loop unbundling is that it has the power to do it. … [T]he agency bolstered its second set of net neutrality rules by voting to reclassify Internet access as a telecommunications service. This legal move gives the agency broader power to regulate.") Some of the more vocal advocates of reclassification appear to support unbundling. *See* Tweet, Public Knowledge, 6:58 AM, 14 April 2015, https://twitter.com/publicknowledge/status/587978168545501184.

169. Consumer Watchdog, Petition for Rulemaking to Require Edge Providers to Honor 'Do Not Track' Requests, RM ____ (filed June 15, 2015), *available at* http://www.consumerwatchdog.org/resources/cwd_petition_for_rulemaking_8-22-12.pdf.

170. *Declaratory Ruling*, para. 25; proposed 47 C.F.R. § 8.2(a) (emphasis added).

Furthermore, the *Ruling* appears to embrace the D.C. Circuit's determination that ISPs offer a service to edge providers,[171] but is ambiguous as to whether or how it reclassifies this service. The *Ruling* states, "we need not reach the regulatory classification of the service that the *Verizon* court identified as being furnished to the edge."[172] Yet despite that rather clear disavowal of a decision, the *Ruling* states that "Title II applies… to the second side of the market [the service to the edge provider], which is always a part of, and subsidiary to, the BIAS service."[173] It later explains that the service to edge providers is "subsumed within the promise made to the retail customer of BIAS service" and "simply derivative of BIAS … and in any event, fits comfortably within the command that practices provided 'in connection with a Title II service [sic] that must themselves be just and reasonable."[174] This extremely ambivalent analysis appears to leave room for future FCC actions that regulate the relationships between ISPs and edge providers.

IV. CONCLUSION

The Internet has evolved in one generation from a network of electronically-interlinked research facilities in the United States to one of the most dynamic forces in the global economy, in the process reshaping entire industries and even changing the way we interact on a personal level. The FCC's efforts to create network neutrality rules notwithstanding, the federal government has largely stood back and allowed this phenomenon to occur without Internet-specific rules and regulations. And, as we have seen over the years with AOL, Microsoft, Google, Facebook, Apple, and many others, the industry, left largely to its own devices, has experimented with countless business and technological models, many of which have provided great benefits to consumers and our economy. Google, for example, follows an open model, while Apple almost religiously adheres to a closed system. Each is successful. And both are valuable to the Internet business ecosystem and to consumers.

I see this freedom to experiment as central to the continued success of the Internet. As we move forward into a new age of technological convergence and the Internet of things, we cannot fall into the trap of legislating or regulating based on an antiquated understanding of the Internet. The Communications Act of 1934 was based on a static understanding of technology; that flaw reverberates today in the FCC's repeated attempts to prescriptively regulate the Internet. Instead of static frameworks, we should follow flexible, normative, and cautious enforcement of the competition and consumer protection laws based on actual harms

171. *Verizon*, 740 F.3d at 653 ("broadband providers furnish a service to edge providers…").
172. *Declaratory Ruling*, para. 339.
173. *Id.* para. 338.
174. *Id.* para. 339.

coupled with self-regulation by open, consensus-based, multi-stakeholder organizations of engineers, consumer groups, and businesspeople. Such regulatory humility will allow markets to serve the greatest good, while still maintaining a federal role in protecting the rights of consumers and a level playing field for competitors.

Regulation Killed the Video Star: Toward a Freer Market in Broadcast Television

Ryan Radia*

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* J.D., The George Washington University Law School, 2015; Associate Director of Technology Studies, Competitive Enterprise Institute, Washington, D.C. The author thanks Sam Kazman, Geoff Manne, Brent Skorup, Fred Campbell, and Adam Thierer for their helpful comments and suggestions.

I. INTRODUCTION

On August 2, 2013, over three million American subscribers to Time Warner Cable lost access to CBS due to a business dispute between CBS Corporation and Time Warner Cable (TWC).[1] This disruption, also referred to as a "blackout," persisted until the companies reached a deal on September 2, 2013—just three days before the National Football League kicked off its 2013 season.[2] During the month-long blackout, TWC subscribers in eight major markets, including New York City and Los Angeles, could not receive their local CBS affiliate's signal through their cable provider.[3] Frustrated by the standoff, thousands of TWC subscribers flocked to Verizon's competing television service, FiOS.[4] TWC lost 306,000 net subscribers during the third quarter of 2013, marking a record quarterly loss for the company.[5]

This blackout is just one of several recent high-profile disputes in which a cable or satellite provider failed to reach an agreement with a broadcaster about how much to pay to redistribute its signal.[6] From 2006 to 2014, these payments from television providers to broadcasters, known as "retransmission fees," increased from $215 million[7] to $4.9 billion[8]—or over twenty percent of broadcast television stations' aggregate revenue.[9] Since 2001, retransmission disputes have caused over 100 blackouts, including

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1. Roger Yu, *CBS, Time Warner Cable Reach Agreement, End Blackout*, USA TODAY, Sept. 3, 2013, *available at* http://www.usatoday.com/story/money/business/2013/09/02/cbs-time-warner-cable-agreement/2755953/.

2. Alex Sherman, *CBS Deal Ends Time Warner Cable Blackout Ahead of NFL*, BLOOMBERG (Sept. 3, 2013), http://www.bloomberg.com/news/2013-09-02/cbs-reaches-accord-to-end-blackout-on-time-warner-cable.html.

3. *Id.*

4. Don Kaplan, *Verizon FiOS Gains Customers as Standoff Continues Between Time Warner Cable and CBS*, N.Y. DAILY NEWS, Aug. 15, 2013, *available at* http://www.nydailynews.com/entertainment/verizon-fios-gains-time-warner-cable-cbs-blackout-continues-article-1.1426909.

5. Jacob Kastrenakes, *Time Warner Cable Lost Record 306,000 Subscribers Amid CBS Blackout*, THE VERGE (Oct. 31, 2013), http://www.theverge.com/2013/10/31/5050698/time-warner-cable-q3-2013-financial-earnings-cbs-blackout-subscriber-loss.

6. *See infra* notes 10–15 and accompanying discussion.

7. *The Satellite Television Law: Repeal, Reauthorize or Revise?: Hearing Before the Subcomm. on Commc'ns. & Tech. of the H. Comm. on Energy & Commerce*, 113th Cong. 10 (2013) (statement of Amy Tykeson, President & Chief Executive Officer, BendBroadband), *available at* http://docs.house.gov/meetings/IF/IF16/20130612/100960/HHRG-113-IF16-Wstate-TykesonA-20130612.pdf.

8. David Lieberman, *Retransmission Consent Payments To Hit $9.3B In 2020: SNL Kagan*, DEADLINE (Oct. 27, 2014, 11:22 AM), http://deadline.com/2014/10/tv-station-retransmission-consent-payments-862748/.

9. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Sixteenth Report*, FCC 15-41, 30 FCC Rcd 3253, 3341, para. 196 (2015) [hereinafter *Sixteenth Video Competition Report*], *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-41A1_Rcd.pdf.

seventy-three between 2010 and 2013.[10] Given that the typical American adult spends thirty-eight hours each week watching live and time-shifted television,[11] viewers consider the loss of a popular channel quite disruptive.[12]

Americans' frustration with blackouts has drawn considerable attention in Washington, D.C. In recent years, congressional committees have held numerous hearings on television blackouts and surrounding issues.[13] Several members of Congress have introduced bills aimed at alleviating or preventing blackouts.[14] The Federal Communications Commission (FCC), the nation's primary telecommunications regulator, is also following the issue.[15] In August 2013, for instance, then-FCC Acting Chairwoman Mignon Clyburn publicly expressed her disappointment with the TWC-CBS retransmission dispute.[16]

Lawmakers and regulators are focused on the statutory and regulatory provisions that govern how pay-television providers[17] retransmit broadcast television signals to their subscribers.[18] In Washington, the battle lines are drawn: on one side are broadcast networks and their affiliate stations; on the other side are multichannel video programming distributors (MVPDs)—an umbrella term that encompasses distributors of video programming through cable, fiber-optic lines, and direct broadcast satellite (DBS) companies.[19]

Most broadcasters affiliated with a major network are largely content with the existing rules,[20] under which a commercial broadcaster may, if it so elects, demand payment from an MVPD in consideration for permission to

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10. Steven C. Salop et al., *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations* 2 (June 3, 2010), *available at* http://97.74.209.146/downloads/broadcaster_brinkmanship.pdf; *see also* American Television Alliance, Broadcaster Retrans Blackouts 2010-2015 (Jan. 7, 2015), http://www.americantelevisionalliance.org/wp-content/uploads/2013/05/ATVA-Comprehensive-List-of-Broadcaster-Retrans-Blackouts-2010-20155.docx.

11. NIELSEN, THE TOTAL AUDIENCE REPORT - Q4 2014 10 (2015), *available at* http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2015-reports/total-audience-report-q4-2014.pdf.

12. *Cf.* Kaplan, *supra* note 4 (noting TWC subscribers losses due to CBS blackout).

13. *See, e.g.*, *The State of Video: Hearing Before the Subcomm. on Comm'cns, Tech., & the Internet of the S. Comm. on Commerce, Science & Transportation*, 113th Cong. (2013).

14. *See, e.g.*, Video CHOICE Act of 2013, H.R. 3719, 113th Cong. (2013), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113hr3719ih/xml/BILLS-113hr3719ih.xml.

15. Katy Bachman, *FCC Acting Chairwoman Threatens to Step Into CBS, Time Warner Cable Standoff*, ADWEEK (Aug. 9, 2013, 3:34 PM), http://www.adweek.com/news/television/fcc-acting-chairwoman-threatens-step-cbs-time-warner-cable-standoff-151797.

16. *Id.*

17. Pay-television providers deliver their subscribers video programming over cable, direct broadcast satellite, fiber, or phone lines. *See Sixteenth Video Competition Report*, *supra* note 9, at 3259, para. 16; *see also* discussion *infra* Part II.C.

18. *See infra* Parts II.B–C.

19. 47 U.S.C. § 522(13) (2012); *see also* 47 C.F.R. § 76.64(d) (2014).

20. *See* John Eggerton, *Nets, Stations Push Back on Retrans Via TVFreedom.org*, MULTICHANNEL NEWS (Feb. 3, 2014, 5:09 PM), http://www.multichannel.com/news/fcc/nets-stations-push-back-retrans-tvfreedomorg/295130.

retransmit the station's signal.[21] If, after negotiating in good faith,[22] a broadcaster and an MVPD cannot agree on retransmission terms, the MVPD must cease retransmitting that station's signal—lest it incur a potentially severe FCC fine.[23] Under this system, blackouts happen on occasion, but network-affiliated broadcasters have largely succeeded in negotiating retransmission agreements with MVPDs—although retransmission fees have risen steadily in recent years.[24]

Many MVPDs, however, argue that the existing regime is skewed in favor of broadcasters, who supposedly overcharge pay-television providers—and, indirectly, their subscribers—for broadcast programming.[25] MVPDs claim that the increasing frequency of television blackouts and mounting retransmission fees are the side effects of an outdated regulatory framework that does not reflect today's hyper-competitive market for video distribution.[26] Moreover, MVPDs contend that broadcasters are insulated from competitive forces by unfair FCC rules.[27] These allegedly unfair rules include the protection of the exclusivity of syndicated programming[28] and the ban on MVPDs "duplicating" a network affiliate's signal—that is, offering their subscribers the signal of a network-affiliated broadcaster based in a distant community.[29] Many MVPDs also criticize the FCC's rule[30] that governs broadcasters' and MVPDs' statutory duty[31] to negotiate retransmission consent agreements with one another in "good faith."[32]

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21. 47 U.S.C. § 325(b)(1) (2012 & Supp. 2014); 47 C.F.R. § 76.64(a)–(b) (2014); *but see* 47 U.S.C. § 325(b)(2) (2012 & Supp. 2014) (listing five limited exceptions to retransmission consent requirement).

22. 47 C.F.R. § 76.65 (2014) (broadcast stations and MVPDs must negotiate "in good faith the terms and conditions of retransmission consent").

23. *See, e.g.*, TV Max, Inc. and Broadband Ventures Six, LLC d/b/a Wavevision et al., *Notice of Apparent Liability for Forfeiture and Order*, FCC 13–86, 28 FCC Rcd 9470, para. 1 (2013), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0625/FCC-13-86A1.pdf.

24. *Sixteenth Video Competition Report*, *supra* note 9, at 3345, para. 203.

25. *See, e.g.*, AMERICAN TELEVISION ALLIANCE, *About the Issue*, http://www.americantelevisionalliance.org/about-the-issue/ (last visited Jan. 13, 2013) (arguing that consumers are "used as hostages by broadcasters to obtain higher fees" in retransmission disputes).

26. *See, e.g.*, TIME WARNER CABLE, *Conversations: What Others Are Saying*, http://twcconversations.com/what-others-are-saying/ (last visited Jan. 13, 2014) (arguing retransmission rules are outdated and harmful to consumers).

27. *Id.*

28. 47 C.F.R. §§ 76.101, .123 (2014).

29. 47 C.F.R. §§ 76.92, .122 (2014).

30. 47 C.F.R. § 76.65 (2014).

31. 47 U.S.C. § 325(b)(3)(C)(ii)–(iii) (2012 & Supp. 2014).

32. *See, e.g.*, Reply Comments of Mediacom Inc. at 2, Amendment of the Comm'n's Rules Related to Retransmission Consent, FCC 11–31, 26 FCC Rcd 2718 (rel. Mar. 3, 2011), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021689912. The FCC amended its retransmission consent rules in May 2014, Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 14-29, 29 FCC Rcd 3351 (2014), and again in February 2015,

As broadcasters and MVPDs wrangle over video regulation, Americans are increasingly turning to non-traditional video platforms, fueled by speedy broadband networks and powerful mobile devices.[33] According to some observers, overhauling the laws and regulations that underlie television broadcasting is the legislative equivalent of rearranging the gramophones on the Titanic.[34] Despite the rise of online video services such as Netflix and Hulu, however, conventional television—including broadcast and cable networks—remains Americans' primary video source, accounting for over ninety percent of U.S. adult consumers' daily video viewing in 2014.[35] As cable networks such as AMC, USA, TBS, and FX have matured, the supremacy of broadcast television has faltered.[36] Nevertheless, most top-rated shows continue to air on broadcast networks, which collectively account for almost one-third of all prime time[37] television hours viewed.[38] Thus, lawmakers' renewed interest in broadcasting is justified, for the industry's future—and the broader video marketplace—depends in large part on the regime that governs the relationships between broadcasters and pay-television providers.[39]

Should lawmakers and regulators listen to MVPDs and act to fix today's supposedly broken retransmission regime? Or should officials instead follow broadcasters' advice and leave existing rules alone, allowing the video marketplace to continue on its current path? This Note evaluates these competing policy prescriptions and their implications for video consumers, concluding that neither MVPDs nor broadcasters have offered a compelling case for their preferred approach to governing the retransmission of broadcast television. Instead, this Note argues that Congress should amend the Communications Act to strip the FCC of the authority to regulate negotiations between MVPDs and broadcasters. In lieu of FCC oversight, this Note proposed that Congress amend the Copyright Act to confer on

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Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014, *Order*, FCC 15-21, 30 FCC Rcd 2380 (2015).

33. *See generally* The Video Marketplace & the Internet Transformation: Remarks of Comm'r Ajit Pai, FCC Media Institute Luncheon (2013), *available at* http://www.fcc.gov/document/commissioner-pai-remarks-media-institute-luncheon.

34. *See, e.g.*, Thomas W. Hazlett, *If a TV Station Broadcasts…: An Essay on 21st Century Video Distribution* at 66 (2011), *available at* http://www.americantelevisionalliance.org/wp-content/uploads/2011/05/TV-Future-TWH-5-19-111.pdf (discussing upheaval and creative destruction in video market).

35. *See* NIELSEN, THE TOTAL AUDIENCE REPORT, *supra* note 11, at 11 (live and time-shifted television together account for over 38 hours of U.S. adults' weekly video viewing).

36. *See* Nicholas W. Allard & Theresa Lauerhass, *Debalkanize the Telecommunications Marketplace*, 28 CAL. W. L. REV. 231, 233 (1992) (chronicling the historical dominance of broadcast television).

37. Prime time refers to the most widely viewed—and most commercially valuable—time of day for television networks. *Sixteenth Video Competition Report*, *supra* note 9, at 3332, para. 175 (prime time encompasses 8:00 PM – 11:00 PM, Eastern and Pacific Time; 7:00 PM – 10:00 PM, Central and Mountain Time).

38. *Id.* at 3340, para. 194.

39. *See infra* Part IV.

broadcast programming the same intellectual property rights that inhere in nearly all other types of original creative expression.

Part II of this Note chronicles the history of broadcaster-MVPD interactions, and describes how federal law has influenced this relationship. Part III critically evaluates both sets of incumbent firms' arguments about how to best regulate the video marketplace. Finally, Part IV harnesses the economic principles underlying modern competition and consumer protection law to identify several welfare-enhancing reforms to the regime that governs how MVPDs retransmit broadcast television signals.

In particular, this Note examines the deregulatory approach embodied in the Next Generation Television Marketplace Act (NGTMA), a bill introduced in Congress in 2011 and again in 2013.[40] NGTMA would overhaul the rules governing broadcast television, eliminating many of the ways in which broadcasters—and their transactions with other economic actors—are treated differently from most other creators and distributors of video programming.[41] Notably, NGTMA would repeal a controversial provision of the Communications Act[42] that requires an MVPD to secure permission—usually through a bilateral contract[43]—from a broadcaster whose television signal the MVPD wishes to retransmit to its subscribers.[44] At the same time, NGTMA would eliminate a longstanding exception to the Copyright Act that allows MVPDs to publicly perform broadcast television by paying a government-set fee—regardless of whether the copyright holders of these works consented.[45]

If so revised, U.S. copyright law would for the first time recognize full intellectual property rights in audiovisual programs aired on broadcast television.[46] Whereas broadcaster-MVPD negotiations are currently subject to various provisions in the Communications Act—as administered by the FCC—this bargaining would instead occur under the familiar Copyright Act were NGTMA enacted. Swapping out the legal regime that governs broadcaster-MVPD negotiations may seem insignificant or unnecessary. However, this Note concludes that video reform resembling NGTMA's

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40. Next Generation Television Marketplace Act, H.R. 3720, 113th Cong. (2013) [hereinafter NGTMA], *available at* http://beta.congress.gov/113/bills/hr3720/BILLS-113hr3720ih.pdf. The bill was previously introduced in 2011, *see* S. 2008 and H.R. 3675, 112th Cong. (2011).

41. *Satellite Television Laws in Title 17: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on Energy & Commerce*, 113th Cong. 3 (2013) (statement of Preston Padden, former President, ABC Television Network), *available at* http://judiciary.house.gov/_files/hearings/113th/09102013/Padden%20testimony%20091013.pdf.

42. 47 U.S.C. § 325(b) (2012 & Supp. 2014).

43. *See infra* Part II.C.

44. NGTMA, *supra* note 40, § 2(b) (repealing 47 U.S.C. § 325(b)).

45. *Id.* § 3(a)(1) (repealing 17 U.S.C. §§ 119, 122, 510); *id.* § 3(b) (repealing 17 U.S.C. § 111(c)–(e)).

46. *Cf.* Teleprompter Corp. v. CBS, Inc., 415 U.S. 394, 396 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 393 (1968) (holding that MVPD retransmissions of broadcast television programs did not implicate copyright protection).

approach would benefit consumers by fostering the successful market-oriented approach to television regulation that public policy has gravitated toward in recent years.[47]

II. BACKGROUND

A. The Birth of Cable Television

From the 1930s through the 1950s, watching television meant tuning in to a radio signal broadcasted over the air on the electromagnetic spectrum.[48] In each major U.S. metropolitan area, or "television market,"[49] a handful of stations typically broadcasted video programming over frequencies licensed to them by the FCC.[50] Many of these broadcasters were owned and operated by a national television network, such as the National Broadcasting Company (NBC) or the American Broadcasting Company (ABC),[51] while other stations were independently owned. Some of these independent stations elected to affiliate with a national network.[52] Under these affiliation agreements, the local station would typically broadcast the network's national prime time television programming for several hours daily, airing both local ads (sold by the station itself) and national ads (sold by the network) to the mutual benefit of both parties.[53]

Yet many American homes were too far from the nearest transmitter to receive a reliable broadcast television signal; other homes faced physical obstacles such as mountains or tall buildings.[54] Recognizing a commercial opportunity, in the late 1940s, entrepreneurs began to deploy antennas that received broadcast signals and retransmitted them over copper cables to nearby homes for a fee.[55] And so cable television was born. By the mid-

47. *See infra* Parts II.B–D.

48. *See* James A. Bello, Turner Broadcasting System, Inc. v. FCC: *The Supreme Court Positions Cable Television on the First Amendment Spectrum*, 30 NEW ENG. L. REV. 695, 697–98 (1996).

49. *Id.*; *see also* James Miller & James E. Prieger, *The Broadcasters' Transition Date Roulette: Strategic Aspects of the DTV Transition*, 9 J. TELECOMM. & HIGH TECH. L. 437, 499 n.163 (2011) (U.S. broadcast media markets are substantially similar to the Census Bureau's standard metropolitan statistical areas).

50. *See* Stephen R. Barnett, *Cable Television and Media Concentration, Part I: Control of Cable Systems by Local Broadcasters*, 22 STAN. L. REV. 221, 231–32 (1970).

51. Roni Mueller & Gretchen Wettig, *The "New" Series Co-Production Deal in Network Series Television*, 31 SW. U. L. REV. 627, 629 (2002)

52. *See* Stuart Benjamin, *Evaluating the Federal Communications Commission's National Television Ownership Cap: What's Bad for Broadcasting Is Good for the Country*, 46 WM. & MARY L. REV. 439, 465 (2004).

53. *Id.*

54. *See* United States v. Southwestern Cable Co., 392 U.S. 157, 162 (1968).

55. *Id.*

1960s, over 1,000 commercial cable providers were operating across the country.[56]

Over time, consumers flocked to cable, and many of the small upstarts of the 1950s and 1960s grew into profitable enterprises—even though cable companies generally did not compensate the broadcasters whose signals they retransmitted.[57] During cable's formative years, broadcasters generally tolerated this state of affairs, as cable systems often expanded the audience capable of receiving a local station's signal.[58] But broadcasters began to sour on cable in 1960s, when some cable systems started carrying so-called "distant signals"—that is, transmitting a signal originating in a remote market to local subscribers who could not otherwise access the signal.[59] By enabling residents of one community to watch national network programming originally transmitted by a station in a remote market, network-affiliated broadcasters feared this "distant signal retransmission" would cause some viewers to tune into faraway affiliates that aired much of the same programming.[60] Broadcasters feared this out-of-market competition would fragment local audiences—and, in turn, undermine advertising revenues, which are based largely on audience measurements.[61]

Due in part to these concerns, in the early 1960s, the FCC began regulating cable systems that used wireless "microwave facilities" to retransmit broadcast signals long distances for redistribution in remote cities.[62] In 1966, the FCC extended its rules to encompass *all* cable systems, reasoning that these companies fell within the agency's statutory jurisdiction to regulate entities "engaged in interstate communication by wire to which

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56. *Id.* at 162–63. Notably, in 1970, the FCC promulgated rules that "severely restricted telephone company entry into the cable television market." Eric T. Werner, *Something's Gotta Give: Antitrust Consequences of Telephone Companies' Entry into Cable Television*, 43 FED. COMM. L.J. 215, 217 (1991) (citing 47 C.F.R. §§ 63.54–.58 (1990)).

57. Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision of the 1992 Cable Act*, 49 FED. COMM. L.J. 99, 102 (1996) (noting that "cable operators had no obligation to pay or negotiate with anyone for the right to retransmit broadcast signals" prior to 1976).

58. *Id.* at 104.

59. *Cf.* In re Carter Mountain Transmission Corp., 32 FCC 459, 465, para. 17 (1962), *aff'd sub nom.* Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir. 1963) (cable system unsuccessfully petitioned FCC for permission install radio transmitter to import distant signals).

60. *See, e.g.*, Amendment of Parts 21, 74 (Proposed Subpart j), & 91 to Adopt Rules & Regulations Relating to the Distribution of Television Broadcasting Signals by Cmty. Antenna Television Sys., *Notice of Inquiry and Notice of Proposed Rulemaking*, 1 FCC 2d 453, 461 para. 21 (1965).

61. Benjamin, *sup*ra note 52, at 454.

62. *See* Amendment of Subpart l, Part 11, to Adopt Rules & Regs. to Govern the Grant of Authorizations in the Business Radio Serv. for Microwave Stations to Relay Television Signals to Cmty. Antenna Sys., *First Report and Order*, 38 FCC 683, 715–30, paras. 80–124 (1965).

the provisions of the Communications Act are applicable."[63] Among the obligations the FCC's 1966 rules imposed on cable systems was a rule known as "network non-duplication," which generally barred cable systems from importing distant signals that duplicated programming carried by local stations.[64] Another rule, known as "must-carry," required cable systems to retransmit local television signals to subscribers residing in the same market upon a broadcaster's request, subject to the cable system's channel capacity.[65]

Soon thereafter, Midwest Television, which owned a CBS-affiliated station in San Diego, California, complained to the FCC that several cable companies were retransmitting certain Los Angeles-based signals to San Diego households, in violation of FCC rules.[66] When the FCC ordered the cable companies to stop distributing Los Angeles signals outside that market, the cable companies sued the agency, arguing that Congress had not authorized the FCC to regulate cable systems.[67] In 1968, the Supreme Court sided with the FCC, upholding the agency's jurisdiction over cable systems in *United States v. Southwestern Cable Co.*[68] Noting that the FCC "reasonably found that the successful performance of [its] duties demands prompt and efficacious regulation of community antenna television systems," the Court affirmed the agency's regulation of cable systems as "reasonably ancillary" to its statutory responsibility to regulate television broadcasting.[69]

During the early 1970s, as several states began to regulate various aspects of cable television, the FCC revisited its cable regulations.[70] In 1972, the FCC adopted several new rules, one of which authorized local franchise authorities to regulate how much cable providers charge for basic services.[71] But neither the FCC nor local governments required cable systems to

63. 1 FCC 2d at 453, para. 29; *see also* Amendment of Parts 21, 74, and 91 to Adopt Rules and Regs. Relating to the Distribution of TV Broad. Signals by Cmty. Antenna TV Sys., *Second Report and Order*, 2 FCC 2d 725, 733–34, para. 19 (1966).

64. 2 FCC 2d at 746, para. 49.

65. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1440 (D.C. Cir. 1985).

66. *See* Petition of Midwest Television, Inc., San Diego, Cal., for Immediate Temp. & for Permanent Relief Against Extensions of Serv. of CATV Sys. Carrying Signals of Los Angeles Stations into the San Diego Area, *Memorandum Opinion and Order*, FCC 66–683, 4 FCC 2d 612 (1966).

67. United States v. Southwestern Cable Co., 392 U.S. 157, 159–60 (1968).

68. *Id.* at 181; *see also* 47 U.S.C. §§ 151–152 (2012).

69. *Southwestern Cable Co.*, 392 U.S. at 177–78.

70. *See generally* Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Government Demarcation and Roles*, 44 FED. COMM. L.J. 1, 23–24 (1991) (chronicling the rise of state and local regulation of cable).

71. The FCC defined basic services as "services regularly furnished to all subscribers." Amendment of Part 74, Subpart k, of the Comm'n's Rules & Regs. Relative to Cmty. Antenna Television Sys., *Cable Television Report and Order*, 36 FCC 2d 141, 209, para. 183 (1972); *see also* Copple, *supra* note 70, at 31.

compensate broadcast stations in consideration for retransmitting their signals for private commercial gain.[72]

B. Statutory Copyright License for Broadcast Signal Retransmission

To some major media stakeholders, the FCC's rules did not go far enough to protect broadcasters.[73] In the 1960s, two companies—United Artists Television, a major film studio and owner of copyrights in several popular motion pictures aired regularly on broadcast television,[74] and CBS, a major broadcaster and owner of copyrights in several hit television series[75]—separately sued two cable system operators: Fortnightly Corporation and Teleprompter Corporation, respectively.[76] In both suits, the plaintiffs alleged the cable system defendants had infringed their copyrights by publicly performing their audiovisual works without permission.[77] In both suits, the cable system defendants prevailed.

First, in 1968, the Supreme Court resolved United Artists' lawsuit in *Fortnightly Corp. v. United Artists Television*, holding that a cable system does not infringe on a copyright holder's public performance right by retransmitting a broadcast signal to an audience residing in that station's local coverage area.[78] Then, in 1974, the Court used similar reasoning in *Teleprompter Corp. v. CBS*, holding that a cable system's retransmission of distant signals was also exempt from copyright infringement liability.[79] Merely installing an antenna that receives a broadcast signal, the Court reasoned, and then connecting that antenna to a person's home—whether one mile or one thousand from the signal's point of origin—did not constitute a "performance" by the cable system operator, no matter how many households received the signal.[80] Examining the copyright provisions then in force, the Court concluded that merely retransmitting a copyrighted work embodied in a public broadcast was not a "performance" as contemplated by the Copyright Act.[81]

Two years later, Congress passed the most significant copyright law overhaul since 1909: the Copyright Act of 1976 (the "1976 Act").[82] With

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72. *See* 36 FCC 2d at 166–67, paras. 63–66 (declining to require cable systems to compensate broadcasters in light of pending legislative efforts to ensure the payment of copyright royalties for broadcast signal retransmission).

73. Lubinsky, *supra* note 57, at 110.

74. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 393 (1968).

75. Teleprompter Corp. v. CBS, Inc., 415 U.S. 394, 396 (1974).

76. *Id.* at 404; *Fortnightly*, 392 U.S. at 391.

77. *See* 17 U.S.C. § 106(5) (2012).

78. 392 U.S. at 390.

79. 415 U.S. at 394.

80. *Id.* at 409.

81. *See Fortnightly*, 392 U.S. at 398.

82. *See generally* Pub. L. No. 94–553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–810).

Fortnightly and *Teleprompter* fresh in lawmakers' minds, the 1976 Act altered the treatment of broadcast signal retransmission in two significant ways. First, Section 101 of the 1976 Act expressly defined the transmission of a performance of an audiovisual work to the public as an exclusive right held by the holder of the copyright in such audiovisual work, subject to certain exceptions and limitations.[83] Second, Section 111 established a compulsory statutory license for broadcast signals, whereby a cable system operator may retransmit a broadcast signal without permission from the broadcaster or the holder of copyright in the underlying audiovisual work.[84]

To obtain a Section 111 license, a cable system must submit to the Register of Copyrights[85] every six months a statement of account specifying which broadcast signals it retransmitted, how many subscribers received each signal, and where such subscribers resided.[86] The cable system must also remit to the Register of Copyrights a royalty payment determined by a complex formula based on, among other things, a cable system's gross receipts, the number of signals it retransmits to subscribers outside the signal's local service area, and the type of each signal it retransmits (independent, network-affiliated, etc.).[87] Importantly, a cable company that complies with these rules *is not required to secure* permission from the broadcaster or copyright owner of a television program—at least as far as copyright law is concerned.[88]

If a cable system only retransmits signals to subscribers located within each station's respective local service area, it owes a royalty fee[89] that ranges from $52 (for very small cable companies[90]) to 1.013 percent of a cable system's semi-annual gross receipts (for larger cable companies[91]). If, however, a cable system retransmits a signal to subscribers located outside the station's market, it owes additional royalties,[92] depending on how many "distant signal equivalents" the cable system retransmits.[93] Annually,

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83. *See* 17 U.S.C. § 101 (2012).

84. 17 U.S.C. § 111(c) (2012 & Supp. 2014).

85. The Register of Copyrights oversees the Copyright Office, a subdivision of the Library of Congress that administers several aspects of the Copyright Act, such as registration and statutory licensing. 17 U.S.C. § 701(a)–(b) (2012).

86. 17 U.S.C. § 111(d)(1)(A); 37 C.F.R. § 201.17 (2014).

87. 17 U.S.C. § 111(d)(1)(B)–(F).

88. Congress amended the Communications Act in 1992 to afford broadcasters certain property-like rights in their signals. These rights exist independently of the Copyright Act. *See generally infra* Part II.C.

89. 17 U.S.C. § 111(d)(1)(B) (payment of royalties above the minimum fee is owed only upon transmitting a signal beyond its "local service area").

90. Definition of Cable System, *Notice of Inquiry*, Copyright Ofc., Dkt. No. 2007–11, 72 Fed. Reg. 70,529, 70,533 (Dec. 12, 2007) (codified at 37 C.F.R. § 201).

91. *Id.*

92. *See generally* 17 U.S.C. § 111(d)(1)(B)–(F); 37 C.F.R. § 256.2 (2014).

93. Independent non-network stations each count as one distant signal equivalent, while network or noncommercial educational stations each count as one-quarter of a distant signal equivalent. 17 U.S.C. § 111(f)(5)(ii).

Copyright Royalty Judges[94] distribute these royalties among those copyright owners whose works were retransmitted under the statutory license.[95]

C. Cable Act of 1992: Congress Establishes Retransmission Consent

Following the enactment of the Copyright Act of 1976, cable systems continued to proliferate across the nation,[96] as Americans increasingly unhooked their television antennas and turned to cable systems for more reliable access to broadcast television programming.[97] Cable gained another major selling point in the 1970s with the emergence of so-called "basic cable networks," which only paid cable subscribers could access.[98] After MTV, CNN, and USA launched in the early 1980s,[99] basic cable uptake grew dramatically: by 1987, four in five U.S. households were wired for cable television, and about half of U.S. households subscribed to it.[100] In 2002, basic cable channels overtook the big four broadcast networks in combined prime time viewership.[101]

As cable continued to grow, however, lawmakers began to fear the dominance of large cable companies in many markets.[102] Reflecting these concerns, in 1992, Congress amended the Communications Act by enacting

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94. The 1976 Act originally provided for Section 111 royalties to be established by the Copyright Royalty Tribunal, an independent legislative branch entity. Pub. L. No. 94-553, § 801(b)(2), 90 Stat. 2541. In 1993, Congress replaced the Copyright Royalty Tribunal with Copyright Arbitration Royalty Panels. Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, § 2, 107 Stat. 2304. Most recently, in 2004, Congress replaced Copyright Arbitration Royalty Panels with Copyright Royalty Judges. Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, § 3, 118 Stat. 2341.

95. *See* 17 U.S.C. § 111(d)(4); *see also Cable and Satellite Carrier Statutory License: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 1 (2004) (statement of Marybeth Peters, Register of Copyrights), *available at* http://www.copyright.gov/docs/regstat022404.html.

96. *See* Henry Geller, *The Copyright Controversy: Making Cable TV Pay?*, THE AMERICAN (June 7, 1981), *available at* http://www.aei.org/publication/the-copyright-controversy-making-cable-tv-pay/.

97. *See* H.R. REP. NO. 102–862, at 2, (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231; *see also* Reexamination of the Effective Competition Standard for the Reg. of Cable Television Basic Serv. Rates, *Further Notice of Proposed Rule Making*, FCC 90–412, 6 FCC Rcd 208, para. 23 (1990).

98. Amendment of Parts 73 & 76 of the Comm'n's Rules Relating to Program Exclusivity in the Cable & Broad. Indus., *Report and Order*, 3 FCC Rcd 5299, paras. 27–28 (1988).

99. *Id.* (popular cable networks CNN and USA "did not begin service until spring 1980," while MTV "did not begin until summer 1981").

100. 3 FCC Rcd at para. 26.

101. Allison Romano, *Cable Breaks 50-Share Mark in Prime*, BROADCASTING & CABLE, Sept. 7, 2002, *available at* http://www.broadcastingcable.com/news/news-articles/cable-breaks-50-share-mark-prime/93087 (noting that June 2002 marked "the first month cable has surpassed a 50 share in prime").

102. *See* H.R. REP. NO. 102-862, at 2 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231.

the Cable Television Consumer Protection and Competition Act ("the 1992 Cable Act"), overriding the veto of then-President George H.W. Bush in the only successful veto override during his term in office.[103] Although the 1992 Cable Act is perhaps best known for "re-regulating" the prices charged by cable carriers operating in markets without direct MVPD competition[104]—a reversal of a 1984 federal law[105] that largely proscribed such regulation[106]—the 1992 Cable Act also codified the FCC's longstanding must-carry rules[107] and established a new legal relationship between broadcasters and MVPDs known as "retransmission consent."[108]

Under this regime, which remains in force to this day, each broadcast station must decide every three years whether to elect retransmission consent or must-carry.[109] If a broadcaster elects must-carry, any cable system that serves subscribers in the station's local market must carry that station,[110] assuming the cable system has ample capacity to carry all must-carry signals.[111] Generally, a cable system may not accept payment from a must-carry station in exchange for carriage.[112]

If, however, a broadcaster elects retransmission consent, no MVPD may retransmit that broadcaster's signal without its "express authority."[113] Nearly all popular broadcast stations, including most network affiliates, have elected retransmission consent,[114] as it enables a broadcaster to receive compensation from MVPDs in exchange for permission to carry its signal—in addition to any royalties the broadcaster receives pursuant to the Copyright Act's statutory license.[115] Whether a station elects must-carry or

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103. Pub. L. No. 102-385, 106 Stat. 1460 (1992) [hereinafter Cable Act of 1992] (codified as amended at scattered sections 47 U.S.C.); *see also* THOMAS W. HAZLETT & MATTHEW L. SPITZER, PUBLIC POLICY TOWARD CABLE TELEVISION: THE ECONOMICS OF RATE CONTROLS 59 (1997).

104. Cable Act of 1992, *supra* note 103, § 3 (codified as amended at 47 U.S.C. § 623).

105. Cable Communications Act of 1984, Pub. L. No. 98-549, § 623, 98 Stat. 2779 (codified as amended at 47 U.S.C. § 543).

106. Congress revisited cable rate regulation yet again in the Telecommunications Act of 1996, which among other things ended rate regulation of all cable programming tiers except the basic tier. Pub. L. No. 104–104, 110 Stat. 56, § 301 (codified as amended at scattered sections 47 U.S.C.).

107. Cable Act of 1992, *supra* note 103, § 4 (codified at 47 U.S.C. § 534).

108. *Id.* § 6 (codified at 47 U.S.C. § 325).

109. 47 U.S.C. § 325(b)(3)(B) (2012 & Supp. 2014).

110. 47 U.S.C. § 534(b) (2012 & Supp. 2014).

111. If a cable operator has limited channel capacity, it may be fully or partially exempt from the must-carry rule. 47 U.S.C. § 534(b)(1)–(2).

112. 47 U.S.C. § 534(b)(10).

113. 47 U.S.C. § 325(b)(1)(A).

114. Lubinsky, *supra* note 57, at 99; see also Charles B. Goldfarb, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, in PROGRAMMER-DISTRIBUTOR NEGOTIATIONS 23, 25 (2008).

115. *See* discussion *supra*, Part II.B.

retransmission consent,[116] any MVPD carrying that station's signal must retransmit it to every subscriber without modification.[117]

Importantly, the 1992 Cable Act left untouched the Copyright Act of 1976.[118] Therefore, a cable company that wishes to retransmit a broadcast television signal must not only abide by the statutory licensing terms in Section 111 of the Copyright Act,[119] but it must also abide by the Cable Act's retransmission consent provisions.[120] If a cable company retransmits a broadcast signal without complying with Section 111, it is liable for copyright infringement.[121] And if a cable company retransmits a non-must-carry signal without the station's express authority, it is liable for a monetary penalty assessed by the FCC.[122]

In the decade following the 1992 Cable Act's enactment, MVPDs generally did not pay broadcasters for retransmission consent.[123] But beginning in the early 2000s, some broadcasters began to insist that MVPDs pay them so-called "retransmission fees." These fees grew over time, totaling an estimated $4.9 billion in 2015.[124] By 2019, retransmission fees are projected to climb to $8.8 billion—or over one-third of total broadcast station revenue, if broadcast revenue continues to stagnate as it has for the past fourteen years.[125]

Opinions vary about why retransmission fees have increased so rapidly in recent years. Some MVPDs argue the rise is due to broadcasters "leverag[ing] their monopoly position, as each local station generally holds an exclusive geographic license to air and retransmit the programming of the major network with which the station is affiliated."[126] But broadcasters

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116. Implementation of the Cable Television Consumer Prot. & Competition Act of 1992, *Report and Order*, FCC 93–144, 8 FCC Rcd 2965, para. 32 (1993) (citing 47 U.S.C. § 534(b)(7)).

117. *Id.* at paras. 164–71 (citing 47 U.S.C. § 534(b)(3)).

118. *See generally* Cable Act of 1992, *supra* note 103; *see also* discussion *supra*, Part II.B.

119. 17 U.S.C. § 111 (2012 & Supp. 2014).

120. *Compare* 47 U.S.C. § 325(b) (2012 & Supp. 2014), *with* 17 U.S.C. § 111.

121. *See* 17 U.S.C. §§ 501–506 (2012) (affording copyright owners injunctive relief and money damages against copyright infringers).

122. *See* Comm'n's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, *Report and Order*, FCC 97–218, 12 FCC Rcd 17087, 17115 (1997), *recons. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b) (2014).

123. *See* Katerina Eva Matsa, Pew Research Cent., *Time Warner vs. CBS: The High Stakes of Their Fight Over Fees* (Aug. 21, 2013), http://www.pewresearch.org/fact-tank/2013/08/21/time-warner-vs-cbs-the-high-stakes-of-their-fight-over-fees/.

124. *See* Lieberman, *supra* note 8.

125. *Id.*; *see also Sixteenth Video Competition Report*, *supra* note 9, at 3341, para. 196 (between 2000 and 2013, broadcast station revenue declined from $26.3B to $24.2B).

126. *See, e.g.*, *The Satellite Television Law: Repeal, Reauthorize or Revise?: Hearing Before the Subcomm. on Commc'ns. & Tech. of the H. Comm. on Energy & Commerce*, 113th Cong. 10 (2013) (statement of Amy Tykeson, President & Chief Executive Officer, BendBroadband), *available at* http://docs.house.gov/meetings/IF/IF16/20130612/100960/HHRG-113-IF16-Wstate-TykesonA-20130612.pdf.

contend that retransmission fees are not the main reason for cable rate hikes, pointing out that cable rates rose forty percent from 1997 in 2002—even though retransmission fees did not exist at the time.[127]

Importantly, although broadcast stations negotiate retransmission terms with MVPDs and collect the resulting fees, stations do not necessarily keep all of this revenue for themselves.[128] To the contrary, national networks are increasingly demanding that their network-affiliated broadcasters pay for network programming—a reversal of the traditional network-affiliate relationship, whereby networks paid affiliates to distribute their programming.[129]

D. Similar Rules Govern Satellite Carriers

Importantly, the term MVPD encompasses video providers other than cable systems.[130] The nation's second and third largest MVPDs in terms of subscribers—DIRECTV and DISH Network—compete against one another and cable companies by distributing video programming via direct broadcast satellite.[131] Although the Copyright Act and the Communications Act treat cable and satellite MVPDs in a fairly similar manner, several unique statutory and regulatory requirements apply to satellite carriers.[132] Although many of these distinctions are beyond the scope of this Note, a few are worth discussing.

Like cable systems,[133] satellite carriers may retransmit broadcast television signals to their subscribers pursuant to a compulsory licensing regime.[134] Because direct broadcast satellite service did not emerge until the 1980s, Congress did not mention it in Section 111 of the Copyright Act.[135] Instead, Congress afforded satellite carriers a statutory copyright license to retransmit broadcast television in two separate bills, enacted in 1988 and 1999, respectively.[136] First, Congress gave satellite carriers a statutory license for *distant* signal retransmissions in the Satellite Home Viewer Act

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127. *See, e.g.*, Written Ex Parte of Nat'l Ass'n of Broads. at 2–7, Amendment of the Comm'n's Rules Related to Retransmission Consent, MB Dkt. Nos. 09–182, 10–71 (rel. Mar. 19, 2010) [hereinafter *NAB Ex Parte*], *available at* http://apps.fcc.gov/ecfs/document/view?id=7521095031.

128. *See Sixteenth Video Competition Report*, *supra* note 9, at 3346, para. 203.

129. *Id.*

130. Verizon FiOS and AT&T U-verse both meet the statutory definition of an MVPD and are thus eligible for the Section 111 statutory license, 17 U.S.C. § 111(f)(3), although only FiOS is registered as a cable system with the FCC. Implementation of Section 3 of the Cable Television Consumer Prot. & Competition Act of 1992, *Report on Cable Industry Prices*, 27 FCC Rcd 9326, 9327, para. 1 n.2 (2012).

131. *Id.* at para. 27.

132. *See, e.g.*, 47 U.S.C. § 335 (2012).

133. *See* discussion *supra* Part II.B.

134. *See* 17 U.S.C. §§ 119, 122 (2012 & Supp. 2014).

135. *See generally* 17 U.S.C. § 111 (2012).

136. Satellite Broad. and Commc'ns Ass'n v. FCC, 275 F.3d 337, 347–49 (4th Cir. 2001).

of 1988 (SHVA).[137] then, in 1999, Congress passed the Satellite Home Viewer Improvement Act of 1999 (SHVIA) to provide satellite carriers a statutory license for certain retransmissions of *local* signals.[138] Under SHVA, as amended, a satellite carrier may generally retransmit a television station's signal to subscribers who live in homes located too far away from the nearest television station to reliably receive its signal over a conventional antenna.[139] Like cable systems, each satellite carrier must submit a statement of account and a formula-based royalty fee to the Register of Copyrights,[140] which in turn distributes these royalties to copyright holders.[141]

Under SHVIA, as amended,[142] a satellite carrier may generally retransmit a television station's signal to subscribers who either reside in that station's local service area, or in any other community in which that station's signal is "significantly viewed," as determined by the FCC.[143] This statutory license, unlike that which governs distant signal retransmissions, does not require a satellite carrier to pay any royalty fee for most retransmissions.[144]

Satellite carriers that retransmit television signals also face several obligations under the Communications Act. The 1992 Cable Act's retransmission consent provision applies to all MVPDs, including satellite carriers.[145] In other words, like a cable company, a satellite carrier may not retransmit the signal of a broadcaster that has elected retransmission consent without first obtaining the station's authorization.[146] This is so even if the satellite carrier otherwise complies with the requirements to retransmit a television signal pursuant to a statutory license under the Copyright Act.[147]

Unlike cable systems, however, satellite carriers are not necessarily required to carry stations that elect must-carry.[148] Instead, a satellite carrier must carry a television station's signal to subscribers residing in that station's local market only if the station elects must-carry *and* the carrier already carries one or more local television stations in that market.[149] This

137. Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, § 202(2), 102 Stat. 3935 (1988) (codified as amended at 17 U.S.C. § 119).

138. Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, § 1002(a), 113 Stat. 1501 (1999) (codified as amended at 17 U.S.C. § 122).

139. 17 U.S.C. § 119(a)(2)(B).

140. *Id.* § 119(b)(1).

141. *Id.* § 119(b)(5).

142. Congress amended SHVA and SHVIA in the Satellite Home Viewer Extension and Reauthorization Act of 2004. Pub. L. No. 108-447, tit. IX, 118 Stat. 2089 (2004) (codified as amended at scattered sections, 17 and 47 U.S.C.). Congress extended both statutory licenses in the Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111–151, 124 Stat. 1027 (2010) (codified as amended at scattered sections, 17 and 47 U.S.C.).

143. 17 U.S.C. § 122(a)(1)–(2) (2012).

144. *Id.* § 122(c).

145. 47 U.S.C. § 325(b) (2012 & Supp. 2014).

146. *See* discussion *supra* Part II.C.

147. *See* 17 U.S.C. §§ 119, 122 (2012 & Supp. 2014).

148. *See* 47 U.S.C. § 534 (2012 & Supp. 2014).

149. 47 U.S.C. § 338 (2012 & Supp. 2014).

requirement, colloquially known as "carry one, carry all,"[150] reflects the limited channel capacity of satellite carriers relative to their cable competitors.[151] Satellite carriers are also subject to network non-duplication and syndicated program exclusivity rules that are substantially similar to those governing cable systems.[152]

III. MVPDS AND BROADCASTERS GO HEAD-TO-HEAD IN WASHINGTON

In the late 2000s, as retransmission fees swelled, several major MVPDs and allied organizations launched a major offensive in Washington, D.C., aimed at persuading lawmakers and regulators to revisit the rules governing broadcast television signal retransmission. In 2010, critics of the existing retransmission consent framework launched the American Television Alliance (ATVA), a coalition of companies and nonprofit groups that purports to "give consumers a voice and ask lawmakers to protect consumers by reforming outdated rules that do not reflect today's marketplace."[153] Broadcast networks and affiliated stations, represented by the National Association of Broadcasters (NAB), countered this offensive in 2013 by launching their own campaign to defend retransmission consent: TVfreedom.org.[154]

In recent years, groups and individuals on both sides of this debate have advanced a variety of arguments through opinion essays, fact sheets, and position papers.[155] As is often the case with Washington policy disputes, the reality of retransmission consent is more nuanced than either set of self-interested companies would have consumers, lawmakers, and regulators believe. In this Part, this Note will assess the case for and against today's retransmission regime.

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150. *See, e.g.*, Kim Dixon, *U.S. Lawmaker Wants Satellite Companies to Carry Local TV*, REUTERS (Feb. 10, 2009), http://www.reuters.com/article/2009/02/10/us-satellites-congress-idUSTRE5196V720090210 ("Satellite TV companies operate under a 'carry one, carry all' requirement that if they carry even one local station in a market, they must carry all local stations in that market.").

151. Satellite Broad. and Commc'ns Ass'n v. FCC, 275 F.3d 337, 347 (4th Cir. 2001).

152. *See* 47 C.F.R. §§ 76.122–.123 (2014).

153. *See* AMERICAN TELEVISION ALLIANCE, *About the Issue*, http://www.americantelevisionalliance.org/about-the-issue/ (last visited Jan. 20, 2014).

154. John Eggerton, *Nets, Stations Push Back on Retrans Via TVFreedom.org*, MULTICHANNEL NEWS (Feb. 3, 2014, 5:09 PM), http://www.multichannel.com/news/fcc/nets-stations-push-back-retrans-tvfreedomorg/295130.

155. *Compare* AMERICAN TELEVISION ALLIANCE, *Media Center*, http://www.americantelevisionalliance.org/media-center/ (last visited Jan. 20, 2014) (supporting reform of retransmission consent), *with* NATIONAL ASSOCIATION OF BROADCASTERS, *Protect TV Viewers and Allow Broadcasters to Continue Negotiating in the Free Market* http://www.nab.org/advocacy/issue.asp?id=1891 (last visited Jan. 20, 2014) (supporting current retransmission consent rules).

A. Mandatory Carriage Requirement

According to many MVPDs and several market-oriented economists, the must-carry requirement that MVPDs carry broadcast stations that elect mandatory carriage gives broadcasters an unfair advantage. The must-carry rule has been called a "'heads we win, tails you lose' proposition for the broadcast industry," as it effectively gives smaller broadcasters whose programming MVPDs are unwilling to pay to retransmit a free pathway to consumers' homes.[156] "It is difficult to imagine a more one-sided arrangement," argues Stanford University economist Bruce Owen.[157]

Persuasive as these criticisms of must-carry may be, they tell us little about whether retransmission fees are unreasonably high due to the disparate regulatory treatment of broadcasters and MVPDs. This is because the availability of must-carry rarely, if ever, affects the outcome of retransmission consent negotiations. Recall that a television station must choose between retransmission consent and must-carry once—and only once—every three years.[158] Once a station elects retransmission consent, it is no longer entitled to must-carry for three years, thereby losing the "threat" of must-carry as a bargaining chip in the negotiations. Conversely, if a station elects must-carry, it loses the right to demand payment from an MVPD.

As such, no rational network-affiliated broadcaster would elect must-carry if it believed it could persuade one or more MVPDs to carry its signal for a nontrivial fee.[159] This explains why network-affiliated broadcasters elect retransmission consent over must-carry by an overwhelming margin.[160] Must-carry does not provide a station with meaningful leverage in retransmission negotiations, because most MVPDs would be very pleased to receive the right to retransmit a popular station's signal for free. If Congress eliminated the must-carry requirement, there is little reason to believe that MVPDs and broadcasters of popular programming would reach noticeably different bargaining outcomes.

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156. *See* Thomas W. Hazlett, *If a TV Station Broadcasts…: An Essay on 21st Century Video Distribution*, at 15 (2011), *available at* http://www.americantelevisionalliance.org/wp-content/uploads/2013/07/TV_Future_TWH_4-20-11-X.pdf.

157. BRUCE M. OWEN, THE INTERNET CHALLENGE TO TELEVISION 114 (1999).

158. 47 U.S.C. § 325(b)(3)(B) (2012 & Supp. 2014).

159. *See, e.g.*, Fred Campbell, *Understanding the False Equivalency of the Free State Foundation's Views on Retransmission Consent and the Free Market*, TECH. LIBERATION FRONT (Dec. 20, 2013), http://techliberation.com/2013/12/20/understanding-the-false-equivalency-of-the-free-state-foundations-views-on-retransmission-consent-and-the-free-market/ (arguing that must-carry does not provide a broadcaster "any pricing advantage in negotiations with for-pay video distributors, whose goal is to carry the programming at the lowest possible cost").

160. Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1658 (2003); *see also* Amendment of the Comm'n's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, FCC 11–31, 26 FCC Rcd 2718, 2721, para. 5 (2011).

B. Network Non-Duplication and Syndication Exclusivity Rules

Critics of the current regime also contend that broadcasters enjoy an unfair advantage under the FCC's longstanding network non-duplication and syndicated program exclusivity rules.[161] Under the network non-duplication rule, if a local station has secured exclusive rights to air certain programs in a market, an MVPD may only retransmit those programs to subscribers residing in that market if the station has so authorized.[162] In other words, if the CBS affiliate in New York has exclusive rights to air CBS prime time programming in New York, Time Warner Cable cannot import a distant CBS affiliate's signal to its New York subscribers—even with consent from the distant station. Similarly, under the syndicated program exclusivity rules, an MVPD may not transmit a syndicated program in a market wherein a local television station holds exclusive rights to that program.[163]

These rules, critics argue, confer upon each network-affiliated broadcaster a de facto monopoly in its local market, as they bar an MVPD that is dissatisfied with a local broadcaster's retransmission consent terms from "importing" an out-of-market signal on more favorable terms.[164] Yet neither the network non-duplication nor the syndicated programming exclusivity rule *grants* any broadcaster an exclusive right to distribute programming in its local market.[165] Rather, these rules merely provide broadcasters a means of *enforcing* those exclusive rights they have previously secured through contract from a network or a vendor of syndicated programming.[166]

Even if these FCC rules were eliminated, a broadcaster would be entitled to judicial recourse for breach of contract against a network or vendor that abrogated its exclusive distribution agreement with that broadcaster.[167] Conversely, if an MVPD were to reach an agreement with a local affiliate to serve as the exclusive local distributor of that affiliate's programming, that MVPD would run afoul of an FCC rule that prohibits[168] exclusive retransmission agreements.[169]

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161. *See, e.g.*, Hazlett, *supra* note 156, at 57 (criticizing non-duplication and syndication exclusivity rules).

162. 47 C.F.R. §§ 76.92, .122 (2014).

163. 47 C.F.R. §§ 76.101, .123 (2014).

164. *See, e.g.*, Seth Cooper, *Understanding the Un-Free Market for Retrans Consent Is the First Step for Reforming It*, FREE ST. FOUND. BLOG (Dec. 17, 2013), http://freestatefoundation.blogspot.com/2013/12/understanding-un-free-market-for_17.html.

165. 47 C.F.R. §§ 76.92, .101, .122, .123 (2014).

166. Amendment of the Comm'n's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, FCC 11–31, 26 FCC Rcd 2718, 2740–41, para. 42 (2011) (network non-duplication and syndication exclusivity rules "do not create [exclusive] rights but rather provide a means for the parties to the exclusive contracts to enforce them through the Commission rather than through the courts").

167. *Id.*

168. 47 C.F.R. § 76.64(l) (2014).

169. Congress mandated that the FCC enforce this provision until a fixed date, currently codified as January 1, 2015. 47 U.S.C. § 325(b)(3)(C)(ii) (2012 & Supp. 2014).

When critics attack the network non-duplication and syndication exclusivity rules, therefore, they are ultimately criticizing the longstanding custom whereby national networks harness local affiliate stations to distribute network programming on an exclusive basis in each market.[170] These voluntary agreements,[171] however, are the result of private ordering—that is, private voluntary interactions among individual economic actors[172]—not the byproduct of FCC rules that unfairly advantage broadcasters at the expense of MVPDs. Similar contracts involving a product supplier designating exclusive geographic zones for each of its distributors are often referred to as "intrabrand vertical agreements."[173] These arrangements, which are commonplace in the nation's economy, have been the subject of extensive study in law and economics scholarship.[174] In general, these agreements tend to "produce significant economic benefits by facilitating the distribution of products to consumers."[175] There is no reason to believe the television marketplace works any differently.

C. How Broadcasters "Earn" Their Retransmission Consent Rights

Another common criticism of the current retransmission regime argues that it confers upon broadcasters a de facto property right in their signals, even though most broadcasters do relatively little to "earn" this right.[176]

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170. *See* Comments of Broad. Ass'ns at 24–25, Amendment of the Commn's Rules Related to Retransmission Consent, MB Dkt. No. 10–71 (rel. Mar. 19, 2010), *available at* http://www.nab.org/documents/advocacy/retransmissionConsent/RetransComments051810.pdf ("Advertisers on local broadcast stations expect and, indeed, pay for that exclusivity . . . .").

171. *Id.*

172. For a comprehensive discussion of private ordering, see F. Scott Kieff, *Coordination, Property, and Intellectual Property: An Unconventional Approach to Anticompetitive Effects and Downstream Access*, 56 EMORY L.J. 327, 437 (2006), and Oliver E. Williamson, *The Evolving Science of Organization*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 36, 47 (1993).

173. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 11.1, at 441 (1999) ("These restraints are described as 'intrabrand,' because they regulate a dealer's sales of a single brand without creating limitations on its sales of brands made by other suppliers."); *see also* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977) ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.").

174. *See* ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE 412 (2d ed. 2008).

175. Alan J. Meese, *Property Rights and Intrabrand Restraints*, 89 CORNELL L. REV. 553, 556 (2004) (citing ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 290–91, 435–39; HOVENKAMP, *supra* note 173, § 11.7a, at 485; RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 171–84 (2001); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 185–89 (1985).

176. *See, e.g.*, Bruce Owen, *The FCC and the Unfree Market for TV Program Rights*, 6 FREE ST. FOUND. PERSPECTIVES 3 (2011), *available at* http://www.freestatefoundation.org/images/The_FCC_and_the_Unfree_Market_for_TV_Program_Rights_030111.pdf.

Because network-affiliated broadcasters create very little of the programming they air, the argument goes, the "economic value of a retransmission right comes solely from the ability of its owner to extract cash . . . from cable systems and other [MVPDs]."[177] Bolstering this claim, the FCC noted in its first cable rulemaking following the 1992 Cable Act's enactment that "Congress created a new communications right in the broadcaster's signal, completely separate from the programming."[178] And, as discussed above, the retransmission consent right exists in addition to, not in lieu of, the exclusive rights in audiovisual works recognized by the Copyright Act.[179]

This critique of retransmission consent, though compelling at first glance, also misses the mark. To be sure, scholars have long understood the potentially serious downside of granting complex, idiosyncratic property rights to owners valuable assets—a principle known in the civil law as the "numerus clausus."[180] However, a broadcaster's property right in its signal is attenuated,[181] because unlike traditional property rights, it is not "good against the world."[182] Retransmission consent recognizes property rights solely in a readily identifiable asset class—broadcast signals—against a discrete set of firms—MVPDs—that are otherwise subject to pervasive regulation at all levels of government.[183] The resulting frustration and measurement costs are seemingly negligible.[184]

As for retransmission consent enabling broadcasters to enjoy an undeserved windfall, the existing regime gives broadcasters no assurance they will retain any of the compensation they receive from suppliers of television programming.[185] When an MVPD negotiates retransmission consent with a network affiliate, the MVPD values that broadcast signal not only for the affiliate's local programming, but far more importantly, for

177. *Id.*

178. Implementation of the Cable Television Consumer Prot. & Competition Act of 1992, *Report and Order*, FCC 93–144, 8 FCC Rcd 2965, 3004–05, para. 173 (1993).

179. *See* discussion *supra* Part II.B; *cf.* 17 U.S.C. §§ 111, 119, 122 (2012 & Supp. 2014).

180. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4 (2000) (explaining that in the civil law, "the principle that property rights must conform to certain standardized forms . . . . is called the numerus clausus—the number is closed.").

181. Retransmission consent is considered an "attenuated" right because its limits are operational, rather than temporal, as Prof. Shyamkrishna Balganesh observed in *The Social Costs of Property Rights in Broadcast (and Cable) Signals*, 22 BERKELEY TECH. L.J. 1303, 1347 (2007).

182. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 358 (2001).

183. *See* Copple, *supra* note 70, at 28–29; *see also* discussion *supra* Parts II.A–C.

184. *Cf.* Merrill & Smith, *Optimal Standardization*, *supra* note 180, at 24 (the numerus clausus seeks to avoid "bargaining difficulties" that create "large transaction-cost barriers to any exchange of the property, creating an undue restraint on alienation").

185. *See Sixteenth Video Competition Report*, *supra* note 9, at 3345–46, para. 203.

network programming—chiefly, prime time content.[186] Well aware of this dynamic, the networks are increasingly demanding a major cut of their affiliates' retransmission consent revenue.[187] To a significant extent, therefore, broadcast affiliates now act as middlemen who simply broker deals between MVPDs and television networks.

The FCC has observed this trend in recent years, noting in its Sixteenth Video Competition Report that "[n]etwork compensation to television broadcast stations has all but disappeared, and today, television stations instead commonly pay compensation to networks in order to air their programming."[188] This trend will likely persist, according to research firm SNL Kagan, which recently projected that local stations will soon pay nearly sixty percent of the retransmission fees they receive to their respective national networks.[189] As local affiliates garner higher retransmission fees, stations and their national network partners must decide how to divvy up the spoils. Each party's leverage in these negotiations will likely depend largely on its respective contributions to the economic value of the station's overall programming lineup.

IV. GOVERNING A PRO-COMPETITIVE, PRO-CONSUMER VIDEO MARKETPLACE

Although critics of the retransmission status quo have not shown that broadcasters benefit—or consumers suffer—to any substantial degree due to unfair or lopsided federal regulations, the existing framework is flawed in two important respects. First, existing law subjects broadcasters and MVPDs to needlessly cumbersome rules, imposing on both sets of firms an array of idiosyncratic rights and obligations lacking a policy justification in the modern video marketplace. Second, the laws now governing broadcast signal retransmission—which Congress has left largely untouched since the 1992 Cable Act and the 1976 Copyright Act[190]—give federal agencies too much discretion to regulate the television market. To fix these problems, lawmakers should end the disparate regulatory treatment of broadcasters and MVPDs. Instead, Congress should simplify television licensing by aligning it with the many other forms of media that have flourished under a voluntary, copyright-based licensing scheme. This reform would also advance

186. *See, e.g.*, Owen, *The FCC and the Unfree Market for TV Program Rights*, *supra* note 176, at 3.

187. *Sixteenth Video Competition Report*, *supra* note 9, at 3345–46, paras. 202–03.

188. *Id*. at 3345, para. 202.

189. *See* Tony Maglio, *U.S. TV Station Retransmission Fees Will Hit $9.3 Billion by 2020, SNL Kagan Projects*, THE WRAP (Oct. 27, 2014, 8:02 AM), http://www.thewrap.com/u-s-tv-station-retransmission-fees-will-hit-9-3-billion-by-2020-snl-kagan-projects/.

190. *See* discussion *supra* Parts II.B–C.

Congress' lofty goals in the Telecommunications Act of 1996,[191] which embraced consumer welfare as paramount in U.S. communications policy.[192]

A. The Case for a Level Playing Field in Video

The Copyright Act and the Communications Act reflect many assumptions regarding the nature of video competition that are no longer true.[193] For instance, when lawmakers wrote the Cable Act, they assumed cable companies would remain the only viable option for consumers to access multiple channels of video at home.[194] Fast forward twenty-three years, however, and cable companies face intense competition from MVPD rivals that did not even exist in 1992.[195] Cable companies' share of MVPD subscribers declined to 53.9% at the end of 2013, after declining steadily for several years.[196] Cable companies now vie for customers against satellite carriers such as DIRECTV and DISH—with a combined 33.9% share of MVPD subscribers[197]—and against AT&T U-verse and Verizon FiOS, which collectively account for 11.2% MVPD subscribers.[198] And while a typical U.S. household had access to just one MVPD in 1992, virtually all of them are now served by at least three MVPDs—and a fast-growing number of households can access four or more MVPDs.[199]

Competition has likewise intensified in the *creation* of video programming. Although the "Big Four" broadcast networks—ABC, CBS, NBC, and Fox—remain the four most-viewed channels in America, basic cable channels including ESPN, USA, and TBS attract many more combined viewers than major broadcast networks.[200] Basic cable also faces competitive threats as consumers flock to Internet-based video platforms. Perhaps most notably, the online video distributor Netflix, which counts forty-one million

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191. *See generally* Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

192. Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417, 451 (1999) ("Congress . . . emphasized in the Telecommunications Act that the improvement of consumer welfare was the new legislation's overarching purpose.").

193. *See* The Video Marketplace & the Internet Transformation, Remarks of Comm'r Ajit Pai, FCC Media Institute Luncheon (2013) [hereinafter Pai Remarks], *available at* http://www.fcc.gov/document/commissioner-pai-remarks-media-institute-luncheon (discussing vibrant, competitive nature of modern video marketplace).

194. *See* H.R. REP. NO. 102–862, at 2 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231.

195. *Sixteenth Video Competition Report*, *supra* note 9, at 3311–12, para. 133 (Table 7: MVPD Video Subcribers).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 3267, para. 31 (Table 2: Access to Multiple MVPDs).

200. *Id.* at 3340–41, para. 194 (ad-supported cable enjoys twice the audience share of broadcast network affiliates); *see also* Jethro Nededog, *Nickelodeon, USA Network Are 2013's Most-Watched Basic Cable Channels*, THE WRAP (Jan. 2, 2014, 4:35 PM), http://www.thewrap.com/2013-most-watched-basic-cable-rankings.

U.S. subscribers,[201] has developed dozens of original television series, including *House of Cards*, *Daredevil*, and *Orange Is the New Black*.[202] Overall, Netflix is expected to invest over $450 million on "original programming" in 2015, or nearly twice as much as the company spent in 2014.[203] Other non-traditional sources of original video programming include Hulu and Amazon Prime, both of which are growing rapidly in viewership and revenue.[204] Meanwhile, consumers can pay to watch nearly every network and cable show soon after it airs from "over-the-top" services such as Apple iTunes, Google Play, and Xbox Video.[205]

The myriad firms that compete to create, finance, and distribute video programming come in all shapes and sizes, relying on technologies ranging from 1940s-era analog television to HTML5 Internet video distribution.[206] Despite the hyper-competitive state of the modern video marketplace, however, broadcast television is still regulated under statutory provisions that largely predate the World Wide Web—let alone ubiquitous online streaming video.[207] From a consumer's perspective, watching network television over a cable MVPD's service is not too different from watching the same content on Hulu. Yet these two methods of watching broadcast television are governed very differently in both the Copyright and Communications Acts.[208] The following pages present an ambitious yet focused proposal to level the regulatory playing field with respect to broadcaster-MVPD negotiations.

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201. David Lieberman, *Netflix Shares Soar On Q1 Report Showing Strong Sub Growth And Stock Split Plans*, DEADLINE (Apr. 15, 2015, 1:19 PM), http://deadline.com/2015/04/netflix-q1-earnings-reed-hastings-1201410558/.

202. Emily Steel, *Netflix Is Betting Its Future on Exclusive Programming*, N.Y. TIMES, Apr. 20, 2015, at B1, *available at* http://www.nytimes.com/2015/04/20/business/media/netflix-is-betting-its-future-on-exclusive-programming.html.

203. Emily Steel, *Netflix, Amazon and Hulu No Longer Find Themselves Upstarts in Online Streaming*, N.Y. TIMES, Mar. 25, 2015, at B1, *available at* http://www.nytimes.com/2015/03/25/business/media/netflix-amazon-and-hulu-no-longer-find-themselves-tvs-upstarts.html?smprod=nytcore-iphone&smid=nytcore-iphone-share.

204. Brian Stelter, *Taking a Page from Netflix, Hulu Promotes Original Shows for 2014*, CNN MONEY (Jan. 8, 2014), http://money.cnn.com/2014/01/08/technology/hulu/.

205. *The Satellite Television Law: Repeal, Reauthorize or Revise?: Hearing Before the Subcomm. on Commc'ns. & Tech. of the H. Comm. on Energy & Commerce*, 113th Cong. 13–14 (2013) (statement of Geoffrey Manne, Executive Director, International Center for Law & Economics) [hereinafter Manne Statement], available at http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Manne-CT-Satellite-TV-Law-2013-6-12.pdf.

206. *Cf.* Pai Remarks, *supra* note 193.

207. Manne Statement, *supra* note 205, at 23–24.

208. *See, e.g.*, Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding, *Public Notice*, DA 12–507 (2012).

B. If Retransmission Consent Isn't Broken, Why Fix It?

If the current retransmission regime is generally well-functioning, as this Note has argued so far,[209] why overhaul it? After all, if Congress legislates, it might err—perhaps leaving the video market in worse shape than the status quo.[210] Echoing this sentiment, former FCC Commissioner Robert McDowell has urged lawmakers to "be patient," warning that "unintended consequences are sure to ensue" if "Washington tries to 'outsmart' the marketplace."[211] Yet this skepticism toward video reform, while understandable, underestimates the risk that the FCC will reinterpret its statutory authority to play a much more interventionist role in retransmission negotiations.

Since the 1992 Cable Act's passge, the FCC has largely taken a hands-off approach to retransmission consent negotiations to date, resisting numerous calls to intervene in carriage disputes.[212] Section 325(b)(3)(C)(iii) of the Communications Act tasks the FCC with issuing regulations that "prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in *good faith*."[213] Accordingly, the FCC's rules require broadcasters and MVPDs to designate representatives empowered to negotiate retransmission consent terms, meet with their counterparts at reasonable times and locations, offer more than one unilateral proposal, and respond to counter-proposals, among other duties.[214] These rules reflect a common sense understanding of negotiating in good faith, but do not foreclose the possibility that parties acting in good faith might simply reach an insurmountable impasse.

Yet, as several commentators have noted,[215] nowhere in the Communications Act is "good faith" defined—even though the term appears in several other sections of the Act.[216] Congress did, however, specify that "it shall not be a failure to negotiate in good faith if [a broadcaster or MVPD]

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209. *See* discussion *supra* Part III (critiquing MVPDs' arguments against existing retransmission rules).

210. *See* Robert McDowell, *Should the Government Try to 'Fix' Retransmission Consent?*, THE HILL CONGRESS BLOG (Nov. 22, 2013, 2:00 PM) [hereinafter McDowell Op-Ed], http://thehill.com/blogs/congress-blog/technology/191201-should-the-government-try-to-fix-retransmission-consent#ixzz2yG3rcrmx.

211. *Id.*

212. Statement of Comm'r Robert M. McDowell at 1, Amendment of the Comm'n's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, FCC 11–31, 26 FCC Rcd. 2718, 2766 (2011).

213. 47 U.S.C. § 325(b)(3)(C)(ii)–(iii) (2012 & Supp. 2014) (emphasis added).

214. *See* 47 C.F.R. § 76.65(b) (2014).

215. *E.g.*, Reply Comments of Mediacom Inc. at 1–2, Amendment of the Comm'n's Rules Related to Retransmission Consent, FCC 11–31, 26 FCC Rcd 2718 (rel. Mar. 3, 2011) [hereinafter *Mediacom Comments*], *available at* http://apps.fcc.gov/ecfs/document/view?id=7021689912.

216. Thomas B. Romer, *Negotiate in Good Faith As to What? An Analysis of the Good Faith Negotiation Clause of the Telecommunications Act of 1996*, 69 U. COLO. L. REV. 257, 261 (1998).

enters into retransmission consent agreements containing different terms and conditions, including price terms, with different [MVPDs or broadcasters] if such different terms and conditions are based on competitive marketplace considerations."[217] Thus, although the statute plainly bars the FCC from directly regulating how much broadcasters charge MVPDs for retransmission consent, the statute is sufficiently ambiguous as to afford the FCC considerable latitude as to how it regulates retransmission consent negotiations.[218]

Under the reigning administrative laws of the United States, courts defer to rules promulgated by federal agencies under a doctrine known as *Chevron* deference, which refers to a 1984 Supreme Court decision holding that a court should defer to an agency's "permissible construction of [an ambiguous] statute."[219] Although the FCC's most recent inquiry regarding retransmission consent concluded that the agency has limited authority to intervene in retransmission impasses, the FCC's pronouncements today cannot bind the Commission tomorrow.[220] "An initial agency interpretation is not instantly carved in stone."[221] An agency can always change its mind so long as it offers a reasoned explanation for doing so and abides by applicable laws of administrative procedures.[222] Thus, if the FCC someday decides to change its course regarding retransmission consent, it will enjoy the same considerable deference from courts as in the agency's other rulemakings.

Seizing on this legal wiggle-room, several MVPDs and media advocacy organizations have implored the FCC to revisit its rules governing retransmission consent negotiations. For instance, Free Press, Parents Television Council, and Consumers Union jointly urged the FCC to require that each MVPD disclose to its subscribers the precise amount of retransmission fees it paid for each broadcast station.[223] And Mediacom, a major cable company, urged the FCC to revise its rules to impose interim carriage requirements when a "good faith" complaint is pending,[224] criticizing the FCC's conclusion that it "lacks authority to order carriage in

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217. 47 U.S.C. § 325(b)(3)(C)(ii)–(iii) (2012 & Supp. 2014).

218. *See Mediacom Comments*, *supra* note 215, at 8.

219. Chevron USA, Inc. v. NRDC, 467 U.S. 837, 842–43 (1984).

220. In *Chevron*, the agency at issue had changed its mind about how to best administer a federal statute. *Id.* at 863.

221. *Id.*

222. Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

223. Comments of Free Press, Parents Television Council, and Consumers Union at 2, Pet. for Rulemaking to Amend the Comm'n's Rules Governing Retransmission Consent, FCC 11–31, 26 FCC Rcd 2718 (rel. Mar. 3, 2011) [hereinafter *Free Press et al. Comments*], *available at* http://www.freepress.net/sites/default/files/fp-legacy/Retrans_Petition_Filing_FP_PTV_CU.pdf.

224. *Mediacom Comments*, *supra* note 215, at 2.

the absence of a broadcaster's consent due to a retransmission dispute."[225] Contrasting the FCC's "apparent resignation to its powerlessness" to regulate retransmission consent negotiations with the agency's "herculean . . . efforts in other contexts to find a legal basis for regulatory initiatives that have a statutory foundation that . . . can be called debatable,"[226] Mediacom emphasized that Congress expressly empowered the commission to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent."[227]

Mediacom has a point: although Congress set forth certain specific rules regarding retransmission consent—such as broadcast stations' triennial election of must-carry or retransmission consent[228]—Section 325 does not address the specifics of how the FCC chooses to govern the right of broadcasters to retransmission consent.[229] As such, the FCC seems to possess considerable authority under current law to amend its retransmission rules and adopt a far more interventionist approach to carriage disputes, perhaps by imposing a retransmission fee disclosure obligation[230] or an interim carriage requirement[231] in the event a broadcaster and an MVPD reach an impasse in retransmission negotiations. Moreover, a broad group of MVPDs, including Time Warner Cable, the American Cable Association, DISH Network, and DIRECTV—along with several advocacy groups—even urged the FCC to amend its rules to provide for the arbitration of retransmission consent disputes.[232]

In March 2014, the FCC amended its retransmission consent regulations to bar broadcast stations from engaging in "joint negotiation" with MVPDs over retransmission consent terms.[233] Under these rules, a broadcaster would violate its duty to negotiate in good faith if it colluded with, or delegated authority to, rival network affiliates in the same market with respect to retransmission negotiations.[234] In February 2015, the FCC broadened these rules in response to new legislation, in which Congress directed the agency to prohibit independently owned stations in the same

225. Amendment of the Comm'n's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, FCC 11–31, 26 FCC Rcd 2718, 2728–29, para. 18 (2011).

226. *Mediacom Comments*, *supra* note 215, at iii.

227. 47 U.S.C. § 325(b)(3)(A) (2012 & Supp. 2014).

228. *Id.* § 325(b)(3)(B).

229. *Mediacom Comments*, *supra* note 215, at 17.

230. *See Free Press et al. Comments*, *supra* note 223, at 2.

231. *Mediacom Comments*, *supra* note 215, at 2.

232. Petition for Rulemaking to Amend the Comm'n's Rules Governing Retransmission Consent at 31, MB Dkt. No. 10–71 (filed Mar. 9, 2010), *available at* http://www.fhhlaw.com/PublicKnowledgeetalPetitionforRulemaking.2010.03.09.pdf.

233. Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 14-29, 29 FCC Rcd 3351, 3368–69, paras. 24–26 (2014).

234. *Id.*

market from coordinating retransmission negotiations.[235] However, the FCC stopped short of adopting many of the rules advocated by various commenters. FCC Commissioner Ajit V. Pai praised this move, noting that the FCC "carefully remains within its limited authority over retransmission consent."[236] Commissioner Pai added that the FCC's new rules do not not give it the "power to mandate the substantive outcome of retransmission consent negotiations."[237]

Still, although the FCC may continue to possess the authority to promulgate more interventionist rules, whether the agency *should* do so is another question. As former Commissioner McDowell has argued, "[a]ttempted government arbitration of retrains[mission] disputes is likely to result in more blackouts, not fewer."[238] "When regulators intervene," McDowell explains, "negotiations stop and the companies have to pivot to accommodate the new third party to their talks: Uncle Sam."[239] Even if mandatory arbitration or similar regulatory interventions succeed in reducing the frequency of blackouts, there is little to reason to believe the resulting retransmission consent terms would mean better outcomes for consumers in the long run. If the FCC begins to intervene in retransmission disputes, MVPDs and broadcasters will face a different calculus in retransmission negotiations, particularly if the FCC is perceived as friendlier to one set of firms than another—as the FCC has reportedly been on several past occasions.[240] Injecting political considerations into the process by which market participants determine the price of broadcast television programming is unlikely to produce an economic outcome superior to the status quo. If, on the one hand, FCC intervention pushes retransmission payments downwards, the quality of broadcast programming might suffer as a result,[241] even if MVPDs pass along some of the savings to their subscribers. In the alternative, FCC intervention might have the opposite effect, leading to higher retransmission fees and, in turn, higher cable and satellite prices. In either scenario, consumers stand to suffer from a suboptimal mix of prices and quality in television programming. In light of these potentially costly

235. Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014, *Order*, FCC 15-21, 30 FCC Rcd 2380, 2381, para. 4 (2015); *see also* STELA Reauthorization Act, Pub. L. No. 113-200, § 103(a), 128 Stat. 2059 (2014).

236. Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 14-29, 29 FCC Rcd 3351, 3429–30 (2014) (Pai, Comm'r, concurring).

237. *Id.*

238. McDowell Op-Ed, *supra* note 210.

239. *Id.*

240. *See, e.g.*, Ted Hearn, *Comcast Cites Martin's 'War On Cable' To Appeals Court*, MULTICHANNEL NEWS (Feb. 6, 2008, 9:38 AM), http://www.multichannel.com/news/courts/comcast-cites-martin-s-war-cable-appeals-court/295042.

241. *See NAB Ex Parte*, *supra* note 127, at 1.

errors,[242] the FCC can serve consumers best by staying out of retransmission negotiations.

C. Simple Rules for Retransmission Consent: The Next Generation Television Marketplace Act

To resolve these ambiguities and simplify the rules that govern the video marketplace, the NGTMA[243] would eliminate the 1992 Cable Act's retransmission consent provision[244]—including its good faith bargaining requirement—along with the Act's mandatory carriage rules regarding commercial broadcast stations.[245] In so doing, the bill would strip the FCC of the authority it seemingly possesses to meddle with retransmission negotiations. In lieu of the retransmission consent regime, the NGTMA would scrap the compulsory licensing system that currently governs the retransmission of broadcast programming by MVPDs, thereby conferring full copyright protection on works televised by broadcasters.[246] Therefore, the NGTMA would, for the first time, afford the owners of copyrights in broadcast television programs the right to freely negotiate rates with MVPDs, instead of relying on the royalties set by Copyright Royalty Judges.[247]

As discussed above, MVPDs currently pay two entities in exchange for the right to retransmit broadcast television programming: the Copyright Office[248] and each broadcast station itself.[249] The Copyright Office royalty is based not on the real-world market value of copyrighted works aired on television, but by a complex statutory scheme that was "hammered out" among media stakeholders over four decades ago.[250] Conversely, the retransmission consent payment is determined by a market negotiation—at least under current rules.[251] By sweeping away both of these regimes, NGTMA would establish a unified system of market-based negotiation for

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242. *Cf.* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984) (arguing that governmental errors "on the side of excusing questionable [business] practices are preferable" to the other kind of errors).

243. Next Generation Television Marketplace Act, H.R. 3720, 113th Cong. (2013) [hereinafter NGTMA], *available at* http://beta.congress.gov/113/bills/hr3720/BILLS-113hr3720ih.pdf.

244. *Id.* § 2(b) (repealing 47 U.S.C. § 325(b)–(c)).

245. *Id.* § 2(a)(6) (repealing 47 U.S.C. § 534); *id.* § 2(c)(1) (amending 47 U.S.C. § 338 to eliminate "carry one, carry all" rule for commercial stations).

246. *Id.* § 3(a)(1) (repealing 17 U.S.C. §§ 119, 122, 510); *id.* § 3(b) (repealing 17 U.S.C. §§ 111(c)–(e)).

247. *See* 17 U.S.C. § 111(d)(3)–(4) (2012 & Supp. 2014).

248. *See supra* Part II.B.

249. *See supra* Part II.C.

250. Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y USA 1, 32 (2011); *see also* Padden, *supra* note 41, at 4–5.

251. *See supra* Part III.C; *but see supra* Part IV.B (discussing potential FCC intervention in retransmission disputes).

broadcast television programming: traditional copyright negotiations.[252] The bill's elegant simplicity evokes "simple rules for a complex world," a phrase coined by legal scholar Richard Epstein to describe his vision of modest and limited regulation as a superior alternative to complex laws and rules.[253]

How would this system work in practice? In many ways, it would closely resemble the current process by which MVPDs negotiate for cable networks such as ESPN and USA, paying each network a per-subscriber rate pursuant to voluntary carriage agreements. The transaction costs of these negotiations are not prohibitive, as illustrated by MVPDs' ability to "secure broad performance rights from copyright owners as hundreds of cable networks have demonstrated."[254] Because broadcast stations do not hold copyrights in many of the programs they air, however, many contracts would likely need to be rewritten—perhaps borrowing language from cable channel carriage agreements—if NGTMA was enacted.

Perhaps each broadcast station would acquire a nonexclusive right to sublicense network and syndicated programming to MVPDs under terms similar to existing retransmission consent agreements.[255] In this regime, MVPDs would continue to bargain with broadcasters on a market-by-market basis, albeit for copyright licenses instead of retransmission consent.[256] Or, MVPDs might obtain copyright licenses directly from national networks, dealing with broadcast stations only to access their original content, including local news. Insofar as broadcasters add real value to network programming, they have little to fear from this regime; after all, national networks are free to sever their affiliate agreements, become cable networks, and deal with MVPDs under traditional copyright laws—yet no network has done so.[257]

How would NGTMA affect the amount that MVPDs pay for broadcast television programming? Overall, the amount should not change substantially, as retransmission consent affords networks and broadcasters a "safety valve" around price controls. Whereas copyright royalties are set by statute,[258] retransmission consent fees are wholly unregulated.[259] If copyright royalties were set too high, therefore, MVPDs would only retransmit broadcast signals in premium markets—or not at all. Instead, retransmission

252. Dan Garon, *Poison ivi: Compulsory Licensing and the Future of Internet Television*, 39 J. CORP. L. 173, 186 (2013).

253. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1997).

254. Garon, *supra* note 252, at 187.

255. *Id.*

256. *Id.*

257. In 2013, Fox threatened to become a cable channel if Aereo, an Internet video company, continued to retransmit Fox's programming online without paying the network or its affiliates. However, the Supreme Court held that Aereo infringed Fox's copyright, so Fox remains a broadcast network. *Sam* Gustin, *Murdoch's News Corp. Threatens to Pull Fox Off the Air in Aereo Dispute*, TIME (Apr. 9, 2013), http://business.time.com/2013/04/09/news-corp-threatens-to-pull-fox-off-the-air-in-aereo-dispute/.

258. *See* 17 U.S.C. §§ 111, 119, 122 (2012 & Supp. 2014).

259. *See* 47 U.S.C. § 325(b)(3)(A) (2012 & Supp. 2014).

fees are growing steadily.[260] This strongly suggests that copyright owners usually *earn too little* from copyright royalties alone, and thus augment royalties with "reverse retransmission" payments.[261] If anything, because copyright owners themselves receive royalties from television programs,[262] NGMTA would likely improve the *distributional* allocation of MVPDs' payments for access to broadcast programming among copyright owners, while leaving the overall amount of these payments essentially unchanged.

V. CONCLUSION

As Congress and the FCC work to improve how the airwaves are allocated and ensure spectrum is put to its most highly valued uses, a day may come when television broadcasting as we know it ceases to exist. Meanwhile, however, policymakers would be loath to lose sight of the basic principles that underlie free markets—voluntary exchange, property rights, and regulatory parity—in governing the television marketplace. This market has evolved dramatically just over the past decade; it will surely continue to change rapidly in the years hence. Congress can best bring this market into the twenty-first century by liberalizing it—and the NGTMA would mark an excellent first step.

260. *Sixteenth Video Competition Report*, *supra* note 9, at 3345–46, para. 203.
261. *See id.* at para. 208.
262. *See* 17 U.S.C. § 111(d)(3)–(4).

When Silence Isn't Golden: Analogizing the FCC's Discontinuance Regulations to Prevent Retransmission Consent Blackouts

Rachel Noteware*

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* J.D., The George Washington University Law School; B.A. in Communications and Slavic Languages and Literature, Northwestern University. The author would like to thank Ethan Lucarelli for his guidance in preparing this note, the staff of the *Federal Communications Law Journal*, and Rachel and Aaron for their patience, encouragement, and feedback throughout the writing process.

I. INTRODUCTION

Most cable customers would find it unfathomable that they could fail to receive local weather warnings due to an impasse in negotiations between local broadcasters and cable providers. Yet as more retransmission consent negotiations between broadcasters and cable companies fail to result in an agreement, blackouts of local networks for cable customers will become more frequent, resulting in the loss of local programming for a large cross-section of the community who no longer rely on over-the-air TV signals.

Blackouts have reached an all-time high in recent years, having affected viewers in 91 markets in 2012, almost twice the number of blackouts in 2011.[1] In 2013, there were 19[2] publicized instances of broadcast negotiation impasses that resulted in blackouts of 94 stations.[3] And while broadcasters are quick to point out that most of the 15,000 retransmission disputes from 2009–2012 were resolved without a blackout,[4] the increase in lengthy blackouts suggests that the possibility of being without critical local programming is not an impossibility. In fact, as broadcasters and cable companies consolidate, deeper pockets on both sides will allow parties to dig in their heels to withstand longer blackouts in the future.[5] The 32 days during which CBS was blacked out on Time Warner Cable in August 2013 affected more than three million cable customers and had the potential to prevent local weather warnings from reaching cable subscribers in Dallas, Los Angeles, New York City, and five other markets.[6] During the blackout, wildfires raged in Colorado just a few hours from Denver, one of the affected markets.[7]

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1. *American Television Alliance Introduction Packet* (June 2013), *available at* http://www.americantelevisionalliance.org/wp-content/uploads/2013/06/ATVA-intro_packet.pdf.

2. Robert C. Kenny, *Guest Blog: Is the Sky Falling on the Retransmission Consent System?*, BROADCASTING & CABLE (June 18, 2014, 9:15 AM), http://www.broadcastingcable.com/blog/bc-dc/guest-blog-sky-falling-retransmission-consent-system/131840.

3. CHARLES B. GOLDFARB, CONG. RESEARCH SERV., R43248, UPDATING THE STATUTORY FRAMEWORK FOR COMMUNICATIONS FOR THE DIGITAL AGE: ISSUES FOR CONGRESS 35 (2013) (citing research data provided by SNL Kagan).

4. Eriq Gardner, *TV Executives Debate Retrans Rules in Congressional Hearing*, THE HOLLYWOOD REPORTER (July 24, 2012, 2:04 PM), *available at* http://www.hollywoodreporter.com/news/retrans-rules-tv-executives-congressional-hearing-353621.

5. GOLDFARB, *supra* note 3, at 7.

6. *See* Michael Calabrese, *The CBS-Time Warner Blackout Battle: Time for Congress to Rescue the Hostages*, SLATE (Aug. 9, 2013, 4:58 PM),

Blackouts were not always the looming threat in negotiations between broadcasters and cable providers that they are now. Congress created the retransmission consent regime for a television market in which broadcasters and cable providers had equal leverage.[8] Cable operators were regional monopolies, with typically only one or two cable companies controlling access to multichannel video programming in each region.[9] Broadcast stations had exclusive regional access to network programming, including high-value sports and entertainment content.[10] This original balance of power no longer exists. Today, four or more multichannel video programming distributors (MVPDs) serve many markets, but broadcasters continue to enjoy exclusive access to network programming.[11] Also, the 1992 Cable Act includes no provision for network-owned stations that also own powerful cable channels.[12] These network-owned and operated stations can use their market power from cable holdings as well as network programming to influence retransmission consent fees.[13]

While the market has changed in recent years, the governmental interest in ensuring public access to local broadcast content from diverse sources remains the same. This compelling interest demonstrates the need for greater oversight of good faith in retransmission consent negotiations. Congress charged the Federal

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http://www.slate.com/blogs/future_tense/2013/08/09/cbs_time_warner_cable_blackout_battle_congress_should_rescue_hostages.html.

7. *See* Brooke Way, *Red Canyon Fire Grows to 350 Acres: Evacuations Ordered*, KDVR, (Aug. 13, 2013), *available at* http://kdvr.com/2013/08/13/red-canyon-fire-near-glenwood-springs-grows-to-nearly-200-acres/.

8. Richard Greenfield, *The Disequilibrium of Power: How Retransmission Consent Went So Wrong, and How to Fix It*, ALL THINGS D (Aug. 27, 2013, 9:01 AM), http://allthingsd.com/20130827/the-disequilibrium-of-power-how-retransmission-consent-went-so-wrong-and-how-to-fix-it/.

9. *Id.*

10. *Id.*

11. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fifteenth Report*, FCC 13-99, 28 FCC Rcd. 10496, 10512-13, paras. 35-36 (2013), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-99A1_Rcd.pdf [hereinafter *Video Competition Report*]. The report notes that in 2011 over 35% of U.S. households had access to at least four MVPDs (a cable MVPD, two satellite MVPDs, and a telephone MVPD). *Id.*

12. *See* Greenfield, *supra* note 8. Greenfield cites Disney's negotiating power that stems from the parent company's ability to pool programming from ESPN, Disney Channel and ABC.

13. CBS, for example, pulled 27 CBS-owned stations as well as CBS Sports Network, Smithsonian Channel, TVGN, and Showtime Networks off of Dish Network during a retransmission consent dispute in December 2014. The blackout lasted just 12 hours before Dish conceded to CBS demands regarding retransmission consent fees and ad skipping. *See* Phillip Swann, *Dish vs. CBS: Who Won?*, TVPREDICTIONS.COM (Dec. 8, 2014), http://tvpredictions.com/dishcbs120814.htm.

Communications Commission (FCC) with overseeing retransmission consent negotiations,[14] and increasingly-frequent blackouts from failed negotiations suggest a need to reexamine the enforcement approach. The policy framework for a stronger enforcement approach can be found in other FCC rules regarding service disruptions that are based on a similar policy rationale.

This note explores how the FCC's policies regarding stations that violate minimum operating schedules by discontinuing service can apply to broadcasters who willingly discontinue broadcasts to MVPD customers during blackouts. Part II discusses, first, the original purposes of retransmission consent and its evolution over time; and second, FCC and legislative efforts to reform retransmission consent negotiations and prevent blackouts. Part III turns to the FCC's rules and policies surrounding discontinuance of service and how enforcement mechanisms in this arena may be wielded against voluntary disruptions of service in retransmission consent negotiation breakdowns. Ultimately, the note concludes that the FCC should uphold the public interest policies that underlie retransmission consent regulations by adopting the intervention framework for discontinuances in the context of voluntary blackouts.

II. BACKGROUND

Retransmission consent is a statutory creation of Congress that requires cable systems to obtain the consent of broadcast stations prior to retransmission of the signal. This requirement, which had applied to broadcasters who sought to use the programming of other stations since 1934, was made applicable to cable systems in 1992 because the absence of this requirement was thought to be distorting the video marketplace and threatening the future of over-the-air television broadcasting.15 Congress found that cable operators benefitted from the local broadcast signals that they were able to carry without broadcaster consent or copyright liability, and legislators adopted retransmission consent to remedy the unfairness to broadcasters. 16 As the video programming market has developed and competition among MVPDs has grown, the disparity between the bargaining positions of MVPDs and broadcasters has increased. While broadcasters have a fair argument that their content is the most demanded

14. *See* 47 U.S.C. § 325(b)(3)(A) (2012).

15. *Cable Carriage of Broadcast Stations*, FCC GUIDE, http://www.fcc.gov/guides/cable-carriage-broadcast-stations (last updated Aug. 15, 2013).

16. Amendment of the Comm'n's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, FCC 11-31, 26 FCC Rcd. 2718, 2720 (2011), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-31A1_Rcd.pdf [hereinafter *NPRM*].

and valuable, MVPDs suggest that consumers are harmed by rising costs and blackouts.

A. Policy Basis and Evolution of Retransmission Consent Negotiations

Since 1934, broadcast stations that use the programming of other broadcast stations have been required to obtain the prior consent of the originating station.[17] In response to the perceived threat that cable monopolies posed to the governmental interests in preserving free over-the-air local broadcasting and promoting dissemination of information from a multiplicity of sources[18], Congress applied "must-carry" and retransmission consent rules to cable systems as a part of the 1992 Cable Act.[19] Must-carry rules allow broadcasters with less popular programming (that cable providers might decline to carry) to elect mandatory, non-compensated carriage on each cable system operating within its service area.[20] Alternatively, under retransmission consent, broadcasters with popular programming can elect to negotiate a rate of compensation with local cable systems for the right to retransmit the broadcaster's signal.[21] This signal right is recognized as a quasi-property right distinct from copyright licenses, as the local broadcaster is usually not the copyright holder for network programming.[22] Rather, the separate licensing for retransmission consent was designed to promote the availability of broadcast signals.[23]

Congress adopted must-carry and retransmission consent rules to foster localism and diversity. At the time of the Cable Act's adoption, the number of over-the-air broadcast consumers was on the decline, but Congress did not draft the legislation solely to protect a

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17. *See* 47 C.F.R. § 73.1207(b) (2014); *see also* FCC GUIDE, *supra* note 15.

18. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

19. These rules were placed into §§ 325 and 614 of the Communications Act as amended; *see* 47 U.S.C. § 534 (2012).

20. *See* GOLDFARB, *supra* note 3, at 31.

21. *Id.*

22. *About the Issue*, AMERICAN TELEVISION ALLIANCE, http://www.americantelevisionalliance.org/?page_id=46 (last accessed March 14, 2014); *see also*, Sherwin Siy, *Cable Pays Twice, or, Retransmission Consent Isn't Copyright*, PUB. KNOWLEDGE (Sept. 12, 2013), http://www.publicknowledge.org/news-blog/blogs/cable-pays-twice-or-retransmission-consent-is.

23. Matthew A. Brill & Matthew T. Murchison, *How the FCC Can Protect Consumers in the Battle over Retransmission Consent*, BLOOMBERG LAW (Sept. 11, 2013), http://www.bna.com/how-the-fcc-can-protect-consumers-in-the-battle-over-retransmission-consent/.

minimum of broadcast service for those who could not afford cable.[24] In Turner Broadcasting Systems, Inc. v. FCC, the Supreme Court upheld the constitutionality of must-carry rules, noting that the "greatest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[25] Congress declared one of the goals of the Cable Act to be ensuring the continuation of the local origination of broadcast programming—otherwise known as "localism"—for over-the-air and cable viewers.[26]

1. Imbalanced Negotiations: The Problem with Retransmission Consent

In the early years of the Cable Act, retransmission consent battles were few, as most stations elected for must-carry status.[27] Stations that negotiated for retransmission consent often chose in-kind compensation, such as agreements to carry a broadcaster's affiliated cable network in exchange for signal carriage.[28] The regulations governing retransmission mitigated the leverage of local cable monopolies to give broadcasters sufficient clout to negotiate and preserve access to local broadcast stations.[29]

As competition developed among MVPDs, their bargaining power decreased and retransmission consent allowed broadcasters to demand higher rates of compensation. Due to the proliferation of video programming distribution options, cable companies' market shares have fallen steadily from 95 percent in 1994 to roughly 55 percent today.[30] If a cable provider refuses to pay the retransmission fee demanded, broadcasters can withhold their signal and steer consumers towards another MVPD who is willing to compensate them at that level.[31] Broadcasters have many more options in dealing with MVPDs today. The FCC noted that over 98 percent of homes in

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24. 47 U.S.C. § 521 (2012) (as added by Section 2(b) of the 1992 Act).
25. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663-64 (1994).
26. 47 U.S.C. § 325 (2012) (as added by Section 2(a)(10) of the 1992 Act).
27. *See* Brill, *supra* note 23.
28. *Id*.
29. GOLDFARB, *supra* note 3, at 31.
30. *Video Competition Report*, *supra* note 11, at paras. 3, 33.
31. *See* Brill, *supra* note 23; *see also*, Press Release by WNWO, an NBC-affiliate, after a breakdown in negotiations with Buckeye Cable stating, "[o]ur research indicates that better pricing and programming (including WNWO) is available from Buckeye competitors Dish Network, DirecTV and, for some people, AT&T U-verse, and we encourage Buckeye subscribers to find alternative means for receiving our station's programming," *available at* http://www.nbc24.com/community/content.aspx?id=984815.

the U.S. have access to at least three video distribution options, and many homes have access to four or more.[32] Broadcasters can also choose to distribute programming online through their own websites.[33] All of these options make threats of blackouts more credible for cable providers.[34]

That broadcasters possess the most popular program content on television further strengthens their bargaining position. Nine of the top ten most watched television programs in 2012–2013 were on broadcast networks.[35] Broadcasters point to the popularity of their network programming to justify retransmission consent prices, and use these programs as leverage when threatening a blackout.[36]

The increase in bargaining power of broadcasters corresponds with a steady rise in retransmission consent fees. According to industry research, retransmission consent revenues for local broadcast stations have grown more than tenfold since the middle of the last decade, from $215 million in 2006 to $2.4 billion in 2012, and are projected to reach more than $6 billion by 2018.[37] As retransmission fees rise, the likelihood that negotiations will devolve into blackouts increases as well.[38] Broadcasters have increasingly become dependent on retransmission revenue while cable systems do not want to pay higher fees for content that was once distributed free of charge.[39]

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32. *Video Competition Report*, *supra* note 11, at paras. 35-36.

33. In fact, broadcasters have leveraged their online content as well when negotiations with MVPDs have soured. For instance,when Time Warner Cable dropped the CBS and Showtime signals in most major markets during the August 2013 blackout, CBS blocked access to full-episode viewing on CBS.com for customers with Time Warner Cable internet service. *See* Ryan Lawler, *CBS Blocks Time Warner Cable Subscribers from Watching Full Episodes on CBS.com*, TECHCRUNCH (Aug. 2, 2013), http://techcrunch.com/2013/08/02/cbs-blocks-time-warner-cable-subscribers-from-watching-full-episodes-on-cbs-com/.

34. *See* Brill, *supra* note 23.

35. Michael Schneider, *America's Most Watched: The Top 25 Shows of the 2012-2013 TV Season*, TV GUIDE (June 10, 2013, 12:18 PM), http://www.tvguide.com/news/most-watched-tv-shows-top-25-2012-2013-1066503.aspx. The only cable programming to break into the top ten was AMC's *The Walking Dead*, "a rare feat for a cable series." *Id.*

36. *See* Doug Halonen, *Retrans Reform Heats Up in Washington*, TVNEWSCHECK (Jan. 14, 2014, 5:49 AM), http://www.tvnewscheck.com/article/73261/retrans-reform-heats-up-in-washington/.

37. Robin Flynn, *Retrans Projections Update: $6B by 2018*, SNL KAGAN (Oct. 18, 2012, 7:44 PM), https://www.snl.com/InteractiveX/articleabstract.aspx?id=16003888&KPLT=8.

38. American Television Alliance Introduction Packet, *supra* note 1.

39. Mark Tatge claims that consumers should "expect to see more blackouts. This is a reflection of the changing economics of broadcast TV." Daniel B. Wood & Gloria Goodale, *CBS, Time Warner Head into Week 2 of Standoff*, CHRISTIAN SCI. MONITOR (Aug. 8, 2013), http://www.csmonitor.com/Business/2013/0808/CBS-Time-Warner-head-into-Week-2-of-standoff.

Exacerbating the problem of blackouts is the fact that most consumers view local broadcast channels through their cable or satellite provider. The surge in programming distribution alternatives has led the vast majority of Americans away from traditional over-the-air TV signals.[40] According to a 2013 study, eighty-three percent of U.S. households receive TV programming through cable, satellite, or fiber connections with only seven percent relying on over-the-air transmission.[41] When retransmission consent negotiations break down and a broadcast signal is pulled from a MVPD channel lineup, more consumers are affected than ever before.

2. The Case Made by Broadcasters for Increased Retransmission Consent Fees

As consumers bemoan increased cable subscription costs and more frequent broadcast station blackouts, both broadcasters and MVPDs blame each other for failed retransmission consent negotiations. Broadcasters argue that increasing content costs, the erosion of advertising revenue, and the proliferation of program options have forced broadcasters to rely on a dual income stream of carriage fees and advertising.[42] Because broadcasters still bring in the most viewers and provide local content that is unavailable elsewhere, they argue it is only fair that cable companies acknowledge the value their stations bring with commensurate fees.[43] After years of retransmission with no compensation, broadcasters still receive carriage rates much lower than other cable networks.[44] During a 2012 retransmission consent dispute between the Tribune Company and Cablevision, Tribune argued, "Cablevision has never compensated Tribune for the retransmission of its local stations, which are among the most highly watched channels on Cablevision's line-ups. What we have proposed

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40. Sean Patterson, *Cable Households Dropping, Over-the-Air Households Down to 7%*, WEBPRONEWS (July 30, 2013), http://www.webpronews.com/cable-households-dropping-over-the-air-households-down-to-7-2013-07.

41. *Id.*

42. *Another Plea for FCC Intervention in Retransmission Consent*, RADIO & TELEVISION BUS. REP. (Aug. 27, 2013), *available at* http://rbr.com/another-plea-for-fcc-intervention-in-retransmission-consent/.

43. David B. Wilkerson, *Disney May Pull ABC Signal from N.Y. Cablevision Systems*, MARKETWATCH (Mar. 2, 2010, 5:13 PM), http://www.marketwatch.com/story/abc-may-pull-its-signal-from-cablevision-systems-2010-03-02?reflink=MW_news_stmp.

44. *See Protect TV Viewers and Allow Broadcasters to Continue Negotiating in the Free Market*, NAB, http://www.nab.org/advocacy/issue.asp?id=1891 (last visited on May 22, 2015). NAB argues that analysts have estimated that, "if broadcasters received retransmission consent payments at a rate comparable to what is paid to cable networks, broadcasters would receive five times their current compensation."

amounts to less than a penny a day per subscriber, well below what Cablevision pays to providers of less well-watched channels."[45]

Broadcasters further argue that though they are asking for more monetary compensation than they have in the past, retransmission consent payments are not responsible for the rising consumer prices charged by cable operators. Broadcasters assert that only two cents of every dollar of cable revenue go to broadcast retransmission consent fees, while twenty cents of every dollar go to cable programming fees, even though broadcast programs remain the most popular with viewers.[46] They remain skeptical that any cost savings from reducing broadcasters' carriage fees would actually result in savings for consumers, citing cable's history of increasing subscriber fees that predates broadcasters' ability to receive monetary compensation for retransmission of broadcast signals.[47]

3. The Case Made by MVPDs that Increased Fees and Blackouts Hurt Consumers

MVPDs, facing more competition from online distributors like Netflix, argue that the current retransmission consent rules are out of touch with changes in the industry and favor broadcasters. Rising retransmission consent fees raise costs that are passed on to subscribers and if a cable provider refuses to give in to demands for higher fees, consumers are the ones who are hurt by station blackouts.[48] During a retransmission consent dispute with ABC, Cablevision spokesman Charles Scheuler said, "[i]t is not fair to force Cablevision customers to pay a new TV tax for programming ABC Disney gives away free, both over-the-air and on the Internet."[49]

Smaller cable providers argue that their retransmission fee burdens are heavier because they lack the negotiating power to bargain for better deals. The American Cable Association, which represents smaller cable companies, claims that broadcasters often demand that "the smaller cable operators pay an exceptionally higher per-customer fee than other larger operators in the same market," and that this harms consumers and reduces

45. *Tribune Company Statement on Negotiations with Cablevision*, PR NEWSWIRE (Aug. 17, 2012), http://www.prnewswire.com/news-releases/tribune-company-statement-on-negotiations-with-cablevision-166515786.html.

46. Supp. Comments of the Nat'l Ass'n of Broadcasters at iii-iv, Amendment of the Comm'ns Rules Relating to Retransmission Consent, FCC MB Docket No. 10-71 (May 29, 2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7022419306.

47. *Id*. at iv.

48. *See* Tom Wheeler, *Protecting Television Consumers by Protecting Competition*, FCC BLOG (Mar. 6, 2014), https://www.fcc.gov/blog/protecting-television-consumers-protecting-competition.

49. Wilkerson, *supra* note 43.

price competition.[50] There is no justification, they argue, for charging smaller companies more, because retransmission costs the broadcaster nothing and it reduces competition among MVPDs by making it too expensive for independent cable companies to stay in business.

B. Regulating Retransmission Consent Negotiations: the Good Faith Standard

To address the challenges in retransmission consent negotiations, Congress and the FCC have developed rules requiring that parties negotiate in good faith. But this standard has proven challenging to implement, and FCC efforts to clarify the rules have not proven sufficient to prevent retransmission-related blackouts.

The Satellite Home Viewer Improvement Act of 1999 (SHVIA) included a two-part framework for determining whether parties negotiate in good faith. First, the FCC considers violations of seven objective good-faith standards to be *per se* breaches of good faith.[51] Second, even if no *per se* violations are found, the FCC may look to the totality of the circumstances in determining whether a party has breached the duty of good faith.[52] Originally derived from labor law precedent,[53] the seven *per se* violations of good faith include: refusal to negotiate retransmission consent; refusal to designate a representative with the authority to make binding representations; refusal to negotiate retransmission consent at reasonable times or causing unreasonable delays; refusal to put forth more than a single, unilateral proposal; failure to respond to a proposal of the other party; execution of an agreement that requires the other party not to enter into a retransmission consent agreement with any other broadcaster or MVPD; and refusal to execute a written retransmission consent agreement.[54]

The SHVIA good faith standard did not address two of the most contentious industry negotiation practices. First, the FCC clarified that it is

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50. *Retransmission Consent*, AMERICAN CABLE ASS'N, http://www.americancable.org/issues/page/Retransmission_Consent (last visited Mar. 31, 2014).

51. *NPRM*, *supra* note 16, at 2724; *see also*, Implementation of the Satellite Home Viewer Improvement Act of 1999, *First Report and Order*, 15 FCC Rcd. 5445, 5457, 5462 (2000) [hereinafter *Good Faith Order*] (The FCC stated that the *per se* standards "identify . . . situations in which a broadcaster did not enter into negotiations with the sincere intent of trying to reach an agreement acceptable to both parties.").

52. *See* 47 C.F.R. § 76.65(b)(2) (2014) ("In addition to the standards set forth in § 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith . . . . ").

53. *NPRM*, *supra* note 16, at 2723.

54. 47 C.F.R. § 76.65(b)(1)(i)–(vii) (2014).

not evidence of bad faith if a broadcaster or MVPD enters into agreements at different prices or conditions with different MVPDs or broadcasters if the different terms are based on competitive marketplace considerations.[55] Second, failure to negotiate—and ultimately reach—agreement is not evidence of bad faith.[56] This means that blackouts that occur because of an impasse in negotiations are not *per se* violations of the FCC's good faith standard.

The negotiating parties can enforce the good faith standards by commencing an adjudicatory proceeding with the FCC,[57] but parties rarely invoke them. While the FCC may order forfeitures for MVPDs and broadcasters that fail to negotiate in good faith,[58] in 2011, the Commission noted that few parties had made allegations of good faith violations and only one violation of the good faith standard had been upheld since its adoption.[59] The FCC indicated that uncertainty regarding which market practices constitute a breach of the obligation to negotiate in good faith could be the reason why so few parties lodge complaints.[60]

1. FCC Efforts at Strengthening Good Faith Standards

Industry uncertainty along with the need for good faith standards that addressed particular practices in today's media market led the FCC to issue a Notice of Proposed Rulemaking (NPRM) regarding the rules on retransmission consent in 2011.[61] The FCC justified modifying the good-faith standards by citing the increase in station blackouts and the uncertainty facing consumers regarding their ability to continue receiving certain broadcast television stations during contentious negotiations.[62]

The NPRM sought to update the good faith rules to better utilize the good faith requirement as a consumer protection tool. The FCC proposed the addition of certain *per se* violations of good faith, such as stations giving networks the right to approve an agreement with an MVPD for its affiliates or giving another station, not commonly owned, the power to approve its retransmission consent agreement through a local marketing agreement (LMA). The FCC also proposed that a broadcaster or MVPD's

55. *Id.* § 76.65(a)(1)–(2).
56. *Id.*
57. *Id.* § 76.65(c).
58. *See Good Faith Order*, *supra* note 51, at 5480, 5482; 47 U.S.C. § 325(b)(3)(C).
59. *NPRM*, *supra* note 16, at 2718, 2724.
60. *Id.* at 2730.
61. *Id*.
62. *Id.* at 2727, 2730. The FCC's goal in the rulemaking proceeding was to identify ways to "increase certainty in the marketplace, thereby promoting the successful completion of retransmission consent negotiations and protecting consumers from impasses or near impasses." *Id.*

refusal to submit to non-binding mediation when parties reach an impasse within 30 days of the retransmission consent agreement's expiration be considered a *per se* violation of good faith.[63] The FCC also questioned whether other market practices, such as a broadcaster's requirement that an MVPD not carry a "significantly viewed" out-of-market station or the delay of retransmission consent negotiations, would constitute *per se* violations of the current good faith standards.[64]

In 2014, the FCC announced in a Report and Order (R&O) that joint retransmission consent negotiations between non-commonly owned "Top Four" stations in the same market would also be *per se* violations of the good faith standard.[65] Representing a more limited approach than the NPRM's proposal to make *all* joint negotiations by non-commonly owned stations breaches of good faith, the FCC found a rule banning joint negotiations by Top Four stations to be necessary to prevent competitive harms.[66] The FCC concluded that such joint negotiations allow broadcasters to charge supra-competitive retransmission consent fees and contribute to negotiation breakdowns.[67] The report acknowledges the role that blackouts play in obtaining higher retransmission consent fees by noting that the higher fees in joint negotiations are obtained, in part, from the MVPD's fear of losing two sets of must-have programming.[68]

In the past, the FCC dismissed more interventionist approaches to dealing with retransmission consent, and concluded that Congress did not intend for the good faith negotiation provision to allow for substantial FCC oversight of retransmission negotiations. In its 2011 NPRM, the FCC interpreted the Cable Act provision prohibiting retransmission of a signal without a broadcaster's $_{\text{consent}}$[69] to bar the provision of mandatory interim coverage during a retransmission dispute.[70] In the 2014 R&O, the FCC cited the Congressional purpose in creating a retransmission regime to "establish a marketplace for the disposition of the rights to retransmit broadcast signals," but not authorizing the FCC "to dictate the outcome of

63. *Id.* at 2731–32.

64. *See id*. at 2733.

65. Amendment of the Comm'n's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 14-29, 29 FCC Rcd. 3351 (2014) [hereinafter *R&O*], *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-29A1_Rcd.pdf.

66. *See id.*

67. *See id.* at 3355-56.

68. *See id.* at 3359; *see also*, CHARLES B. GOLDFARB, CONG. RESEARCH SERV., RL34078, RETRANSMISSION CONSENT AND OTHER FEDERAL RULES AFFECTING PROGRAMMER-DISTRIBUTOR NEGOTIATIONS: ISSUES FOR CONGRESS CRS-70 (2007), *available at* http://www.policyarchive.org/handle/10207/bitstreams/19204.pdf.

69. 47 U.S.C. § 325(b)(1)(A) (2012) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except—(A) with the express authority of the originating station").

70. *NPRM*, *supra* note 16, at 2728.

the ensuing marketplace negotiations."[71] Even in the case of a breach of the good faith standards, the FCC interpreted its enforcement power as instructing the parties to renegotiate the agreement in accordance with the rules of good faith, with no statutory authority to compel retransmission absent broadcaster consent.[72] The FCC also found that it lacked the authority to make mandatory binding dispute resolution upon parties, as this was inconsistent with both the Cable Act and the Administrative Dispute Resolution Act (ADRA), which authorizes an agency to use arbitration "whenever all parties consent."[73]

In cases where the FCC has intervened in retransmission consent, it has done so in the interest of preserving competition. As the R&O regarding joint negotiations by unrelated Top Four stations suggests, the FCC infers an implicit authority to regulate price fixing and non-compete agreements from the good faith standard.[74]

a. MVPD Response to the FCC's Proposed Strengthened Good Faith Standards

MVPDs praised the FCC's recognition of needed reforms in retransmission consent but argued that additions should be made to the list of *per se* violations of the duty of good faith. Several providers endorsed Cablevision's blueprint for retransmission reform.[75] The highlights of the blueprint include preventing the bundling of broadcast TV station carriage with co-owned cable channels, requiring broadcasters to publicize their price for TV station carriage, and preventing "discrimination" in price based on the size of an operator.[76] While not as sweeping as MVPD proposals that LMAs should be *per se* violations of good faith,[77] cable operators applauded the 2014 R&O prohibition on joint negotiations by

71. *R&O*, *supra* note 65, at 3352 (citing S. Rep. No. 92, 102nd Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169).

72. *NPRM*, *supra* note 16, at 2723–24.

73. 5 U.S.C. § 575(a)(1) (2012).

74. *R&O*, *supra* note 65, at 3358; *see also Good Faith Order*, *supra* note 51, at 5470 ("It is implicit in Section 325(b)(3)(C) that any effort to stifle competition through the negotiation process would not meet the good faith negotiation requirement . . . . Conduct that is violative of national policies favoring competition . . . . is not within the competitive marketplace considerations standard included in the statute.").

75. *See, e.g.*, Reply Comments of Charter Communications, Inc., Amendment of the Comm'n's Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. June 28, 2011), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021689996.

76. John Eggerton, *Cablevision Makes Its Case for Retrans Reform*, MULTICHANNEL NEWS (May 26, 2011, 12:16 PM), http://www.multichannel.com/news/news/cablevision-makes-its-case-retrans-reform/376922.

77. Ex Parte of Nat'l Cable & Telecomm. Ass'n, Amendment of the Comm'n's Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. July 25, 2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7520933561.

Top Four stations as a move to protect consumers from rising prices that result from collusive negotiating by broadcasters.[78]

The American Cable Association argued further that the FCC could, and should, take immediate action by mandating that broadcasters and MVPDs maintain the status quo and continue to offer a broadcaster's signal to customers after a retransmission consent agreement expires and while negotiations continue. Once the dispute is resolved, the agreement should apply retroactively, including any required price adjustments.[79]

b. Broadcasters' Response to FCC's Proposed Strengthened Good Faith Standards

Broadcasters responded that, as recognized in the NPRM, several of the MVPD proposals constitute FCC interference with the substance of retransmission consent negotiations, contrary to both the statutory language and congressional intent.[80]

Also, broadcasters contend that government intervention to reduce fees paid to broadcasters will ultimately reduce the quality and diversity of broadcast programming and move more quality programming to pay-TV services.[81] Broadcasters argued that there is a public value in free, over-the-air TV for those who cannot afford premium services. In defense of blackouts, broadcasters argue that consumers are never truly "blacked out" from broadcast programming because all pay-TV customers could choose to switch cable providers or watch programming over the air in the event of a retransmission consent dispute.

Broadcasters decried the FCC's 2014 R&O as a job-killing measure that hurts broadcasters and consumers and is purely beneficial to satellite and cable providers.[82] The National Association of Broadcasters responded to the proposed prohibition on joint negotiations by Top Four

78. *See* Josh Peterson, *FCC Chief Targets Broadcasters to End TV Blackouts, Helps Cable Industry Friends*, WATCHDOG.ORG (Mar.10, 2014), http://watchdog.org/131534/broadcast-cable-fight/. Matthew Polka, president and CEO of American Cable Association, praised the order stating, "[a]doption of Chairman Wheeler's proposed order would represent a victory not only for fair competition, but also for millions of consumers who are being victimized by TV station conglomerates, which have the perverse idea that collusion is somehow consistent with their legal charter to bargain in good faith." *Id.*

79. *See* Ex Parte of American Cable Ass'n, Amendment of the Comm'ns Rules Related to Retransmission Consent, FCC MB Docket No. 10-71 (rel. Aug. 22, 2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7520939380.

80. Nat'l Ass'n of Broadcasters, *supra* note 46, at v.

81. *Id.*

82. *NAB Statement on FCC Chairman Wheeler's Proposal Affecting Broadcaster Sharing Agreements*, NAB.ORG (Mar. 6, 2014) ("The real loser will be local TV viewers, because this proposal will kill jobs, chill investment in broadcasting and reduce meaningful minority programming and ownership opportunities."), *available at* http://www.nab.org/documents/newsRoom/pressRelease.asp?id=3335.

station broadcasters by arguing that broadcasters need to join together to be a competitive force among giants in cable, satellite, and wireless industries.[83] Dismantling joint negotiation agreements that the industry has detrimentally relied upon, NAB argued, will chill investment and cause significant job losses.[84]

2. Legislative Proposals to Strengthen the FCC's Enforcement Powers in Retransmission Consent Negotiations

While many would like the FCC to take additional action to monitor retransmission consent negotiations and prevent impasses that lead to blackouts, there is disagreement about whether the FCC has the authority to do so. The legislative history of the 1992 Cable Act is replete with congressional comments regarding the FCC's obligation to intervene in some retransmission consent negotiations under the Act's provisions. Arguing that the FCC would ensure that retransmission negotiations would not lead to unreasonable rate increases for consumers, former Representative and current Senator Edward Markey (D-MA) stated that "protections for rate increases will stay on the books, and the FCC is mandated in this legislation to ensure that there are reasonable rates for every citizen in America."[85]

In addition to concern over reasonable rates, some members of Congress expressed concern that without FCC intervention, failed negotiations would leave cable subscribers without local broadcast signals. The late Senator Daniel Inouye (D-HI), a sponsor of the Cable Act, responded to these concerns by arguing that the FCC does have authority to resolve disputes between broadcasters and MVPDs by requiring arbitration.[86] Indeed, the language of the Cable Act itself appears to sanction FCC intervention in retransmission consent negotiations, obligating the agency to, "govern . . . the impact that the grant of retransmission consent by television stations may have on the rates."[87]

In more recent years, legislators have taken on the task of giving the FCC explicit authority to intervene in retransmission consent negotiations.[88] Recent congressional proposals address the problem of

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83. Letter to Chairman Wheeler by National Association of Broadcasters at 2, *available at* http://apps.fcc.gov/ecfs/document/view?id=7521095036.

84. *See id.*

85. ROBERT E. EMERITZ ET AL., THE 1992 CABLE ACT: LAW & LEGISLATIVE HISTORY 1066 (1992).

86. *Id.*

87. 47 U.S.C. § 325(b)(3)(A) (2012).

88. Some legislative proposals, such as the Local Choice Bill drafted by Sen. John Thune and Sen. Jay Rockefeller, do not explicitly increase FCC oversight but require increased transparency in retransmission consent agreements, including disclosing the

blackouts by strengthening the FCC's enforcement powers in such negotiations. For example, the Video CHOICE (Consumers Have Options in Choosing Entertainment) Act introduced by Representative Anna Eshoo (D-CA) would allow the FCC to intervene in retransmission consent negotiations when it determines that parties have reached an impasse and allow for interim carriage by the MVPD until a new agreement can be reached.[89] Senators John McCain (R-AZ) and Richard Blumenthal (D-CT) also introduced a bill in 2013 proposing to increase the FCC's oversight of retransmission consent disputes.[90] Among other things, the bill would require broadcasters and MVPDs who cannot come to an agreement to disclose the terms of their most recent agreement, including the price, to the FCC.[91]

Predictably, cable companies praised the bills for protecting consumer interests in preventing blackouts and claimed that must-carry and network non-duplication rules already prevent retransmission consent negotiations from being free-market negotiations.[92] Broadcasters, however, claimed that such legislation favors pay-TV by not requiring providers to pay fair market price for programming consumers want and taking away consumer protections, such as refunds, in the event of blackouts.[93]

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amount of retransmission fees paid. Under the Thune-Rockefeller proposal, broadcasters would set the price they charge individual MVPD subscribers and cable and satellite providers would collect those fees and remit them to broadcasters. Subscribers could select local broadcast stations on an individual basis and opt-out of paying retransmission consent fees for stations they do not select. *See* Timothy H. Lee, '*Local Choice': Bipartisan Senate Proposal Brings Market Reform to Broadcast Industry*, THE HILL (Sept. 09, 2014, 3:00 PM), http://thehill.com/blogs/congress-blog/technology/216969-local-choice-bipartisan-senate-proposal-brings-market-reform. The proposal was ultimately left out of the Satellite Television Access and Viewer Rights Act (STAVRA). *See* Press Release, Sen. John Thune, Rockefeller, Thune Issue Joint Statement on Committee Passage of the Satellite Television Access and Viewer Rights Act (Sept. 17, 2014), *available at* http://www.thune.senate.gov/public/index.cfm/press-releases?ID=6d5f16f5-7d72-481e-955f-9b45495b2dc5.

89. Press Release, Rep. Anna Eshoo, Bill to Eliminate TV Blackouts and Reform the Video Marketplace Introduced (Sept. 9, 2013), *available at* http://eshoo.house.gov/news-stories/press-releases/bill-to-eliminate-tv-blackouts-and-reform-the-video-marketplace-introduced/; *see also, Eshoo Releases Draft Bill to Address TV Programming Pitfalls*, FIERCECABLE (Sept. 9, 2013), http://www.fiercecable.com/press-releases/eshoo-releases-draft-bill-address-tv-programming-pitfalls.

90. Bryce Baschuk, C*ompeting House Bills Would Revise Television Retransmission Consent Rules*, BLOOMBERG LAW (Dec. 20, 2013), http://www.bna.com/competing-house-bills-would-revise-television-retransmission-consent-rules/.

91. Television Consumer Freedom Act of 2013, S. 912, 113th Cong. (2013), *available at* https://www.congress.gov/113/bills/s912/BILLS-113s912is.pdf.

92. John Eggerton, *Rep. Eshoo Proposes Retransmission Bill*, MULTICHANNEL NEWS (Sept. 9, 2013, 2:24 PM), http://www.multichannel.com/policy/rep-eshoo-proposes-retransmission-bill/145361.

93. Steve Donohue, *Eshoo Bill Triggers Retransmission-Consent Showdown*, FIERCECABLE (Sept. 10, 2013), http://www.fiercecable.com/story/eshoo-bill-triggers-retransmission-consent-showdown/2013-09-10.

In the meantime, the FCC has maintained that it lacks statutory authority to intervene when retransmission consent negotiations fail.[94] The Commission rejected any claims of authority to compel interim carriage of broadcast programming or mandatory arbitration.[95] Some MVPDs see the reluctance of the FCC to interfere in retransmission consent disputes as inconsistent with the agency's prior expansive interpretation of the mandate to ensure that broadcasters operate in the public interest.[96]

C. Discontinuance Rules: An Alternative Framework to Discourage Blackouts

A possible tool in the FCC's existing regulatory toolbox that could be used to discourage blackouts in retransmission consent negotiations are regulations regarding discontinuance of service and operating at a variance with a broadcasting license. FCC enforcement of discontinuance regulations is premised on the important role broadcasters play in disseminating information to local communities. When a station discontinues operations or operates at a variance from their license without permission from the Commission, the FCC may take several enforcement actions, including issuing show cause orders or revoking licenses, shortening a station's renewal period, and upwardly adjusting forfeitures based on the egregiousness of the behavior or circumstances.

The FCC's rules on discontinuance of service allow a station to go silent or fail to maintain a minimum operating schedule for up to 30 days without receiving prior FCC authorization, as long as the station notifies the Commission within 10 days and discloses the limited or discontinued operation.[97] By the 30th day, the station must seek Special Temporary Authority to remain silent or operate at

94. *See NPRM*, *supra* note 16, at 2763 (Statement of Chairman Julius Genachowski) (asserting that "[t]he current statutory framework limits the Commission's tools to respond to retransmission consent impasses").

95. *See id*. (Chairman Genchowski stating that "the statute doesn't give the Commission the authority to order interim carriage of broadcast programming or mandatory arbitration. The jury is still out on whether those measures are necessary . . . but if they are, it will require statutory change . . . .").

96. *See* 47 U.S.C. § 309(a) (2012); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 379–80 (1969); *see also* Letter from Joseph E. Young, Senior Vice President, Mediacom, to P. Michelle Ellison, Chief of Staff, FCC, (Aug. 12, 2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7520937280 (contrasting FCC's "timidity" with expansive statutory interpretations advanced in areas such as net neutrality and terrestrial program services where there is no authority "apparent on the face of the statute or in the relevant legislative history . . . ").

97. 47 C.F.R. § 73.1740 (2014).

variance from its license.[98] If technical problems make it impossible for a station to operate in accordance with its license, the FCC allows the broadcaster to operate at variance with its license for a period of not more than 30 days without specific authority from the FCC.[99]

The policy rationale for deterring temporary or permanent discontinuance of operations is to prevent public harm.[100] Silent stations do not serve the public interest because they fail to offer community service programming such as news, public affairs, weather information, and emergency alerts.[101] In some cases, the FCC found stations operating at a lower power than the minimal signal level required for service to the community of license to be the functional equivalent of a silent station.[102] Spectrum efficiency policies also underlie the minimum operating schedule and discontinuance rules to ensure "that scarce broadcast spectrum does not lie fallow and unavailable to others capable of instituting and maintaining service to the public."[103]

The FCC has authority to discourage service disruptions by issuing show cause orders and revoking licenses. *Debrine Communications, Inc.* affirmed the FCC's authority to issue orders for a station that had gone silent without authorization to show cause for why the agency should not revoke its license.[104] *Radio Northwest Broadcasting Co.* established the FCC's authority to issue license revocation orders to silent stations.[105]

While license renewal is generally automatic, the FCC has made exceptions in regards to silent stations. Since the 1980s, the license renewal process—traditionally, the time at which the FCC evaluates a station's public interest performance—has been abbreviated and made virtually automatic through a "postcard

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98. *Id.*

99. 47 C.F.R. § 73.691(b) (2014).

100. Renewal Reporting Requirements for Full Power, Commercial AM, FM and TV Broad. Stations, *Notice of Proposed Rulemaking*, FCC 92-557, 8 FCC Rcd. 49, 49, para. 5 (1993) [hereinafter *Renewal Reporting Requirements NPRM*]; *see also* Media Bureau Announces Revisions to License Renewal Procedures and Form 303-S, *Public Notice*, DA 11-489, 26 FCC Rcd. 3809, 3810 (2011).

101. *See* LKCM Radio Group, *Memorandum Opinion and Order*, DA 14-122, 29 FCC Rcd. 1045, at 1049 (2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-14-122A1_Rcd.pdf.

102. See *id.* at 1049 n.30.

103. Family Life Ministries, Inc., *Denial of Petition for Reconsideration*, DA 08-2361, 23 FCC Rcd. 15395, 15397 (2008).

104. Debrine Commc'ns, Inc., *Order to Show Cause and Hearing Designation Order*, FCC 92-84, 7 FCC Rcd. 2118, 2118-19 (1992).

105. Radio Nw. Broad. Co., *Order of Revocation*, FCC 88-397, 4 FCC Rcd. 596, 596 (1989).

renewal" process.[106] As part of the license renewal process, the FCC requires stations to note periods of discontinued operations.[107] In *LKCM Radio Group*, the FCC's Media Bureau determined that stations with prolonged periods of silence face a heavy burden in demonstrating that they have served the public interest.[108] While the FCC did renew the license for the station in question in *LKCM Radio Group*, the Media Bureau shortened the renewal period from four years to two years to ensure that the station "endeavors in the future to provide the broadcast service it is licensed to provide."[109]

The most versatile enforcement mechanism the FCC has to deter service disruptions is the agency's ability to upwardly adjust penalties according to various circumstances of the case.[110] The FCC may adjust forfeitures for egregious misconduct, the ability to pay or the relative disincentive to the action sought to be deterred, intentional violations, substantial harm, prior violations of any FCC requirements, substantial economic gain from the prohibited action, and repeated or continuous violations.[111]

III. ANALYSIS

The FCC's proposed enhancements to the good faith standard may not go far enough to prevent blackouts and proposed congressional reforms may not be feasible in the current political climate. At the same time, the FCC does have authority to intervene to prevent service disruptions and ought to intervene to preserve the public's interest in access to local media and diversity of media sources. Intervention in retransmission disputes would be akin to FCC enforcement of discontinuance rules and the agency could implement retransmission intervention in a similar fashion.

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106. *See The Public Interest Standard in Television Broadcasting*, BENTON FOUND., https://www.benton.org/initiatives/obligations/charting_the_digital_broadcasting_future/sec2 (last accessed Apr. 30, 2015).

107. Section III, Item 4 of the license renewal application form, FCC Form 303-S, requires that the licensee certify that, during the license term, the radio station has not been silent (or operating for less than its prescribed minimum operating hours) for any period of more than 30 days. If the licensee is not able to so certify, then it must submit an exhibit specifying the exact dates on which the station was silent or operating for less than its prescribed hours. FCC, INSTRUCTIONS FOR FCC 303-S: APPLICATION FOR RENEWAL OF BROAD. STATION LICENSE 9 (Mar. 2011), *available at* https://transition.fcc.gov/Forms/Form303-S/303s.pdf.

108. *See LKCM Radio Group*, *supra* note 101, at 1049.

109. *Id.* at 1050.

110. 47 C.F.R. § 1.80 (2014).

111. *Id.*

A. Proposed FCC and Congressional Reforms May Not Be Realistic or Robust Enough to Prevent Blackouts

The FCC's issuance of the R&O regarding joint negotiations by broadcasters in 2014 demonstrates the agency's preference towards taking incremental steps in addressing retransmission consent. The limited application of the R&O to non-commonly owned Top Four stations more than three years after the FCC's proposed enhancement to the good faith standards makes it unlikely that the agency will adopt the new standards in the near future. While the R&O is a step in the right direction by making it difficult for two major stations to threaten blackouts during retransmission consent negotiations, it does not address blackouts by single broadcasters.[112]

Even if the FCC implements the proposed strengthened good faith standards, there is reason to believe they will not deter blackouts. For FCC enforcement of good faith provisions to prevent blackouts, there must be enough of a disincentive to pursue greater profits from negotiations. The FCC's position that it lacks authority to compel arbitration or alternative dispute resolution takes away a powerful means of enforcing the good faith standards. Additionally, blackouts are not one of the *per se* violations of good faith in the proposed rulemaking and the adoption of the strengthened good faith standards may not deter future blackouts in stalled negotiations.

Similarly, proposed legislative efforts to give the FCC explicit authority to intervene in retransmission consent negotiations will likely be unsuccessful in preventing blackouts. Legislative proposals with overtly interventionist approaches, such as those in the Eshoo and McCain bills, will face strong challenges in the current political climate. In the past, Congress has used FCC action, such as proposed rulemaking, as a justification to stay out of the retransmission fight. Thus, it is unlikely that Congress will intervene with the FCC's notice of proposed rulemaking in regards to the good-faith standards.[113]

B. The FCC Can and Should Intervene to Prevent Future Blackouts

While the FCC shies away from intervention, citing its lack of statutory authority to compel broadcaster consent to retransmission, the Cable Act and its accompanying legislative history seem to mandate that

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112. *See generally R&O*, *supra* note 65.

113. Senator Kerry commented on earlier retransmission consent legislation: "With the FCC taking action and their experts focused on a solution, there's no need to introduce legislation at this time." John Eggerton, *Kerry Won't Proceed with Retrans Legislation*, BROADCASTING & CABLE (Dec. 8, 2010, 1:36 PM), http://www.broadcastingcable.com/news/washington/kerry-wont-proceed-with%C2%A0retrans-legislation/58255.

the agency intervene on behalf of the public interest to prevent blackouts.[114] The debates surrounding the Cable Act show that Congress considered the possibility of consumers being deprived access to broadcast signals should retransmission negotiations fail. Responding to these concerns, the bill's authors reassured fellow lawmakers that the FCC had authority to compel arbitration or alternative dispute resolution, preventing such a deprivation.[115]

The same policy rationale underlies preventing blackouts and ensuring broadcasters follow minimum operating schedules: preventing public harm from diminished service. Because local content and a multiplicity of sources are important for cable subscribers as well as over-the-air viewers, the same financial disincentives that the FCC is permitted to apply when a station discontinues service altogether could apply to broadcasters who effectively discontinue service to cable subscribers. Furthermore, the unwillingness of broadcasters to restore service to pay-TV subscribers has efficiency implications similar to those expressed in discontinuance policies. The harm of diminished service is compounded when another party would be willing to resume service. Though broadcasters have not stopped broadcasting, they serve a significantly smaller percentage of the community and the spectrum is not being used to most effectively serve the public interest.

To be clear, it is unlikely that the FCC could legally revoke a broadcaster's license for an intentional blackout because it has not technically discontinued service or changed its operating schedule. Discontinuance and operation at variance rules concern technical specifications that the FCC has explicit authority to regulate. A reduction in the percentage of the population served by a broadcaster's signal concerns the FCC's ability to regulate carriage more than the signal. Moreover, the

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114. 138 CONG. REC. S643 (daily ed. Jan. 30, 1992) (statement of Sen. Inouye) ("There may be times when the Government may be of assistance in helping the parties reach an agreement . . . . [T]he FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers.").

115. *See* 138 CONG. REC. S1006 (daily ed. Jan. 30, 1992) (statement of Sen. Levin) ("[T]he bill does not directly address the possibility that broadcasters and cable operators in a particular market may be unable to reach an agreement, resulting in noncarriage of the broadcast signal via the cable system. I strongly suggest . . . that the FCC should be directed to exercise its existing authority to resolve disputes between cable operators and broadcasters, including the use of binding arbitration or alternative dispute resolution methods in circumstances where negotiations over retransmission rights break down and noncarriage occurs, depriving consumers of access to broadcast signals."). Senator Daniel Inouye responded, "[t]he FCC does have the authority to require arbitration, and I certainly encourage the FCC to consider using that authority if the situation the Senator from Michigan is concerned about arises and the FCC deems arbitration would be the most effective way to resolve the situation." *Id.*

30-day window to obtain FCC authorization of discontinuing service or operating at variance makes this less useful as an enforcement mechanism for retransmission consent negotiations because most blackouts are for a shorter duration.

If the FCC were simply to take any complaints regarding blackouts and failures to negotiate in good faith into consideration when considering license renewal, it would not likely serve as an effective deterrent to blackouts because, as discussed earlier, license renewal is almost always automatic. Nonetheless, as described above, the policy underpinnings of the discontinuance rules are equally relevant in the case of voluntary blackouts, and the FCC practice in the former context should guide the agency's implementation of its broad statutory authority in the latter.

The FCC's ability to upwardly adjust forfeitures for discontinuance of service according to various factors can guide disincentives in blackouts as well. The fact that forfeitures may be set to be a relative disincentive is pertinent to the FCC's ability to dissuade broadcasters from blackouts. The fine could be set according to the amount a broadcaster hopes to gain by a blackout during negotiations, examining the fee demanded in the current stalled negotiations with fees agreed to in the past. The FCC may also upwardly adjust forfeitures for intentional violations of discontinuance rules. The discontinuance of service to cable subscribers during a blackout is voluntary, unlike the technical service disruptions of the discontinuance and operation at variance rules. Even during involuntary service disruptions, stations may face fines if they have not sought FCC authorization or have failed to take prescribed steps. Disruptions due to blackouts are perceived as solely for financial gain.

That the FCC may adjust fines according to substantial harm is also pertinent to blackouts, as they frequently coincide with important sporting and entertainment events. Blackouts, for example, that coincide with the Super Bowl or the Academy Awards may cause more substantial harm to viewers. Or blackouts that may prevent viewers from obtaining important safety information, such as during a wildfire or flooding, may deserve stronger deterrents because of the potential harm. The longer the duration of a blackout, the greater the harm may be to the public as well.

Finally, the provision that allows the FCC to adjust forfeitures for repeated or continuous violations is relevant to broadcasters who regularly use blackouts as a negotiation tool. The FCC may impose greater financial disincentives on broadcasters who have used blackouts in the past to gain the upper hand in negotiations, showing a repeated disregard for the public they serve. Taking into account each of these factors gives the FCC flexibility in creating effective financial deterrents to harmful blackout

tactics while respecting the good faith provision's preservation of the competitive market.[116]

The effect of greater FCC enforcement on retransmission consent negotiations might not eliminate blackouts altogether, but financial penalties for service disruptions to cable subscribers will help to restore the balance in bargaining power between broadcasters and MVPDs. When retransmission consent and must-carry rules were developed, broadcasters were concerned about reaching cable customers for their own financial viability and relevance in the community. Without financial disincentives, broadcasters may continue to deny their programming to certain MVPDs in favor of more lucrative deals with others. Denying significant portions of the public the benefits of local programming and a multiplicity of voices clearly goes against the purposes of the Cable Act of preserving a diverse, local media landscape. While it is possible that the prospect of lower retransmission revenues will push broadcast networks to convert to cable networks for higher fees, the complexity and time involved to make that business model shift makes the immediate risk less likely.

As noted earlier, the more broadcasters and cable providers consolidate and gain access to greater financial reserves, the more consumers can expect lengthier blackouts.[117] If more retransmission consent disputes follow the model of the 2013 Time Warner Cable and CBS mega blackout, the FCC's discontinuance rule may be relevant even with its 30-day window provision. Also, with online video distribution becoming a prevalent sticking point in negotiations, retransmission consent negotiations have become more complicated and protracted. For example, in the 32-day CBS-Time Warner Cable blackout, digital video rights were reportedly a major sticking point in the carriage dispute.[118] The terms and conditions of these negotiations have increased exponentially. While the FCC should seek to prevent blackouts, the 30-day window in the discontinuance of service regulations may provide an entry date of FCC intervention into lengthy blackouts.

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116. 47 U.S.C. § 325(b)(3)(A) instructs the Commission that broadcasters may enter into retransmission consent agreements "containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations."

117. SNL Financial has identified 35 retransmission consent blackouts between 2005 and 2013 that lasted 28 days or longer. *See* Robin Flynn, *A Brief History of Retrans Blackouts and Where TWC/CBS Ranks*, SNL FINANCIAL (Sept. 6, 2013), http://www.snl.com/InteractiveX/article.aspx?id=24891271&Printable=1.

118. *See* Amol Sharma & Shalini Ramachandran, *Digital Video Rights Are Hurdle in CBS-Time Warner Cable Fight*, WALL ST. J. (Aug. 8, 2013, 8:58 PM), http://www.wsj.com/articles/SB10001424127887323838204579001281120168554.

IV. CONCLUSION

All parties acknowledge the fact that significant market changes have affected retransmission consent negotiations since the adoption of the Cable Act in 1992. Cable companies are no longer an imminent threat to the existence of broadcasters. Outdated policies that refuse to recognize the current reality of how Americans view network television fail to address the large portions of communities that lose access to local stations during blackouts. The FCC has both the mantle, through the authority granted under the Cable Act and its public interest mandate, and the means, through existing discontinuance policies and enforcement mechanisms, to prevent harmful service disruptions for consumers.

Treating Consumer Data Like Oil: How Re-framing Digital Interactions Might Bolster the Federal Trade Commission's New Privacy Framework

Andrew Hasty*

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* J.D., The George Washington University Law School. Andy would like to thank his wife Isabelle and all of his friends within the FTC's Division of Privacy and Identity Protection for their patience and helpful feedback.

I. INTRODUCTION

Americans have grappled with consumer privacy concerns for a long time. More than 120 years have passed since Samuel Warren and Louis Brandeis—fearing that innovations such as "instantaneous photography" and "newspaper enterprise" would "proclaim[] from the house-tops" what "is whispered in the closet"—wrote their famous article calling for "the right 'to be let alone.'"[1] And yet, the same concern remains manifest in today's headlines.[2] More than a century later, solutions to the consumer privacy dilemma have not materialized.

Today's technologies enable unprecedented collection and analysis of consumer data, but mechanisms aimed at protecting consumer privacy have lagged.[3] When consumers use search engines to explore the web, exchange messages with friends, or download apps to their smartphones, these digital interactions are often tracked and monetized by a number of behind-the-scenes companies.[4] Yet, as business models centered on monetizing consumers' data and attention have taken off,[5] safeguarding consumer privacy in the United States remains the job of a motley assortment of protections.[6] Indeed, to the extent that regulations exist, they are "sectoral, with different laws regulating different industries and economic sectors."[7] This patchwork has created large gaps in coverage, making the Federal Trade Commission (FTC)—through enforcement of section 5 of the Federal Trade Commission Act ("Section 5")[8]—the United States' "regulator" of consumer privacy.[9]

Over the years, the FTC has skillfully leveraged its tools and experience to advance and enforce three different frameworks for

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1. Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4. HARV. L. REV. 193, 195 (1890).

2. *See, e.g.*, Editorial, *The End of Privacy?*, N.Y. TIMES, July 15, 2012, at SR10, *available at* http://www.nytimes.com/2012/07/15/opinion/sunday/the-end-of-privacy.html; *see also* Bruce Schneier, *Will Giving the Internet Eyes and Ears Mean the End of Privacy?*, THE GUARDIAN (May 16, 2013, 7:26 AM), http://www.theguardian.com/technology/2013/may/16/internet-of-things-privacy-google.

3. *See, e.g.*, Paul Ohm, *Don't Build a Database of Ruin*, HARV. BUS. REV. (Aug. 23, 2012), https://hbr.org/2012/08/dont-build-a-database-of-ruin/.

4. *See* Julie Brill, *Data Industry Must Step Up to Protect Consumer Privacy*, AD AGE (Oct. 28 2013), http://adage.com/article/guest-columnists/data-industry-step-protect-consumer-privacy/244971/.

5. *See, e.g.* Ohm, *supra* note 3 ("Many businesses today find themselves locked in an arms race with competitors to see who can convert customer secrets into the most pennies.").

6. *See, e.g.*, Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 587 (2014).

7. *Id.*

8. Section 5 of the FTC Act provides that "unfair or deceptive acts or practices in or affecting commerce . . . are . . . unlawful." Federal Trade Commission Act of 1914, ch. 311, § 5, 38 Stat. 719 (codified as amended at 15 U.S.C. § 45 (2012)).

9. Solove & Hartzog, *supra* note 6, at 587–88.

safeguarding consumer privacy, but it has so far been unable to create a regulatory model that keeps pace with rapidly evolving technologies.[10] Beginning in the 1990s, as consumers turned to the Internet to communicate, shop, and explore new possibilities, the FTC promulgated the first of its three privacy frameworks.[11] Widely referred to as the "notice and choice" framework, the FTC's initial attempt to grapple with the consumer privacy implications of connected digital technologies centered on encouraging companies to tell consumers how their data was handled so that consumers could choose which services to use.[12] Despite some early successes, the "notice and choice" approach quickly proved inadequate to deal with the "increasing convergence of online and offline data systems" ushered in by the new millennium.[13] Under its second framework—referred to as the FTC's "harm-based" approach—the FTC "targeted practices that caused or were likely to cause physical or economic harm, or 'unwarranted intrusions in [consumers'] daily lives,'" instead of "emphasizing potentially costly notice-and-choice requirements for all uses of information."[14]

Like the earlier "notice and choice" model, however, the harm-based framework also relied heavily on self-regulation, which developed too slowly to provide consumers with "adequate and meaningful protection" in light of technology's continued march forward.[15] In a recent effort to ensure that adequate and meaningful consumer privacy protections kept pace with technological change, the FTC set out to develop a third framework. In March 2012, after hosting a series of public roundtables and issuing a preliminary report for notice and comment,[16] the FTC released its latest framework for safeguarding consumer privacy.[17]

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10. *See, e.g.*, *Hearing on "The FTC at 100: Views from the Academic Experts," Subcomm. on Commerce, Mfg., & Trade of the Comm. on Energy & Commerce*, 113th Cong. (2014) (statement of Paul Ohm, Professor, University of Colorado Law School) (praising the FTC for its prudent approach to privacy regulation but noting limitations that prevent the FTC from addressing privacy harms imposed by changing technologies), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Ohm-CMT-FTC-100-Academic-Perspective-2014-2-28.pdf.

11. *See* FTC, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICY MAKERS 6–7 (2010), *available at* https://www.ftc.gov/sites/default/files/documents/ reports/federal-trade-commission-bureau-consumer-protection-preliminary-ftc-staff-report-protecting-consumer/101201privacyreport.pdf .

12. *Id.* at iii.

13. *Id.* at 9.

14. *Id.* (internal citations omitted).

15. *Id.* at iii.

16. *Id.* at iii–v.

17. FTC, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS (2012), *available at* https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

Meanwhile, consumer technologies—and the privacy problems they raise—continue to evolve. Yesterday's desktop-based Internet technologies are paving the way for tomorrow's "Internet of Things," which seeks to give every device, from pacemakers, eyeglasses, and refrigerators to watches, cars, and HVAC systems, the ability to sense, remember, and communicate information with every other device.[18] Although these technologies promise to improve efficiency, lower costs, and create new products and services that enrich consumers' lives, they also raise serious privacy concerns by making consumers' every action potentially visible to anyone or anything with an Internet connection.[19] Already, as companies rush to extract information from consumers, the expression "data is the new oil" has become a tired cliché.[20] If consumer privacy regulation in the United States is to keep pace without restraining technological development, it must scale to meet complex and evolving challenges.

With the "Internet of Things" on the horizon, this Note asks how the United States' approach to consumer privacy regulation would change if the "digital oil" cliché were taken seriously. The Note proceeds by describing the consumer technology landscape as it currently exists, before turning to the FTC's role as the United States' primary privacy regulator. Through references to existing technologies and services, this Note argues that consumers' digital interactions should be recognized as the commercial exchanges of value that they are. Such a framing would substantiate the FTC's new privacy framework and could realistically be achieved through incremental implementation. After submitting the "data-as-oil" construct to public scrutiny for further refinement, the FTC could bring pilot cases to establish and stress test the theory in varying factual scenarios. This approach—matching the FTC's new privacy framework with the "data-as-oil" recognition—could ultimately be used to create a flexible regulatory solution to the complex privacy problems created by evolving technologies.

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18. *See generally* Edith Ramirez, Chair, FTC., Opening Remarks at the FTC Public Workshop: The Internet of Things: Privacy and Security in a Connected World (Nov. 19, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/opening-remarks-ftc-chairwoman-edith-ramirez-federal-trade-commission-Internet-things-privacy/131119iotremarks.pdf.

19. *See, e.g.*, Maureen K. Ohlhausen, Comm'r, FTC., Remarks at the Consumer Electronics Show: Promoting an Internet of Inclusion: More Things AND More People, (Jan. 8, 2014), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/promoting-Internet-inclusion-more-things-more-people/140107ces-iot.pdf.

20. *See, e.g.*, John Naughton, *The Web Giants Pumping Us for Data*, THE GUARDIAN (Aug. 31, 2013, 7:06 PM), http://www.theguardian.com/technology/2013/sep/01/big-data-corporations-information.

II. THE MODERN DIGITAL ENVIRONMENT DEMANDS A NEW REGULATORY APPROACH

The modern digital environment requires a flexible regulatory structure capable of resolving complex consumer privacy dilemmas. As the number of transistors that can fit onto a square inch of silicon continues to double approximately every two years,[21] today's engineers continue to conceive and build products, services, and systems that solve problems and enrich lives. These developments also foster tremendous amounts of data collection, sharing, and use— raising difficult consumer privacy dilemmas that outstrip regulatory capacity. If consumers are to retain control over their information while harnessing the promise of tomorrow's technologies, the United States must implement a flexible regulatory solution that keeps pace with technological development.

A. Consumer Technologies Are Rapidly Evolving

What used to be confined to the creative minds of yesterday's science fiction writers is now the stuff of today's technological reality. Over the past few years, consumers have started carrying powerful personal computers at an astonishingly fast rate. Smartphone adoption has "outpaced the 1980s PC revolution, the 1990s Internet boom, and the social networking craze of the 'aughts,'"[22] and is reported to be "10 times that of what we might now perceive as the positively glacial pace of early personal computer adoption."[23] More than fifty-six percent of adults in the United States own smartphones[24] and spend a considerable amount of time using their devices to interact with the digital world.[25]

Possessing considerably more power than the guidance computers that first put astronauts on the moon,[26] today's ordinary smartphones are capable of identifying their user's every movement within inches and reporting these

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21. *See, e.g.*, Mark Ward, *The Future of the Silicon Chip*, BBC NEWS (Sept. 27, 2011), http://www.bbc.com/news/technology-14880363.

22. Stephanie Mlot, *Smartphone Adoption Rate Fastest in Tech History*, PCMAG (Aug. 27, 2012, 2:27 PM), http://www.pcmag.com/article2/0,2817,2408960,00.asp.

23. *Id.*

24. Aaron Smith, *Smartphone Ownership 2013*, PEW RES. CENTER (June 5, 2013), http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/.

25. *See, e.g.* Maeve Duggan & Aaron Smith, *Cell Internet Use 2013*, PEW RES. CENTER (Sept. 16, 2013), http://www.pewInternet.org/Reports/2013/Cell-Internet.aspx.

26. *See, e.g.* Shaun Clayton, *8 Famous Computers with a Pathetic Amount of Power*, TOPLESS ROBOT (May 30, 2012, 8:03 AM), http://www.toplessrobot.com/2012/05/8_famous_computers_with_a_pathetic_amount_of_power.php (comparing the iPhone 4 to the Apollo Guidance Computer).

movements to anyone or anything with an Internet connection.[27] Brick and mortar retailers can combine their stores' video surveillance with facial recognition technologies to analyze customers' expressions (and, if any of those customers have the retailer's app on their phone, connect their customer's digital interactions with their physical ones).[28] Other examples abound. Bracelets worn around consumers' wrists help their wearers track steps taken, calories burned, and other physical activities.[29] Today's cars integrate sophisticated sensing and processing technologies to detect looming dangers and take preventive actions before the "driver" is even aware of an issue.[30] Many also take advantage of persistent data connections to keep the car in contact with service providers at all times.[31]

B. Information-Based Monetization Strategies Are Powering Technological Growth

The rapid development of technology, fueled by information-based monetization strategies, fosters a tremendous amount of data collection, use, and sharing. Aptly described as a "revolution,"[32] companies are rapidly adopting "big data" technologies, which promise to yield lucrative insights by mining unimaginably large data sets for previously undiscovered connections.[33] Behind the scenes of consumers' digital interactions, "[d]ata companies [scoop] up enormous amounts of information about almost every American. They sell information about whether you're pregnant or divorced or trying to lose weight, about how rich you are and what kinds of cars you have."[34] Today's companies "maintain[] vast troves of transactional data,

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27. *See* Liat Clark, *Finnish Startup Can Locate You Indoors Using Magnetic Field Anomalies*, WIRED UK (July 9, 2012), http://www.wired.co.uk/news/archive/2012-07/09/indoor-smartphone-compass-locater.

28. *See* Megan Garber, *I Know What You Did Last Errand*, THE ATLANTIC (July 15, 2013), http://www.theatlantic.com/technology/archive/2013/07/i-know-what-you-did-last-errand/277785/.

29. *See, e.g.*, Barry Levine, *Wearable Bands Are Booming. Better Get in Shape for All That Fitness Tracking*, VENTURE BEAT (Feb. 12, 2014, 10:02 AM), http://venturebeat.com/2014/02/12/wearable-bands-are-booming-better-get-in-shape-for-all-that-fitness-tracking/.

30. *See, e.g.*, Nick Palmero, *6 Affordable Vehicles with Collision Warning Systems*, AUTOTRADER, http://www.autotrader.com/research/article/best-cars/188920/6-affordable-vehicles-with-collision-warning-systems.jsp (last visited Mar. 3, 2014).

31. *See, e.g.*, Keith Barry, *Can Your Car Be Hacked?*, CAR & DRIVER (July 2011), http://www.caranddriver.com/features/can-your-car-be-hacked-feature.

32. *See* Steve Lohr, *The Age of Big Data*, N.Y. TIMES (Feb. 11, 2012), http://www.nytimes.com/2012/02/12/sunday-review/big-datas-impact-in-the-world.html.

33. "Big Data" is "shorthand for advancing trends in technology that open the door to a new approach to understanding the world and making decisions." *Id.*

34. Lois Beckett, *Everything We Know About What Data Brokers Know About You*, PRO PUBLICA (June 13, 2014, 1:59 PM), http://www.propublica.org/article/everything-we-know-about-what-data-brokers-know-about-you.

much of which is 'data exhaust,' or data created as a by-product of other transactions."[35] Some data, however, including the information derived from mobile devices, is particularly valuable since it can be associated with specific individuals.[36] This allows recipients of the data to "paint a picture about the needs and behavior of individual users rather than simply the population as a whole."[37] It is this promise—the ability to obtain a complete picture of each consumer's life—that is powering the growth of the digital world's most promising firms.[38]

Monetization strategies centered on advertising are not particularly new, nor is the use of data to persuade specific audiences.[39] What *is* new is the ability to use data about specific consumers to persuade those consumers to take desired actions, cheaply and on a wide scale.[40] Companies such as Google and Facebook have built empires by selling access to specific consumers, and many other firms are following their lead.[41] By targeting advertisements to particular individuals, firms employing ad-based monetization strategies compete to gather and analyze consumer-specific data in the hopes of commanding higher rents from companies wishing to reach specific audiences at specific times and in specific contexts.[42]

Instead of selling direct access to consumers, countless other firms profit from advertising-based monetization strategies by offering background services and infrastructure that facilitates the sale, publication,

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35. WORLD ECON. FORUM, BIG DATA, BIG IMPACT: NEW POSSIBILITIES FOR INTERNATIONAL DEVELOPMENT 3 (2012), *available at* http://www3.weforum.org/docs/WEF_TC_MFS_BigDataBigImpact_Briefing_2012.pdf.

36. *Id.* at 3.

37. *Id.* at 2.

38. *See* Lohr, *supra* note 32.

39. Understanding one's customers, and knowing how to influence them, has been viewed as "critical to advertising wisely" at least since 1904. *See* Walter D. Scott, *The Psychology of Advertising*, THE ATLANTIC (Jan. 1904), *available at* http://www.theatlantic.com/magazine/archive/1904/01/the-psychology-of-advertising/303465/.

40. *See, e.g.*, Elizabeth Dwoskin, *What Secrets Your Phone Is Sharing About You*, Wall St. J. (Jan. 13, 2014, 8:47 PM), http://online.wsj.com/news/articles/SB10001424052702303453004579290632128929194?mod=WSJ_hps_LEFTTopStories.

41. *See, e.g.*, *All The Facts You Need to Know About Mobile Marketing*, AD AGE (Aug. 19, 2013), http://adage.com/article/digital/mobile-fact-pack-2013-ad-age-s-guide-mobile-marketing/243696/. *See also* Billy Steele, *Facebook's Mobile Ads Now Account for Over Half of Its Revenue Thanks to 945 Million Monthly Users*, Engadget.com (Jan. 29, 2014), http://www.engadget.com/2014/01/29/facebook-mobile-ad-revenue-q4-2013/; Natasha Lomas, *Mobile Ad Market Spending to Hit $18BN in 2014, Rising to ~$42BN by 2017, Says Gartner*, Techcrunch.com (Jan. 21, 2014), http://techcrunch.com/2014/01/21/mobile-ad-market-forecast-to-2017/.

42. *See, e.g.*, J. HOWARD BEALES & JEFFREY A. EISENACH, NAVIGANT ECONOMICS, AN EMPIRICAL ANALYSIS OF THE VALUE OF INFORMATION SHARING IN THE MARKET FOR ONLINE CONTENT 1 (2014), *available at* http://www.aboutads.info/resource/fullvalueinfostudy.pdf.

and performance tracking of digital ads.[43] Still other firms seek to make money by collecting and packaging consumer information for secondary uses, such as research and targeting.[44] For example, many states' hospital systems make patients' records for sale to the general public.[45] Over the past decade, the number of third parties receiving this data has more than doubled,[46] and it is estimated that the market for medical data will surpass $10 billion over the next six years.[47] While states take a variety of steps to anonymize the data, it is often easy to re-identify and few states require purchasers not to do so.[48]

C. Technology's Benefits

It is unquestionable that advances in technology, especially when paired with the collection, sharing, and use of consumer data, have and will continue to produce tremendous benefits. Today, a blind German person (who knows no English) and a deaf American person (who knows no German) can communicate with each other *almost* in real time, thanks to wearable technology like Google Glass.[49] Questions about self-driving cars have shifted from feasibility to timing (when will they be for sale?), participants (which companies will sell them, and to whom?) and liability (who is at fault in a collision?).[50] Perhaps most promising are the

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43. *See, e.g.*, Terence Kawaja, *Marketing Technology LUMAscape*, SLIDE SHARE (May 8, 2013), http://www.slideshare.net/tkawaja/marketing-technology-lumascape (last visited Jan. 15, 2014) (graphically presenting the firms that participate in digital advertising by grouping specific firms by functionality).

44. OFFICE OF OVERSIGHT & INVESTIGATIONS, S. COMM. ON COMMERCE, SCI., & TRANSP., A REVIEW OF THE DATA BROKER INDUSTRY: COLLECTION, USE, AND SALE OF CONSUMER DATA FOR MARKETING PURPOSES 29 (2013), *available at* http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=0d2b3642-6221-4888-a631-08f2f255b577.

45. *See* Jordan Robertson, *States' Hospital Data for Sale Puts Privacy in Jeopardy*, BLOOMBERG (June 5, 2013), http://www.bloomberg.com/news/2013-06-05/states-hospital-data-for-sale-puts-privacy-in-jeopardy.html.

46. *See* Jordan Robertson, *As Health Records Go Digital, Where They End Up Might Surprise You*, BLOOMBERG (June 5, 2012, 8:27 PM), http://go.bloomberg.com/tech-blog/2012-06-05-as-health-records-go-digital-where-they-end-up-might-surprise-you/.

47. *See* James Manyika et al., *Big Data: The Next Frontier for Innovation, Competition, and Productivity*, MCKINSEY & COMPANY (May 2011), http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for_innovation.

48. *See* Robertson, *supra* note 45.

49. *See* Vint Cerf, Google, Remarks at FTC Workshop: Internet of Things - Privacy & Security in a Connected World 125-27 (Nov. 19, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_events/internet-things-privacy-security-connected-world/final_transcript.pdf.

50. *See, e.g.*, Doron Levin, *Just How Close to Commercial Reality Is a Self-Driving Car?*, FORTUNE (Jan. 10, 2014, 7:54 PM), http://features.blogs.fortune.cnn.com/2014/01/10/self-driving-car-google/.

opportunities in healthcare, where technology and data may be employed to reduce the costs of care and increase the quality of treatment.[51]

From an economist's perspective, the sharing of consumer information can reduce search costs, improving economic efficiency.[52] Indeed, consumers may "suffer privacy costs when too *little* personal information about them is being shared with third parties, rather than too much."[53] For example, buyers need to know where they can purchase which goods and at what prices, and sellers need to know which products to carry. Revealing buyers' tastes (without revealing buyers' maximum price) increases welfare for both sides, leaving everyone better off.[54]

D. Technology's Privacy Dilemmas

For all its benefits, changing technology also presents complex and evolving privacy dilemmas. For example, consumers struggle to understand the flow of their personal information when visiting websites on a desktop computer, let alone how they can take steps to control that flow.[55] These difficulties are exacerbated by smartphones, and "will be exponentially greater with the advent of the Internet of things, as the boundaries between the virtual and the physical worlds disappear."[56] From firms' tendency to change their information collection, use, and sharing practices over time in ways that undermine consumer privacy, to firms' use of "legalese" in key disclosures to maintain an illusion of transparency while obfuscating important information,[57] technology's march forward makes it very difficult to strike the right balance.

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51. *See, e.g.*, Elaine Grant, *The Promise of Big Data*, HARV. PUB. HEALTH, Spring/Summer 2012, at 15 ("Petabytes of raw information could provide clues for everything from preventing TB to shrinking healthcare costs."), *available at* http://www.hsph.harvard.edu/news/magazine/spr12-big-data-tb-health-costs/.

52. *See* Hal R. Varian, *Economic Aspects of Personal Privacy* (U.C. Berkeley, 1996), *available at* http://people.ischool.berkeley.edu/~hal/Papers/privacy/.

53. Alessandro Acquisti, *The Economics of Personal Data and the Economics of Privacy* 4 (Org. for Econ. Co-operation & Dev., 2010), *available at* http://www.oecd.org/sti/ieconomy/46968784.pdf. (summarizing Varian, *supra* note 52).

54. *See* Varian, *supra* note 52.

55. *See, e.g.*, Edith Ramirez, FTC, Remarks at FTC Workshop: Internet of Things - Privacy & Security in a Connected World 10 (Nov. 19, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_events/internet-things-privacy-security-connected-world/final_transcript.pdf.

56. *Id.* at 10–11.

57. *See, e.g.*, Josh Constine, *Tech Companies, You're Killing Yourself with Scary Legalese. Put Policy Changes in Layman's Terms*, TECHCRUNCH (Dec. 18, 2012), http://techcrunch.com/2012/12/18/you-always-fear-what-you-dont-understand/ (calling on technology companies to "wise up and end the cycle of pushing policy updates, watching press and users alike panic and threaten to jump ship, and then issu[e] an apology and clarification").

1. Privacy's "Ratchet" and "Shrouding" Problems

In the midst of today's technological development, it seems as if consumers' ability to express preferences or exercise control over their information is only diminishing. The term "ratchet" is traditionally used to describe mechanisms which allow "effective motion in one direction only,"[58] and it provides a useful schema for understanding firms' tendency to undermine consumer privacy over time. Perhaps the most illustrative example of this behavior is that provided by Google's email service, Gmail.[59]

When Google's flagship email product launched in 2004, many were concerned about Google's plans "to scan the contents of [users'] email messages in order to display advertisements relevant to [users'] online conversations."[60] Of particular concern was the possibility that "users of Gmail, who must give Google their names to sign up, may have their names correlated with the search terms they type in when searching. This can be done through cookies and IP addresses."[61] Responding to such concerns, Google's Vice President of Engineering assured consumers that Google had "very strict policies" and did "not associate search clicks with a user's name or anything like that."[62] Eight years later, however, Google announced that it would begin "follow[ing] the activities of users across nearly all of its ubiquitous sites, including YouTube, Gmail, and its leading search engine."[63] As Google's Director of Privacy for Product and Engineering specifically told users:

> If you're signed in, we may combine information you've provided from one service with information from other services . . . . In short, we'll treat you as a single user across all our products, which will mean a simpler, more intuitive Google experience.[64]

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58. *Ratchet Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/ratchet (last visited Jan. 31, 2014).

59. Google is not the only Internet company contributing to privacy's "ratchet" problem. *See, e.g.*, Constine, *supra* note 57 ("Facebook has been through this ringer more times than anyone.").

60. Donna Wentworth, *Gmail: What's the Deal?*, ELECTRONIC FRONTIER FOUND. (Apr. 5, 2004), https://www.eff.org/deeplinks/2004/04/Gmail-whats-deal.

61. Janis Mara, *Google Responds to Gmail Privacy Concerns*, ClickZ (Apr. 2, 2004), http://www.clickz.com/clickz/news/1702090/google-responds-gmail-privacy-concerns (quoting Pam Dixon).

62. *Id.* (quoting Wayne Rosing).

63. Cecilia Kang, *Google Tracks Consumers' Online Activities Across Products, and Users Can't Opt Out*, WASH. POST (Jan. 24, 2012), http://articles.washingtonpost.com/2012-01-24/business/35440035_1_google-web-sites-privacy-policies.

64. *Id.* (quoting Alma Whitten, Google's Director of Privacy for Product and Engineering).

Thus, despite previously making express assurances that it would not connect Gmail users' accounts with their search queries, Google decided to do just that.

In addition to privacy's "ratchet," companies often obscure, or "shroud," their privacy practices. Consumers struggle to even identify the rights that companies reserve for themselves through their terms of use documents and privacy policies[65] (to the extent privacy policies are even available),[66] let alone to discern companies' actual data practices.[67] When Instagram—a popular photo-sharing service—announced that it was updating its terms of service to include language that many perceived as hostile to user rights, it faced "a major backlash from users" and quickly reverted to its old language.[68] The new terms provided that users "hereby agree that Instagram may place such advertising and promotions on the Service or on, about, or in conjunction with your Content."[69] Instagram users were outraged by the change, as it "would let advertisers pick and choose among user-posted photos for ads."[70] However, under the old terms, users had already granted

> Instagram a non-exclusive, fully paid and royalty-free, worldwide, limited license to use, modify, delete from, add to, publicly perform, publicly display, reproduce and translate such Content, including without limitation distributing part or all of

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65. "The current privacy framework in the United States is based on companies' privacy practices and consumers' choices regarding how their information is used. In reality, we have learned that many consumers do not read, let alone understand such notices, limiting their ability to make informed choices." Comments of the FTC at 5, *Information Privacy and Innovation in the Internet Economy*, NTIA Docket No. 100402174-0175-01 (July 2, 2010) [hereinafter FTC Comments], *available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-department-commerce-national-telecommunications-and-information-administration/100623ntiacomments.pdf.

66. *See* FTC, MOBILE APPS FOR KIDS: DISCLOSURES STILL NOT MAKING THE GRADE 6 (2012), *available at* https://www.ftc.gov/sites/default/files/documents/reports/mobile-apps-kids-disclosures-still-not-making-grade/121210mobilekidsappreport.pdf (surveying the practices of kids apps, and finding that "only 20% of the [400] apps reviewed disclosed any information about the app's privacy practices").

67. FTC Comments, *supra* note 65, at 6 (noting that "consumers generally do not understand data collection practices and are largely unaware that there may be companies collecting and analyzing their data for use by other companies").

68. Tomio Geron, *After Backlash, Instagram Changes Back to Original Terms of Service*, FORBES (Dec. 20, 2012, 7:39 PM), http://www.forbes.com/sites/tomiogeron/2012/12/20/after-backlash-instagram-changes-back-to-original-terms-of-service/.

69. INSTAGRAM, http://instagram.com/about/legal/terms/# (Policy effective as of Jan. 19, 2013).

70. Helen A.S. Popkin, *Instagram Responds to Outrage, Tweaks Privacy Policy to Limit Photo Use in Ads*, NBC NEWS (Dec. 18, 2012, 5:05 PM), https://web.archive.org/web/20131225031831/http://www.nbcnews.com/technology/instagram-responds-outrage-tweaks-privacy-policy-limit-photo-use-ads-1C7660196.

> the Site in any media formats through any media channels, except Content not shared publicly ("private") will not be distributed outside the Instagram Services.[71]

As Instagram noted in its blog post announcing the changes, "[n]othing has changed about [users'] photos' ownership or who can see them."[72] Thus, users were essentially outraged over cleaner language—not a change in Instagram's substantive rights under its terms of service or privacy policies.

2. Privacy Dilemmas Evolve with Changes in Technology

Grappling with dilemmas like privacy's "ratchet" and "shrouding" problems is further complicated by the evolving consumer technology landscape. Ushering in a major wave of change sweeping through the world today is the smartphone—a very personal computer that exacerbates many of the existing challenges to safeguarding consumer privacy. In addition to their high rates of adoption and use, these portable computers make it possible for anyone or anything with an Internet connection to collect a significant amount of consumer data while simultaneously introducing new hurdles for the regulatory environment.

Unlike laptop or desktop computers, "mobile devices are typically personal to an individual, almost always on, and with the user."[73] These "always on" and "always with the user" traits, combined with smartphones' ability to sense and analyze their environment, introduce new twists on existing problems. For example, the software that runs on these portable computers "can capture a broad range of user information from the device automatically—including the user's precise geolocation, phone number, list of contacts, call logs, unique device identifiers, and other information stored on the device—and can share this data with a large number of possible recipients."[74]

Unlike the world of traditional personal computers, where the overwhelming majority of consumers connect to the Internet through a web browser, smartphone users interact with the world through a host of non-

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71. INSTAGRAM, http://instagram.com/about/legal/terms/before-january-19-2013/# (Policy before Jan. 19, 2013).

72. *Privacy and Terms of Service Changes on Instagram*, INSTAGRAM (Dec. 2012), http://blog.instagram.com/post/38143346554/privacy-and-terms-of-service-changes-on-instagram (last visited Jan. 15, 2014).

73. FTC, MOBILE PRIVACY DISCLOSURES: BUILDING TRUST THROUGH TRANSPARENCY 2 (2013), *available at* https://www.ftc.gov/sites/default/files/documents/reports/mobile-privacy-disclosures-building-trust-through-transparency-federal-trade-commission-staff-report/130201mobileprivacyreport.pdf.

74. FTC, MOBILE APPS FOR KIDS: CURRENT PRIVACY DISCLOSURES ARE DISAPPOINTING 1 (2012), *available at* https://www.ftc.gov/sites/default/files/documents/reports/mobile-apps-kids-current-privacy-disclosures-are-disappointing/120216mobile_apps_kids.pdf.

browser applications. "[T]en years ago, the term 'app' had not entered common parlance; today, there are over 800,000 available in the Apple App Store and 700,000 on Google Play."[75] Oftentimes, smartphone users may not even realize that they are interacting with the online world or that the software they are using is collecting and reporting their private information.[76] Indeed, most consumers do not "realize how much data they implicitly give away, how that data might be used or even what is known about them."[77] And this is not a problem restricted to technology's novices—even experts in human computer interaction focused specifically on mobile privacy have acknowledged their own troubles with understanding information flows.[78]

As rapidly as smartphones have displaced the world of traditional computing, tomorrow's "Internet of Things" promises to arrive even quicker, posing even greater privacy questions. Already, many consumer product companies have begun making everyday objects "smart" by endowing them with "the ability to connect and transmit data through the use of embedded devices or sensors that connect with networks."[79] These smart "things" presently range "from household appliances to sophisticated business tools" and promise benefits like "greater efficiency, lower costs, improved services, [and] more accurate supply chain management."[80] However, they also raise privacy concerns that "could have widespread effects not only on business operations, but . . . on consumer trust and corporate reputation."[81] For example, the groceries one purchases and consumes may be logged and reported to health insurance companies. Car manufacturers could observe drivers' habits and tendencies, reporting law breakers to the police.[82] Employers could take productivity tracking to a whole new level, and meaningless correlations might be mistaken for significant causal relationships. If privacy safeguards are to keep pace with technology, they must be capable of reaching the complex privacy dilemmas raised by evolving technologies.

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75. FTC, *supra* note 73, at 2.

76. Claire Cain Miller & Somini Sengupta, *Selling Secrets of Phone Users to Advertisers*, N.Y. TIMES (Oct. 5, 2013), http://www.nytimes.com/2013/10/06/technology/selling-secrets-of-phone-users-to-advertisers.html?_r=0.

77. WORLD ECON. FORUM, PERSONAL DATA: THE EMERGENCE OF A NEW ASSET CLASS 17 (2011), *available at* http://www3.weforum.org/docs/WEF_ITTC_PersonalDataNewAsset_Report_2011.pdf.

78. *See* Miller & Sengupta, *supra* note 76.

79. ISACA, THE INTERNET OF THINGS: RISKS AND REWARDS OF THE INTERNET OF THINGS (2013), *available at* http://www.isaca.org/SiteCollectionDocuments/2013-Risk-Reward-Survey/2013-Global-Survey-Report.pdf.

80. *Id.* at 2.

81. *Id.* at 3.

82. *See, e.g.*, Jim Edwards, *Ford Exec: 'We Know Everyone Who Breaks the Law' Thanks to Our GPS in Your Car*, BUSINESS INSIDER (Jan. 8, 2014, 8:16 PM), http://www.businessinsider.com/ford-exec-gps-2014-1.

III. THE UNITED STATES' REGULATORY REGIME HAS NOT KEPT PACE WITH TECHNOLOGY

In the United States, there is no one law, or set of laws, specifically responsible for policing the data conduct of today's merchants, service providers, or other consumer-facing firms.[83] Nor is there a single entity tasked with across-the-board privacy enforcement.[84] While entities collect, share, analyze, and use massive amounts of consumer data for creativity-is-the-only-limit purposes, the job of ensuring that such practices strike an optimal balance is left to "a hodgepodge of various constitutional protections, federal and state statutes, common law tort, regulatory rules, and treaties."[85] Instead of a comprehensive, omnibus approach to dealing with technology's privacy dilemmas, the United States relies heavily upon the Federal Trade Commission to use its authority under section 5 of the FTC Act to challenge "unfair" or "deceptive" business acts or practices in order to "regulate" consumer privacy's competing interests.[86] While the FTC has played a role in privacy regulation since the dawn of the digital era, the extent to which the United States has relied on the FTC has increased over time. This section explores the United States' attempts to safeguard consumer privacy as digital and Internet technologies have emerged. From its use of the Fair Credit Reporting Act (FCRA)[87] and Fair Information Practice Principles in the pre-Internet digital age, to reliance on contract, self-regulation, and FTC enforcement in the Internet age, the United States has struggled to create a regulatory framework capable of keeping pace with changing technologies.[88]

A. The United States' Initial Approach to Consumer Privacy in the Digital Era

As early as 1969—nearly 80 years after Samuel Warren and Louis Brandeis called for action to protect one's "right to be let alone"[89]—a critical report demanded the Federal Trade Commission use its authority to address "[t]he information explosion, including increasing use of mass data-handling

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83. Solove & Hartzog, *supra* note 6, at 587–88.

84. *See, e.g.*, Paul M. Schwartz, *Privacy and Preemption*, 118 Yale L.J. 902, 902 (2009) (arguing that "it would be a mistake for the United States to enact a comprehensive or omnibus federal privacy law for the private sector").

85. Solove & Hartzog, *supra* note 6, at 587.

86. *See id.* at 588-89.

87. 15 U.S.C. § 1681 (2012).

88. *See* The White House, Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy (2012), *available at* http://www.whitehouse.gov/sites/default/files/privacy-final.pdf (noting that the existing regulatory framework lacks the ability to address "consumer data privacy issues as they arise from technologies and business models").

89. Warren & Brandeis, *supra* note 1, at 196.

techniques to attack the privacy and autonomy of the consumer"—a "trend [that] has made possible social-psychological analysis of potential markets."[90] Shortly thereafter, the FTC began enforcing the FCRA[91]—then a recently enacted statute "govern[ing] the collection, assembly, and use of consumer report information" and "provid[ing] the framework for the credit reporting system in the United States."[92] While the FCRA has been amended over time, as originally enacted it "imposed requirements exclusively on [Credit Reporting Agencies] such as credit bureaus, except for those sections of the Act requiring users of consumer reports and other third parties to provide certain notices to consumers."[93] To address privacy problems outside the scope of the FCRA, the United States relied on industry adherence to "Fair Information Practice Principles."[94] Created through a series of "reports, guidelines, and model codes" issued by "government agencies in the United States, Canada, and Europe," the Fair Information Practice Principles "embody the important underlying concepts of transparency, consumer autonomy, and accountability."[95]

As the Internet emerged, augmenting the power of digital technologies to undermine consumer privacy, actors in the United States initially looked to tort and contract law for solutions. "Attempts to use the privacy torts to address problems with data collection and use ended in failure," but it appeared for a while as if contract law would play a significant role in privacy regulation thanks to the rapid emergence of privacy notices.[96] Partly to build goodwill, and partly to stave off formal regulation, many companies operating on the Internet began to post privacy notices, describing the companies' information practices.[97] Though the effort succeeded in preventing formal regulation,[98] it did not succeed in establishing contract law as the principle framework for safeguarding consumer privacy—"mainly because plaintiffs were not able to establish damages."[99] This suggests that

90. EDWARD F. COX ET AL., THE NADER REPORT ON THE FEDERAL TRADE COMMISSION 18 (1969).

91. 15 U.S.C. § 1681 (2012).

92. FTC, 40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT 1 (2011), *available at* https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrareport.pdf.

93. *Id.* at 1–2.

94. FTC, *supra* note 11, at 6–7.

95. *Id.* at 6–7.

96. Solove & Hartzog, *supra* note 6, at 590–97.

97. *Id.* at 593–94.

98. While Congress did enact a few sector-specific laws during this time frame, industry's self-regulatory efforts prevented the passage of comprehensive or omnibus federal privacy laws. *See id.* at 594.

99. *See id.* at 595–96 for a more detailed historical perspective. Though beyond the scope of this Note, given the numerous changes in technology and business models that have since come to fruition, perhaps private parties could adopt the framing advocated here in order to re-animate the contract-based approach.

practical limitations, as opposed to conceptual ones, have so-far prevented contract-based approaches from succeeding.

B. The Inadequacy of Existing Mechanisms Prompted the FTC to Step In

Originally established in 1914 to protect against "unfair methods of competition," the FTC's authority was expanded in 1938 to reach "unfair or deceptive acts or practices."[100] This authority—found in section 5 of the FTC Act[101]—is quite flexible and serves as the backbone of the agency's consumer protection role. Indeed, "Congress deliberately delegated broad power to the FTC under section 5 of the FTC Act to address unanticipated practices in a changing economy."[102] This flexibility has enabled the FTC to address consumer problems despite evolving markets and technologies.[103]

Taking advantage of this flexibility, the FTC extended Section 5 into the virtual world in 1994 when it brought its first Internet case, alleging that certain advertisements for credit repair kits sold through American Online were deceptive.[104] Shortly thereafter, at the behest of Congress, the FTC turned some if its attention to exploring Internet-related consumer privacy issues.[105] Since then, the FTC has employed three different frameworks (each designed to remedy the gaps of the prior approach), called for baseline privacy legislation to bolster its authority, and significantly ramped up the attention and resources that it devotes to safeguarding consumer privacy.

The FTC's first attempt to grapple with consumer privacy in the Internet era centered on a "notice and choice" framework that emphasized transparency. Under this framework, the FTC "encourage[ed] companies to develop privacy notices describing their information collection and use practices to consumers, so that consumers can make informed choices."[106] Because the FTC currently has no power to compel entities to make disclosures,[107] this approach relied more on policy efforts—such as public workshops, studies regarding website practices and disclosures, and

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100. *See, e.g.*, FTC, 90TH ANNIVERSARY SYMPOSIUM PROGRAM 6-8 (2004), *available at* https://www.ftc.gov/sites/default/files/attachments/ftc-90-symposium/90thanniv_program.pdf.

101. Federal Trade Commission Act of 1914, ch. 311, § 5, 38 Stat. 719 (codified as amended at 15 U.S.C. § 45 (2012)).

102. Brief for FTC at 11, FTC v. Wyndham Worldwide Corp., Civil Action No. 2:13-CV-01887-ES-SCM (D.N.J. May 20, 2013) (citing FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 240 (1972)), *available at* https://www.manatt.com/uploadedFiles/Content/4_News_and_Events/Newsletters/AdvertisingLaw@manatt/FTC-v.-Wyndham.pdf.

103. *Id.* (summarizing historical use of § 5 to reach new issues).

104. Complaint of FTC, FTC v. Corzine, Case No. CIV-S-94-1446 (E.D. Cal. Sept. 12, 1994).

105. Solove & Hartzog, *supra* note 6, at 598–99.

106. FTC, *supra* note 11 at iii (internal citations omitted).

107. *See* Solove & Hartzog, *supra* note 6, at 599.

comments related to industry self-regulatory efforts—than it did on law enforcement.[108] Indeed, the FTC did not bring its first Internet *privacy* enforcement action until August 1998—three years after Congress requested the FTC get involved.[109] In addition to enforcement problems, and despite the model's emphasis on transparency, the notice and choice framework led to the creation of "long, incomprehensible privacy policies that consumers typically do not read, let alone understand."[110]

To address the shortcomings of its "notice and choice" approach, the FTC adopted a second framework focused on consumer harm. Specifically, the "harm-based" model sought to protect consumers from three types of injuries: physical harm; financial harm; and unwarranted intrusions into consumers' daily lives.[111] While this second framework enabled the agency to bring a number of enforcement actions,[112] its conception of harm was too narrow to reach all of privacy's myriad and evolving dilemmas:

> Just as a burn is an injury caused by heat, so is privacy harm a unique injury with specific boundaries and characteristics . . . . The subjective category of privacy harm is the perception of unwanted observation . . . . The objective category of privacy harm is the unanticipated or coerced use of information concerning a person against that person. These are negative, external actions justified by reference to personal information.[113]

Despite the various manifestations of privacy's problems, one must show harm that is "'cognizable,' 'actual,' 'specific,' 'material,' 'fundamental,' or 'special' before a court will consider awarding compensation."[114] These specific and narrow requirements ensured that the harm-based model—like the notice and choice approach—also depended on strong self-regulation in order to reach the problems beyond its scope.

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108. FTC, PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE 3 (2000), *available at* https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000.pdf.

109. *See* GeoCities, *Decision and Order*, FTC No. 982 3015, Docket No. C-3849 (1999), *available at* https://www.ftc.gov/sites/default/files/documents/cases/1999/02/9823015.do_.htm.

110. FTC, *supra* note 11, at iii (citations omitted).

111. *See id.*; *see also* Timothy J. Muris, Chairman, FTC, Protecting Consumers' Privacy: 2002 and Beyond, Remarks at The Privacy 2001 Conference (Oct. 4, 2001), *available at* https://www.ftc.gov/public-statements/2001/10/protecting-consumers-privacy-2002-and-beyond.

112. *See, e.g.*, Solove & Hartzog, *supra* note 6, at 627–48.

113. M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1131 (2011).

114. *Id.*at 1132 (internal citations omitted).

As the FTC has acknowledged, both the notice and choice and the harm-based frameworks "struggled to keep pace with the rapid growth of technologies and business models that enable companies to collect and use consumers' information in ways that are often invisible to consumers."[115] Because these two approaches were not sufficiently comprehensive to cover technology's evolving privacy dilemmas, and because industry self-regulatory efforts failed to close the gaps, the FTC set out to create a new privacy framework in 2010.[116]

The FTC began its quest by convening a series of public workshops composed of industry participants, academics, technologists, privacy experts, consumer advocates, and regulators.[117] After spending a year examining its privacy jurisprudence through these workshops, the FTC compiled and released a preliminary proposal for public comment.[118] Receiving more than 450 submissions, the agency revised its proposal and released its final report in March 2012.[119]

In order to contend with the challenges identified during the FTC's two-years-long re-think, and avoid stifling innovation, the FTC's new privacy framework centers on three core concepts—privacy by design, simplified choice, and transparency—along with a request for Congress to consider bolstering the agency's authority through additional legislation.[120] Specifically, the agency called for companies to "[b]uild in privacy at every stage of product development" and to "[g]ive consumers the ability to make decisions about their data at a relevant time and context . . . while reducing the burden on businesses of providing unnecessary choices."[121] The FTC also called on companies to "[m]ake information collection and use practices transparent," and asked Congress to consider enacting "flexible" and "technology neutral" privacy legislation that "provide[s] clear standards and appropriate incentives to ensure basic privacy protections across all industry sectors."[122]

IV. THE UNITED STATES SHOULD RECOGNIZE DIGITAL INTERACTIONS AS THE COMMERCIAL EXCHANGES OF VALUE THAT THEY ARE

It has been two years since the FTC released the final version of its new privacy framework. Industry self-regulatory efforts appear to be going

115. FTC, *supra* note 11, at iii (internal citations omitted).
116. *See, e.g.*, FTC, *supra* note 17, at i-v.
117. FTC, *supra* note 11, at iii–iv.
118. *Id.*
119. FTC, *supra* note 17, at i.
120. *Id.*
121. *Id.*
122. *Id.* at i, 12, 13.

nowhere,[123] Congress has taken no steps toward enacting baseline privacy legislation to bolster the FTC's enforcement work,[124] and the FTC's authority to act in the consumer privacy space is being challenged in the courts by defendants in two different enforcement actions.[125] While the FTC has been far from stagnant on the privacy front, its new framework does not appear to have moved the needle. If the United States' regulatory regime for consumer privacy is to keep up with today's emerging technologies, something needs to change.

A Google search for the phrase "data is the new oil" yields more than 700,000 results.[126] The expression "has achieved the status of an approved corporate cliché,"[127] and it has spurred a number of creative articles, but it has not been taken seriously by those studying or safeguarding the consumer privacy environment. This Note takes the expression seriously, arguing that such a framing fits neatly within the FTC's mandate, jurisdiction, and authority and could be employed to substantiate the FTC's new privacy framework—producing a flexible solution to complex and evolving consumer privacy dilemmas.

A. Digital Interactions Can Be Framed As Commercial Exchanges of Value

Article II of the Uniform Commercial Code,[128] though it only applies to sales of goods (expressly excluding sales of "information" from its scope),[129] provides a widely-adopted and useful framework for understanding what it means to have a commercial exchange of value.[130] "Sales" are defined as "the passing of title from the seller to the buyer for a

123. *See, e.g.*, Angelique Carson, *Did NTIA's Multi-Stakeholder Process Work? Depends on Whom You Ask.*, THE PRIVACY ADVISOR (Sept. 3, 2013), https://www.privacyassociation.org/publications/did_ntias_multi_stakeholder_process_work_depends_whom_you_ask.

124. *See, e.g.*, Allison Grande, *Groups Push Obama to Float 'Privacy Bill of Rights'*, LAW360 (Feb. 24, 2014, 4:30 PM), http://www.law360.com/technology/articles/512544/groups-push-obama-to-float-privacy-bill-of-rights-.

125. *See* FTC v. Wyndham Worldwide Corp., No. 12-1365 (D. Ariz. 2012); LabMD, Inc., FTC No. 102 3099, Docket No. 9357 (May 26, 2015).

126. Google.com search, executed Jan. 15, 2014.

127. Naughton, *supra* note 20.

128. The Uniform Commercial Code is a comprehensive model code written by experts in commercial law and approved by the National Conference on Commissioners on Uniform State Laws, who recommend that states adopt its provisions. Unless enacted by state legislature, the Code itself does not have legal effect. *See* Uniform Commercial Code Research Guide, DUKE LAW (May 2013), https://law.duke.edu/lib/researchguides/ucc/.

129. U.C.C. § 2-102 (2013); *see also id.* at § 2-103(1)(k) ("'Goods' means all things that are movable at the time of identification to a contract for sale . . . the term does not include information . . . . ").

130. Every state except for Louisiana has adopted some version of Article II of the UCC.

price," [131] where "price may be payable in money, goods, realty, or otherwise."[132] Thus, in the UCC's flexible framework, one party exchanges something of value (goods) for something else of value ("money, goods, realty, or otherwise").[133]

In the digital space, consumers' interactions *can* be viewed as commercial exchanges of value. When consumers execute Google searches, sign up for Facebook accounts, or download and use apps on their smart devices, they offer something in exchange for the digital provider's services.[134] Instead of dollars, consumers pay for their digital services with data and attention.[135] Thus, even where no money passes from a consumer to a service provider, value is exchanged and privacy questions become pricing questions—e.g., how much access and information does a consumer give up in exchange for which services?

Framing digital interactions as commercial exchanges of value is not a distorted way of viewing consumer-business interactions. Ginni Rometty, IBM's chief executive officer, made headlines last year when she encouraged business leaders and lawmakers to "think about data as the next natural resource:"[136]

> Just like oil was a natural resource powering the last industrial revolution, data is going to be the natural resource for this industrial revolution. Data is the core asset, and the core lubricant, for not just the entire economic models built around every single industry vertical but also the socioeconomic models.[137]

And IBM is not the only multi-national entity subscribing to such a view. The World Economic Forum—an independent, international organization—famous for its annual meeting in Davos to address the global

131. U.C.C. § 2-106(1).
132. U.C.C. § 2-304(1).
133. *Id.*
134. *See, e.g.*, Kirsten Martin, *Transaction Costs, Privacy, and Trust: The Laudable Goals and Ultimate Failure of Notice and Choice to Respect Privacy Online*, FIRST MONDAY, December 2013, at 3, *available at* http://firstmonday.org/ojs/index.php/fm/article/view/4838/3802.
135. *Id.*
136. Maria Deutscher, *IBM's CEO Says Big Data is Like Oil, Enterprises Need Help Extracting the Value*, SILICON ANGLE (Mar. 11, 2013), http://siliconangle.com/blog/2013/03/11/ibms-ceo-says-big-data-is-like-oil-enterprises-need-help-extracting-the-value/.
137. *Id.*

implications of technological change[138]—has already "declared data a new class of economic asset, like currency or gold."[139]

Such a framing has also begun appearing in academic contexts in the United States. In a recent article, James C. Cooper, the Director of Research and Policy at George Mason University School of Law's Law & Economics Center, noted that "in some regard, nothing is free online—we pay by revealing data that provides a picture of our likes and dislikes . . . [a]s the already-tired cliché goes, 'Data is the new currency.'" [140] Going further, Capital University Law School Professor Dennis Hirsch has suggested that policymakers look to environmental law's method for curbing oil pollution as a way to "reap big data's many benefits while reducing its negative impacts." [141] Going the furthest, scholars Chris Hoofnagle and Jan Whittington have applied transaction cost analysis to consumers' digital interactions, concluding that "information-intensive companies misuse 'free' to promote products and services that are packed with non-pecuniary costs" like consumers' personal information and attention.[142]

The "data-as-oil" framing has even begun appearing, at least implicitly, in comments and speeches made by FTC leadership. While announcing a recent settlement with an app developer for the deceptive collection of users' geolocation information, the director of the FTC's Bureau of Consumer Protection stated that "[w]hen consumers are given a real, informed choice, they can decide for themselves whether the benefit of a service is worth the information they must share to use it." [143] More explicitly, when FTC Commissioner Julie Brill called for technologists to think critically about solutions to complicated and evolving privacy dilemmas, she acknowledged that "[i]n a real sense, we are becoming the

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138. *See, e.g.*, WORLD ECON. FORUM, WORLD ECONOMIC FORUM INSTITUTIONAL BROCHURE (2012), *available at* http://www3.weforum.org/docs/WEF_InstitutionalBrochure.pdf.

139. Lohr, *supra* note 32; *see also* WORLD ECON. FORUM, *supra* note 77, at 23 (noting that, "[w]hile direct personal data has an inherent value, secondary inferred data can often be mined and interpreted to produce new information of equal or greater value").

140. James C. Cooper, *Privacy and Antitrust: Underpants Gnomes, the First Amendment, and Subjectivity*, 20 GEO. MASON L. REV. 1129, 1130–31 (2013) (internal citations omitted).

141. Dennis Hirsch, *The Glass House Effect: Why Big Data is the New Oil, and What to Do About It* 1-2 (Future of Privacy Forum, 2013), *available at* http://www.futureofprivacy.org/wp-content/uploads/Hirsch-Glass-House-Effect1.pdf (paper submitted in advance of the Future of Privacy Forum and the Stanford Center for Internet & Society's "Big Data and Privacy: Making Ends Meet" workshop).

142. Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet's Most Popular Price*, 61 UCLA L. REV. 606, 609 (2014).

143. Associated Press, *FTC: Flashlight App Left Consumer in the Dark*, USA TODAY (Dec. 6, 2013, 10:35 AM), http://www.usatoday.com/story/tech/2013/12/06/ftc-flashlight-app/3889949/.

sum of our digital parts . . . [a]nd that rich vein of data is exactly the gold that data miners want to extract."[144]

Finally, even critics of the FTC's approach to privacy regulation have suggested framing digital interactions as commercial exchanges of value. When the agency was working to develop its new privacy framework, Adam Thierer, a senior research fellow at George Mason University's Mercatus Center, specifically encouraged the FTC to consider the "value exchange" behind consumers' digital interactions instead of pursuing a "top-down regulatory regime that seeks to micromanage the consent process."[145] Suggesting that "[o]nline advertisers and service providers could make th[e] value proposition/trade-off more explicit by putting a theoretical price tag on their content or services," Thierer went on to note that "a more open and experimental model of 'information as currency' and 'privacy bargaining' will ultimately better serve consumers and online content/service providers since it treats consent as context-sensitive matter and encourages beneficial experimentation and an ongoing learning process."[146]

B. Recognizing Digital Interactions as Commercial Exchanges of Value Synchronizes Well with the FTC's Mandate, Jurisdiction, and Authority

The FTC has no general powers in the privacy realm that authorize it to promulgate rules, levy fines, or ban specific conduct. While it enforces a handful of specific privacy-related regulations—the Fair Credit Reporting Act,[147] the Gramm-Leach-Bliley Act,[148] the Children's Online Privacy Protection Act[149]—along with the US-EU Safe Harbor Agreement,[150] the bulk of the FTC's authority used to safeguard consumer privacy flows from

144. Julie Brill, Comm'r, FTC, Lecture at Polytechnic Institute of NYU: A Call to Arms: The Role of Technologists in Protecting Privacy in the Age of Big Data, (Oct. 23, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/call-arms-role-technologists-protecting-privacy-age-big-data/131023nyupolysloanlecture.pdf.

145. Adam Thierer, Public Interest Comment on Federal Trade Commission Report, *Protecting Consumer Privacy in an Era or Rapid Change* (Feb. 18, 2011), http://www.ftc.gov/sites/default/files/documents/public_comments/preliminary-ftc-staff-report-protecting-consumer-privacy-era-rapid-change-proposed-framework/00320-57670.pdf, at 4-5.

146. *Id.* at 4-5.

147. Fair Credit Reporting Act §604(c), Pub. L. No. 91-508, 84 Stat. 1114-2 (1970) (codified as amended at 15 U.S.C. § 1681 (2012)).

148. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended at 15 U.S.C. § 6803 (2012)).

149. Children's Online Privacy Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-728 (1998) (codified at 15 U.S.C. §§ 6501–06 (2012)).

150. *Welcome to the U.S.-EU Safe Harbor*, EXPORT.GOV, http://export.gov/safeharbor/eu/eg_main_018365.asp (last visited Jan. 24 2014); *see also* Solove & Hartzog, *supra* note 6, at 603-04 (summarizing the FTC's authority to enforce the US-EU Safe Harbor Agreement).

its Section 5 enforcement power.[151] In section 5 of the FTC Act, Congress provided that "unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful,"[152] and charged the FTC with ensuring that all but a few excepted for-profit commercial entities operating in the United States adhere to the law.[153] Congress chose to confer such broad enforcement powers on the FTC because it wanted the agency to be sufficiently equipped to safeguard consumers from developments in commercial practice that could not be fully anticipated in advance.[154]

Under Section 5, in order to establish that a practice is "deceptive," the FTC must show that "a representation, omission, or practice . . . is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[155] Likewise, in order to establish an "unfairness" claim, the FTC must show that "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[156] Thus, establishing that an act or practice is deceptive or unfair ultimately requires the FTC to prove that a misrepresentation was "material" to consumers or that an act caused consumer injury not offset by countervailing benefits, which is difficult to do in the realm of consumer privacy.

A number of factors complicate the FTC's ability to use Section 5 to safeguard consumer privacy. Firms are presently believed to have no regulatory obligation to provide privacy policies or otherwise explain their data practices to consumers.[157] Where companies provide privacy policies, the policies tend to be long[158] and written at reading levels requiring more

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151. *See, e.g.*, Solove & Hartzog, *supra* note 6, at 599.

152. Federal Trade Commission Act of 1914, ch. 311, § 5(a)(1), 38 Stat. 719 (codified as amended at 15 U.S.C. § 45(a)(1) (2012)).

153. *See* 15 U.S.C. § 45(a)(2) (2012) (empowering the FTC to prevent "persons, partnerships, or corporations" from using "unfair or deceptive acts or practices in or affecting commerce," but exempting banks, credit unions, and common carriers from the FTC's jurisdiction).

154. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 240 (1972) (noting that "Congress . . . explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply").

155. FTC Policy Statement on Deception, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

156. 15 U.S.C. § 45(n) (2012) ("In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence" but "[s]uch public policy considerations may not serve as a primary basis for such determination"); *see also* FTC Policy Statement on Unfairness, appended to Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984), *available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

157. *See* FTC, *supra* note 11.

158. One oft-cited study estimated the opportunity cost of reading privacy policies to be $781 billion. *See* Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 ISJLP 543, 564 (2008).

than a high school diploma,[159] often using "vague and innocuous sounding terms to mask third-party information sharing."[160] And most consumers, including the current Chief Justice of the United States, do not read them.[161] Additionally, to show unfairness in the privacy realm, the FTC must connect a privacy issue to financial or physical injury.[162]

Considering these limitations, the FTC has been remarkably effective at using Section 5 to safeguard consumer privacy. Since 1997, it has levied over 170 privacy-related complaints, significantly ramping up its enforcement agenda as Internet-enabled technologies have transformed consumers' daily lives.[163] These efforts have enabled the agency to secure orders committing some of the largest technology companies to privacy audits for the near future and subjecting them to civil penalties for subsequent privacy-related missteps.[164] However, the FTC's privacy-related enforcement work has only produced one privacy-related judicial opinion,[165] and two different FTC defendants are presently challenging the agency's privacy jurisdiction in the courts.[166]

For the first time, FTC defendants, in two separate cases involving breaches of consumer data, are challenging the agency's power to enforce Section 5 for privacy-related offenses. In both cases, the defendants argue that "the FTC's enforcement action . . . should be dismissed because the Commission never provided the 'fair notice' that the Constitution and these cases require," since Section 5 generally prohibits unfair and deceptive business practices and "the FTC has published no rules or regulations at all explaining what data security practices a company must adopt to be in

159. George R. Milne, Mary J. Culnan, & Henry Greene, *A Longitudinal Assesment of Online Privacy Notice Readability*, 25 J. PUB. POL'Y & MARKETING 238, 243 (2006).

160. Chris Hoofnagle & Jan Whittington, *Unpacking Privacy's Price*, 90 N.C.L. REV. 1327, 1358 (2012).

161. *See, e.g.*, Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print*, A.B.A. J. (Oct. 20, 2010, 12:17 PM), http://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print/.

162. *See* FTC, *supra* note 154 ("In most cases a substantial injury involves monetary harm, as when sellers coerce consumers into purchasing unwanted goods or services… Unwarranted health and safety risks may also support a finding of unfairness").

163. *See* Solove & Hartzog, *supra* note 6, at 590, 600.

164. *See, e.g.*, Google, Inc., *Decision and Order*, FTC No.102 3136, Docket No. C-4336, (2011), http://www.ftc.gov/sites/default/files/documents/cases/2011/10/111024googlebuzzdo.pdf; *see also* Facebook, Inc., *Decision and Order*, FTC No. 092 3184, Docket No. C-4365, (2011), http://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf; Twitter, Inc., *Decision and Order*, FTC No. 092 3093, Docket No. C-4316 (2011), http://www.ftc.gov/sites/default/files/documents/cases/2011/03/110311twitterdo.pdf.

165. FTC v. Accusearch, 570 F.3d 1187 (10th Cir. 2009). For a comprehensive review of the FTC's privacy-related enforcement actions, see Solove & Hartzog, *supra* note 6, at 18.

166. *See* FTC v. Wyndham Worldwide Corp., No. 12-1365 (D. Ariz. 2012); *see also* LabMD, Inc., FTC No. 102 3099, Docket No. 9357 (May 26, 2015).

compliance with the statute."[167] While the FTC almost certainly has the authority to use Section 5 to reach the conduct at issue in these cases,[168] it is notable that it has taken twenty-five years of privacy work in the digital era before facing such a challenge.

Treating consumer data as if it were oil—that is, recognizing digital interactions as commercial exchanges of value—would synchronize well with the FTC's authority and jurisdiction, ensuring that the agency remains sufficiently equipped to fulfill its mandate. Armed with such a framing, proving a deception theory would not require the FTC to perform a nuanced review of opaque privacy policies and convoluted data practices, but a showing that the "price" that consumers paid for a service (e.g., the data collection, use, and sharing rights consumers granted) was not consistent with what had been advertised.[169] Likewise, proving an unfairness theory would not require the agency to painstakingly connect specific consumer data to financial losses or physical intrusions borne by specific consumers in order to establish the requisite consumer harm. Instead, the FTC could establish harm by showing that the data collection, use, and sharing rights taken from consumers were more than the consumer had bargained for.[170]

C. Recognizing Digital Interactions as Commercial Exchanges of Value Would Substantiate the FTC's New Privacy Framework

The FTC has publicly acknowledged various limitations in its power to safeguard consumer privacy in the wake of rapidly evolving technological change.[171] Chief among these limitations is the agency's perceived inability to require firms to tell consumers how the firm collects, uses, and shares

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167. Answers and Defenses at 7, LabMD, Inc., FTC No. 102 3099, Docket No. 9357 (June 6, 2012).

168. *See* Lab MD, Inc., *Order Denying Respondent LabMD's Motion to Dismiss*, FTC No. 102 3099, Docket No. 9357, at 2 (2014) (finding that Section 5 "applies to a company's failure to implement reasonable and appropriate data security measures"), *available at* http://www.ftc.gov/sites/default/files/documents/cases/140117labmdorder.pdf.

169. *See, e.g.*, Findings of Fact and Conclusions of Law, FTC v. Lights of Am., Inc., File No. 0923145, Civil Action No. SACV10-1333 JVS (MLGx) 93 (C.D. Cal. Sept. 17, 2013) ("Information about a product's purpose, safety, efficacy, or cost is material") (citing FTC v. Direct Marketing Concepts, Inc., 569 F. Supp. 2d 285, 299 (D. Mass. 2008)); *see also* Guide Concerning Use of the Word "FREE" and Similar Representations, 16 C.F.R. § 251.1(c) (2014) ("When making 'Free' or similar offers all the terms, conditions and obligations upon which receipt and retention of the 'Free' item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.").

170. *See, e.g.*, FTC v. Grant Connect, LLC, 827 F. Supp. 2d 1199, 1224–25 (D. Nev. 2011) (finding that defendants' failure to clearly and conspicuously disclose a "recurring $39.95 per month fee" after advertising that "all [consumers] had to pay was a small activation fee, usually $2.78," constituted a deceptive practice in violation of section 5 of the FTC Act).

171. *See* FTC, *supra* note 17, at i.

consumer data.[172] This limitation has forced the FTC to rely on self-regulatory efforts and firms' goodwill to post privacy policies, inducing the FTC to repeatedly call for legislation strengthening its powers and enabling it to reach the privacy harms that have so-far been viewed as outside the scope of Section 5.[173]

Recognizing consumers' digital interactions as commercial exchanges of value—i.e., treating consumer data as if it were oil—could go a long way toward eliminating these limitations. Such a framing would create a mandate for firms to clearly and conspicuously tell consumers how much consumers must "pay" to use the firms' services before the consumer makes any commitment. This, in turn, could lead to simpler choices as firms compete with each other for consumers' data and attention by offering consumers better "prices." By "pricing" consumer privacy, such a framing might incentive firms to account for consumer privacy at each stage in the design of their digital products and services. Essentially, such a framing would substantiate the FTC's new privacy framework—equipping the agency with the tools necessary to ensure technology continues its march forward while safeguarding consumer privacy.

1. Transparency Would Have to Increase

In its new privacy framework, the FTC called on firms to take steps to increase transparency.[174] Specifically, the agency provided that "[p]rivacy notices should be clearer, shorter, and more standardized to enable better comprehension," and called for "some standardized elements, such as format and terminology, to allow consumers to compare the privacy practices of different companies and to encourage companies to compete on privacy."[175] But, because firms are currently incentivized to reduce transparency for fear that their statements could be used against them in a Section 5 "deception" action,[176] the agency's call for "clearer, shorter, and more standardized" privacy notices is unlikely to result in increased transparency unless something changes.

If consumers' digital interactions were treated as commercial exchanges of value, then transparency would have to improve because firms would have an affirmative obligation to clearly and conspicuously disclose their privacy practices—i.e., the "price" associated with use of their product. At this point, it is a "fundamental principle that any commercial entity, before billing customers, has an obligation to notify such customers of what they may be charged for and when, a principle that applies even to reputable

172. *See* FTC, *supra* note 11, at iii.
173. *See id.* at 21–23.
174. *See* FTC, *supra* note 17, at 60 ("Companies should increase the transparency of their data practices").
175. *Id.* at 61–62.
176. Hoofnagle & Whittington, *supra* note 160, at 1358.

and highly successful companies that offer many popular products and services."[177]

It is often argued that the information asymmetry that exists with regard to consumers' understanding of firms' data practices is so large and complicated that no amount of transparency will, practically speaking, provide a level playing field.[178] However, it seems incomprehensible that something so empowering as rapid technological change could improve virtually every aspect of consumers' lives yet fail to solve something as basic as adequate notice and meaningful consent. Not only do consumers regularly execute complicated financial transactions on a regular basis,[179] but many efforts have already identified methods that yield short, clear, and standardized privacy disclosures that could serve as model "price tags."[180] Firms have long dealt with these problems in the world of advertising disclosures,[181] and the FTC has convened public workshops[182] and produced guides [183] designed specifically to facilitate the efficient disclosure of required information in a variety of new and evolving contexts.

2. Consumers Would Encounter Simpler Choices as Firms Competed for Consumers' Data and Attention

The FTC's new privacy framework also calls for firms to "simplify consumer choice," recognizing that not every aspect of a firms' data

177. Apple, Inc., FTC No. 122-3108 (Jan. 15, 2014) (Comm'r. Ohlhausen, concurring) (settling "allegations that Apple Inc. engaged in unfair acts or practices by billing iTunes account holders for charges . . . without the account holders' express informed consent"), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-k.ohlhausen/140115applestatementohlhausen.pdf.

178. *See, e.g.*, Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1882 (2013).

179. In 2012, U.S. consumers made 26.2 billion credit card transactions. Federal Reserve, THE 2013 FEDERAL RESERVE PAYMENTS STUDY: RECENT AND LONG-TERM PAYMENT TRENDS IN THE UNITED STATES: 2003-2012, 7–8 (2013), *available at* http://www.frbservices.org/files/communications/pdf/research/2013_payments_study_summary.pdf.

180. *See, e.g.*, Patrick Gage Kelley et. al., *Standardizing Privacy Notices: An Online Study of the Nutrition Label Approach* (CMU CyLab, Paper No. 09-014, Jan. 12, 2010), *available at* https://www.cylab.cmu.edu/files/pdfs/tech_reports/CMUCyLab09014.pdf.

181. *See, e.g.*, FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965) ("It has long been considered a deceptive practice to state falsely that a product ordinarily sells for an inflated price but that it is being offered at a special reduced price").

182. *See, e.g.*, Workshop, FTC, *In Short: Advertising & Privacy Disclosures in a Digital World* (May 30, 2012, 9:00 AM), *available at* http://www.ftc.gov/news-events/events-calendar/2012/05/short-advertising-privacy-disclosures-digital-world.

183. *See, e.g.*, FTC, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), *available at* http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf; *see also* FTC, *supra* note 73.

practices ought to require express informed consent.[184] For practices where consumers should be given a choice, the agency's new framework provides that "companies should offer the choice at a time and in a context in which the consumer is making a decision about his or her data," obtaining "express affirmative consent before: (1) using consumer data in a materially different manner than claimed when the data was collected; or (2) collecting sensitive data."[185] However, absent a material misrepresentation to consumers, the FTC currently has little power to ensure that firms offer consumers meaningful choice regarding consumer data practices.

Because recognizing consumers' digital interactions as commercial exchanges of value would force firms to increase the transparency of their data practices, all firms would begin having to justify their "price" to consumers. In traditional markets, firms compete over both price and quality.[186] However, by ignoring privacy costs, consumer-facing Internet-enabled services tend to compete only in terms of quality. If these firms were naturally incentivized to compete over "price"—i.e., over their consumer data practices—then such competition could create simplified choices for consumers. By requiring firms to conspicuously disclose material terms, recognizing digital interactions as commercial exchanges of value would place the burden of reducing the existing information asymmetry on firms, which are the cheapest cost avoiders.[187] As information asymmetry diminishes, and "prices" approach equilibrium, firms and consumers would gain transaction experience, and the terms over which they bargained would naturally be simplified. For example, rather than explain every aspect of a firm's data handling practices before every interaction, standards and baselines that could be efficiently communicated to consumers might emerge such that only deviations would have to be explained.

3. Firms Would Be Incentivized to Account for Consumer Privacy in the Design of Their Services

Finally, the FTC's new privacy framework calls on firms to practice "privacy by design."[188] Specifically, the agency has called for firms to "incorporate substantive privacy protections into their practices, such as data security, reasonable collection limits, sound retention and disposal policies, and data accuracy."[189] Again, this is a prescription that the agency has little

184. FTC, *supra* note 17, at 35–36.

185. *Id.* at 60.

186. *See, e.g.*, EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 1 (2d ed. 2011).

187. *See* Hoofnagle & Whittington, *supra* note 160, at 1357–58 (comparing the "personal information transaction space" to the financial services context, where the "Schumer Box" shifted transaction costs from consumers onto the parties with the greatest incentives to obscure costs).

188. FTC, *supra* note 17, at 22.

189. *Id.* at 30.

power to support. In addition, it is not entirely clear how firms can "bake" privacy into the design of their products and services.[190]

However, if consumers' digital interactions were recognized as commercial exchanges of value, firms would naturally begin to consider consumer privacy at every stage of their design process. Firms are profit-seeking actors; they seek to minimize their costs while maximizing their revenues.[191] It is axiomatic that firms design their products and services in ways that maximize firms' competitive advantage. If collecting and handling consumers' data imposed costs on them beyond those of the underlying technologies used to gather, store and analyze the data (e.g., through lost revenues, as consumers turned to better priced competitors), then firms would inherently consider these costs as they engineered their products and services.

D. Implementing the Data-As-Oil Framing

Over time, as data continues to fuel technology's march forward, consumers' digital interactions may naturally be recognized as commercial exchanges of value. However, to ensure that the data-as-oil framing advocated by this Note becomes a reality within a useful time span, the FTC could submit the framing to public scrutiny before bringing a pilot case to test its merits.

Before taking significant regulatory action in a new domain, the FTC often invites the public to help the agency evaluate new issues and approaches. This is how the agency developed its existing privacy framework[192] and it generally reflects how the FTC grapples with the consumer protection issues of evolving technologies.[193] In order to refine the data-as-oil framing, and to notify those on the other side of consumers' digital interactions of a shift in approach, the FTC could host a public workshop exploring the framing's implications. In such a workshop, the FTC could call on attorneys, economists, consumers, and businesses to work through different hypothetical scenarios, examining how different disclosure and data handling practices complied or conflicted with Section 5's prohibition of unfair or deceptive practices.

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190. *See, e.g.*, Ira S. Rubenstein & Nathaniel Good, *Privacy by Design: A Counterfactual Analysis of Google and Facebook Privacy Incidents*, 28 BERKELEY TECH. L.J. 1333, 1335 (2013) (noting that "despite the strong expressions of support for privacy by design, its meaning remains elusive").

191. *See. e.g.*, Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293, 293 (1992) ("Economists assume that firms act rationally to maximize profits.").

192. *See* FTC, *supra* note 17, at 19–20.

193. *See, e.g.*, *News & Events*, FTC http://www.ftc.gov/news-events/commission-actions (filtered for "public event") (listing numerous FTC conferences addressing such topics as "Alternative Scoring Products", "Mobile Device Tracking", "Internet of Things", and "Mobile Security: Potential Threats and Solutions").

After running the data-as-oil framing through a gauntlet of public scrutiny, the FTC could then bring a pilot case to test the framing before an administrative law judge.[194] Such an enforcement action would enable the FTC to pick an ideal test defendant[195] and try the issue before an expert judge, familiar with the nuance of Section 5. Assuming the agency prevails in its test case, the FTC could then use the precedent to develop the framing by applying it in varying scenarios and courts.[196]

V. CONCLUSION

Rapidly evolving technology promises to continue bringing wonderful things to reality, but it also poses complex and evolving privacy dilemmas. This tendency creates a need for a flexible regulatory framework capable of scaling to meet technology's challenges without stifling innovation. The United States regime for safeguarding consumer privacy relies almost entirely on the FTC to enforce Section 5's broad prohibition of unfair or deceptive acts or practices, but the FTC has openly acknowledged limitations in its ability to carry out this mission—creating a new privacy framework and calling for baseline privacy legislation to bolster its authority.

The FTC's new privacy framework, however, ultimately depends on authority that the FTC does not believe it has. Recognizing digital interactions as commercial exchanges of value would ameliorate this problem. Such a framing would create a mandate for entities that collect data from consumers in exchange for digital products and services to disclose the bargain's material terms by requiring informed consent. This, in turn, might lead to simplified choice and "privacy by design" as companies competed over their consumer products' prices. Such a framing may not be able to solve all of privacy's problems, and more critical thinking needs to be devoted to the topic, but it could substantiate the FTC's new privacy framework—creating a flexible regulatory solution that scales to meet privacy's evolving problems.

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194. "Under Section 5(b) of the FTC Act, the Commission may challenge "unfair or deceptive act[s] or practice[s]" . . . through maintenance of an administrative action." *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FTC (July 2008), http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (last visited April 4, 2014) (quoting 15 U.S.C. § 45(b)).

195. The "ideal" defendant might consist of a well-funded company whose business centers on monetizing consumer data and attention—e.g., a profitable mobile app developer who offers consumers a valuable game or service monetized through the sale of targeted ads, and who only provides an opaque privacy policy. Such a fact pattern would make the value exchange between the consumer and developer as explicit as possible, since the developer's revenues could be directly apportion to individual consumers.

196. If the agency loses in an administrative action, staff may appeal the decision to the full Commission. *See* 15 U.S.C. § 45(b) (2012). Challenges to Commission decisions can be heard in federal appeals courts, 15 U.S.C. § 45(c), but the FTC's decision must be given administrative deference. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).