EDITOR'S NOTE

Welcome to the first Issue of Volume 73 of the *Federal Communications Law Journal*, the nation's premier communications law journal and the official journal of the Federal Communications Bar Association (FCBA). We are thrilled to provide timely and thought-provoking pieces in this Volume's inaugural Issue representing the breadth of telecommunications and informational privacy law. This Issue explores topics including municipal broadband, media ownership, net neutrality and access to the Internet for racial minorities, the Equal Time Rule's application to political debate, and an antitrust review of data collection practices.

This Issue begins with a deep examination of the legal and economic framework for municipal broadband by T. Randolph Bear, PhD, George S. Ford, PhD, Lawrence J. Spiwak, Esq. and Michael Stern, PhD, all of the Phoenix Center for Advanced Legal & Economic Public Policy Studies. Bear, et al. ultimately caution against municipal broadband efforts because they rarely improve competition or access. Next, Christopher Terry, PhD, Stephen Schmitz, and Eliezer (Lee) Joseph Silberberg, all of the University of Minnesota, examine the history of media ownership regulation since the Telecommunications Act of 1996, including the most recent *Prometheus Radio Project* case before the U.S. Supreme Court this term. Terry, et al. argue for a set of policies to produce empirical data that would resolve the persistent ownership debate.

This Issue also features three timely student Notes. In the first Note, Katrina Jackson examines the FCC's repeal of net neutrality and its impact on African Americans' and Hispanics' access to the Internet. Jackson argues that the Internet is a place of public accommodation such that Title II of the Civil Rights Act offers recourse against Internet service providers who cable package their service offerings. In the second Note, Sydney Snower explores political debates' current exemption from the Equal Time Rule, which would otherwise require that candidates receive equal debate time. Snower argues for an exemptions modification that would allow political debate participants equal time under the Rule. In the third Note, Brennan Weiss looks to Germany's use of antitrust enforcement authority to rein in harmful data collection practices by Facebook. Weiss argues that the U.S. can do the same by challenging large technology companies' harmful data collection practices as monopolization offenses under the Sherman Act.

As 2020 ends, the *Journal* asks you to save the date for our joint virtual Spring 2021 Symposium, *25th Anniversary of the Telecommunications Act of 1996—Looking Ahead to the Next Telecommunications Act*, co-hosted with the Berkeley Center for Law & Technology on March 12, 2021. We invite abstract submissions no later than January 11, 2021. See www.fclj.org/symposium/ for further details. The *3rd Annual Spring Symposium, Untethered-Politics and Speech on the Internet* remains postponed until further notice.

The Editorial Board appreciates the continued support of the FCBA and The George Washington University Law School. The Editorial Board also thanks all authors and editors, including the Volume 72 Editorial Board, for their contributions to this Issue during the COVID-19 pandemic.

The *Journal* is committed to providing its readership with rigorous academic scholarship and thought leadership in relevant topics in communications and information technology law. The *Journal* therefore welcomes your feedback and submissions. Please direct questions and comments to fclj@law.gwu.edu and send articles for publication consideration to fcljarticles@law.gwu.edu. This Issue and our archive are available at www.fclj.org.

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Federal Communications Law Journal

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association and The George Washington University Law School. The *Journal* publishes three issues per year and features articles, student notes, essays, and book reviews on issues in telecommunications, the First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, privacy, communications and information policymaking, and other related fields.

As the official journal of the Federal Communications Bar Association, the *Journal* is distributed to over 2,000 subscribers, including Association members as well as legal practitioners, industry experts, government officials and academics. The *Journal* is also distributed by Westlaw, Lexis, William S. Hein, and Bloomberg Law and is available on the Internet at www.fclj.org.

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The Federal Communications Bar Association (FCBA) is a volunteer organization of attorneys, engineers, consultants, economists, government officials and law students involved in the study, development, interpretation and practice of communications and information technology law and policy. From broadband deployment to broadcast content, from emerging wireless technologies to emergency communications, from spectrum allocations to satellite broadcasting, the FCBA has something to offer nearly everyone involved in the communications industry. That's why the FCBA, more than two thousand members strong, has been the leading organization for communications lawyers and other professionals since 1936.

Through its many professional, social, and educational activities, the FCBA offers its members unique opportunities to interact with their peers and decision-makers in the communications and information technology field, and to keep abreast of significant developments relating to legal, engineering, and policy issues. Through its work with other specialized associations, the FCBA also affords its members opportunities to associate with a broad and diverse cross-section of other professionals in related fields. Although the majority of FCBA members practice in the metropolitan Washington, DC area, the FCBA has 11 active regional chapters, including: Atlanta, Carolina, Florida, Midwest, New England, New York, Northern California, Southern California, Pacific Northwest, Rocky Mountain, and Texas. The FCBA has members from across the U.S., its territories, and several other countries.

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ARTICLES

This Article presents a legal and economic framework for analyzing municipal broadband. Economics predicts, and the evidence confirms, that municipal broadband is in almost all scenarios subsidized entry, covering capital costs and losses with tax dollars and other internal transfers. Consequently, municipal broadband is incapable of increasing competition in the long run, is prone to be predatory (i.e., prices below incremental cost), and discourages private sector investment. Many provisions of state law overseeing municipal broadband, especially those discouraging cross subsidy, therefore have a sound economic basis. Empirical studies on municipal broadband confirm the uneconomic nature of municipal entry and suggest the lack of competitive price effects and broader economic rewards. The Article also shows that federal efforts to preempt state laws governing municipal broadband suffer from several Constitutional concerns. Moreover, case law indicates that when government acts as both regulator and competitor, Fifth Amendment due process protections may be violated. In all, the analysis prescribes a heavy dose of caution regarding municipal entry into the communications business.

Since the passage of the Telecommunications Act of 1996, the FCC's approach to broadcast ownership limits has been bogged down in a legal and regulatory quagmire. While initially successful in restructuring the broadcast radio industry using structural regulation between 1996-2003, in 2004, the FCC found a significant antagonist in the form of a group of Citizen Petitioners led by the Prometheus Radio Project. The lack of consistent empirical data supporting the agency's approach doomed three attempts at reforming minority ownership policies. And none of these failed reforms actually would have promoted ownership by minorities or women. After four consecutive FCC losses before the same the Third Circuit Court of Appeals panel, the U.S. Supreme Court will review more than twenty years of FCC media ownership policy in Spring of 2021. This Article traces the timeline for modern media

The Law and Economics of Municipal Broadband

T. Randolph Beard, PhD*
George S. Ford, PhD†
Lawrence J. Spiwak, Esq.‡
Michael Stern, PhD◆

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* Senior Fellow, Phoenix Center for Advanced Legal & Economic Public Policy Studies; Professor of Economics, Auburn University.
† Chief Economist, Phoenix Center for Advanced Legal & Economic Public Policy Studies.
‡ President, Phoenix Center for Advanced Legal & Economic Public Policy Studies. The views expressed in this Article are the authors' alone and do not represent the views of the Phoenix Center. Portions of this research were supported by the State Government Leadership Foundation.
◆ Senior Fellow, Phoenix Center for Advanced Legal & Economic Public Policy Studies; Professor of Economics, Auburn University.

I. INTRODUCTION

Broadband Internet service is integrated into nearly every aspect of contemporary American society, perhaps even to a fault. Kids sleep (or not) with their Internet-connected mobile devices under their pillows, mental health professions treat afflictions like Internet Addiction Disorder and Compulsive Internet Use, and half of the nation's ministers are having issues with online pornography.[1] Like all things, there are downsides, but broadband Internet connectivity is now seen as essential for modern life, not only because of the significant private benefits to its users, but also because of the alleged sizable social payoff—a "broadband bonus" above and beyond the purely private benefits of the service.[2] Consider the FCC's 2010 *National Broadband Plan*'s take: "Broadband is a platform to create today's high-performance America—an America of universal opportunity and unceasing innovation, an America that can continue to lead the global economy, an America with world-leading broadband-enabled health care, education, energy, job training, civic engagement, government performance and public safety."[3] While the rhetoric is often melodramatic, broadband is unquestionably important to consumers for its private benefits and to policymakers for its purported social payoffs, leading some political leaders

1. Hillary Cash et al., *Internet Addiction: A Brief Summary of Research and Practice*, 8(4) CURR PSYCHIATRY REV. 292 (2012); Doni Bloomfield, *Kids Who Sleep Near Smartphones Get Less Shuteye: Study,* BLOOMBERG (Jan. 5, 2015), http://www.bloomberg.com/news/articles/2015-01-05/kids-who-sleep-near-smartphones-get-less-shuteye-study [https://perma.cc/9QXD-EZCW]; Bo Lane, *How Many Pastors Are Addicted to Porn? The Stats are Surprising*, EXPASTORS.COM (Mar. 25, 2015), http://www.expastors.com/how-many-pastors-are-addicted-to-porn-the-stats-are-surprising [https://perma.cc/U4QW-SJD2]; *Computer/Internet Addiction Symptoms, Causes and Effects*, PSYCHGUIDES.COM, http://www.psychguides.com/guides/computerinternet-addiction-symptoms-causes-and-effects (last visited July 5, 2020) [https://perma.cc/CJ8M-3JJH].

2. *See generally* T. Randolph Beard et al., *The Broadband Adoption Index: Improving Measurements and Comparisons of Broadband Deployment and Adoption*, 62 FED. COMM. L.J. 343 (2010); Shane Greenstein & Ryan C. McDevitt, The Broadband Bonus: Accounting for Broadband Internet's Impact on U.S. GDP, (Nat'l Bureau of Econ. Research, Working Article No. 14758, 2009); *Connecting America: The National Broadband Plan*, FED. COMMC'N COMM'N (Mar. 16, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf [https://perma.cc/A5EK-GBZJ] [hereinafter *National Broadband Plan*].

3. *National Broadband Plan, supra* note 2, at 3.

to label the service a "necessity" and even a "human right."[4] Ubiquitous availability of broadband, if not universal adoption, is now a policy goal.[5]

Private investment has gone a long way to providing ubiquitous deployment and about 86% of U.S. homes now subscribe to the service.[6] There remains work to be done, however. Nearly 5% of households still can't subscribe to a basic fixed broadband service of 10 Mbps download speeds and 1 Mbps upload speeds (and 6.5% at 25/1 Mbps) and the capabilities of

4. *See, e.g.*, Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression) *Report of the Special Rapporteur*, U.N. General Assembly, Human Rights Council, U.N. DOC. A/HRC/17/27 (May 16, 2011); *Broadband Opportunity Council Report and Recommendations*, U.S. DEP'T OF AGRIC. & DEP'T OF COMMERCE (Aug. 20, 2015), https://obamawhitehouse.archives.gov/sites/default/files/broadband_opportunity_council_report_final.pdf [perma.cc/H78V-ZFMZ] ("Access to high-speed broadband is no longer a luxury; it is a necessity for American families, businesses, and consumers."); *Finland Makes Broadband a "Legal Right"*, BBC NEWS (July 1, 2010), http://www.bbc.com/news/10461048 [https://perma.cc/3SJ2-SUXU]; *Internet Access is "A Fundamental Right",* BBC NEWS (Mar. 8, 2010), http://news.bbc.co.uk/2/mobile/technology/8548190.stm [https://perma.cc/ZM2V-UTMN].

5. In the U.S., since the passage of the Telecommunications Act of 1996, the ubiquitous availability of broadband connections has been a bi-partisan goal of federal policy. *See, e.g.*, Section 706, 47 U.S.C. § 1302; *see also FACT SHEET: Broadband That Works: Promoting Competition & Local Choice In Next-Generation Connectivity,* THE WHITE HOUSE - OFF. OF THE PRESS SEC'Y (Jan. 13, 2015), https://www.whitehouse.gov/the-press-office/2015/01/13/fact-sheet-broadband-works-promoting-competition-local-choice-next-gener [https://perma.cc/UB6H-NUDJ]; Nick Mudge, *President Bush Says Universal Broadband by 2007*, GOVTECH.COM (Apr. 2, 2004), http://www.govtech.com/policy-management/President-Bush-Says-Universal-Broadband-by.html [https://perma.cc/DK7Y-6KWU].

6. Subscription level dated November 2019 obtained from *Digital Data Explorer*, N'T'L TELECOMM. AND INFO. ADMIN. (June 10, 2020), https://www.ntia.doc.gov/data/digital-nation-data-explorer#sel=wiredHighSpeedAtHome&disp=map [https://perma.cc/83SY-TNC7]; Inquiry Concerning the Deployment of Advanced Telecom. Capability to All Am. in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecom. Act of 1996, as Amended by the Broadband Data Improvement Act*, Notice of Inquiry*, 22 FCC Rcd 7816 (10), para. 15, Table 12 (2007) [hereinafter *2015 Broadband Progress Report*] ("Private industry continues to invest billions of dollars to expand America's broadband networks. This suggests that the industry recognizes both the value of and the need for continued investment to develop a robust broadband network that will meet consumers' demands."); City of Wilson, North Carolina, Petition for Preemption of North Carolina Gen. Statute Sections 160A-340 et seq., The Electric Power Bd. of Chattanooga, Tennessee, Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, Memorandum Opinion and Order*, 30 FCC Rcd 2408, para. 3 (2015) [hereinafter *2015 Preemption Order*] ("The private sector has invested billions of dollars upgrading their broadband networks throughout the United States, and current deployment data indicate that 92% of Americans in urban areas, and 47% in rural areas, have access to fixed broadband with speeds of at least 25/3 Mbps"); Michael J.R. Martin, *Rural and Lower-Income Counties Lag Nation in Internet Subscription*, U.S. CENSUS BUREAU (Dec. 6, 2018), https://www.census.gov/library/stories/2018/12/rural-and-lower-income-counties-lag-nation-internet-subscription.html [https://perma.cc/CQH9-AX2A]; *National Broadband Plan, supra* note 2, at 3 ("Due in large part to private investment and market-driven innovation, broadband in America has improved considerably in the last decade. More Americans are online at faster speeds than ever before.").

broadband connections vary widely across the country.[7] Adoption, while high, is still deemed too low, especially in certain segments of the population, causing what is often dubbed the Digital Divide.[8] Working against the lofty goals of policymakers with respect to broadband are a number of factors, including variations in consumer demand based on income, education, age, perceived value, and so forth, and the high deployment and operating costs of broadband networks.[9]

In pursuit of broadband's social payoffs, some municipal governments have taken on the enormous financial risk of building and operating their own communications networks in order to provide telephone, video, and high-speed Internet connectivity to their constituents (and to some persons beyond the municipal boundaries). These government-owned networks ("GONs") are most often being built in areas where communications services are not available or where the connection speeds and market coverage of existing private providers are deemed by local officials as inadequate.[10] Municipal governments generally have no interest in constructing and operating a communications network and most cities will never even consider it—yet out of desperation for modern communications services (i.e., high-speed broadband) and the benefits they are believed to provide, a few hundred cities

7. Deployment of Advanced Telecom. Capability to All Ams. in a Reasonable and Timely Fashion, *Notice of Inquiry*, 34 FCC Rcd 3857 (2019); John Wenz, *The FCC Has Defined Broadband as 25 Mbps*, POPULAR MECHANICS (Jan. 29, 2015), http://www.popularmechanics.com/culture/web/a13716/fcc-changes-broadband-definition-25-mbps/[https://perma.cc/V57Z-6VPS]; *see* Marguerite Reardon, *Sorry, Your Broadband Internet Technically Isn't Broadband Anymore*, CNET (Jan. 29, 2015, 4:28 PM), http://www.cnet.com/news/sorry-your-broadband-internet-technically-isnt-broadband-anymore [https://perma.cc/5T9X-5KNB].

8. Monica Anderson & Madhumitha Kumar, *Digital Divide Persists as Lower-Income Americans Make Gains in Tech Adoption*, PEW RE. CEN. (May 7, 2019), https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption; Monica Anderson et al., *10% of American Don't Use the Internet. Who Are They?*, PEW RE. CEN. (Apr. 22, 2019), https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/[https://perma.cc/SA3W-LHZ7]; ECON. AND STATISTICS ADMIN., U.S. CENSUS BUREAU, EXPLORING THE DIGITAL NATION - COMPUTER AND INTERNET USE AT HOME, (2011), http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_computer_and_internet_use_at_home_11092011.pdf [https://perma.cc/6CXP-JNW5]; Andrew Perrin, *Digital Gap Between Rural and Nonrural America Persists*, PEW RES. CEN. (May 31, 2019), https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/[https://perma.cc/DSF6-79YL].

9. *Id*.

10. These areas are often referred to as "underserved" communities. *See, e.g.,* Hillary Schaub & Darrell M. West, *Broadband Alternatives in Unserved and Underserved Areas*, BROOKINGS INSTITUTION: TECHTANK (May 23, 2014), http://www.brookings.edu/blogs/techtank/posts/2014/05/23-broadband-alternatives-underserved-areas-schaub [https://perma.cc/V3BG-9QUK]; *2015 Broadband Progress Report*, *supra* note 6, ¶¶ 29–30, 45–46.

are doing so.[11] In markets where private firms already provide some level of service, these government-owned and operated systems become "competitors" to the existing private firms, typically amassing significant market share and serving most, if not all, government buildings.

Not surprisingly, these types of municipal broadband systems are highly controversial. Opponents contend that having to compete with the government is inherently unfair.[12] Opponents also claim that the presence of a government-owned firm threatens private investment, a position supported by the *National Broadband Plan* and economic theory (as detailed herein).[13] A number of high-profile failures, forcing taxpayers and captive municipal electric utility ratepayers to shoulder millions in financial losses, provide

11. *Municipal Networks Will Not Wire U.S. for Broadband*, SPEEDMATTERS.ORG (Jan. 19, 2015, 8:52 PM), http://www.speedmatters.org/blog/archive/municipal-networks-will-not-wire-u.s.-for-broadband [https://perma.cc/EE94-HBD4]. Harold DePriest, Head of Chattanooga's municipal broadband system, made a similar point at a hearing before the Tennessee State Legislature: "This stuff is not cheap, it is not easy, and I guess I'm not really telling you that every community is going to run out and build broadband, that doesn't make sense to me." Institute for Local Self-Reliance, Head of Chattanooga EPB Discusses Broadband at State Legislation, YouTube (Apr. 20, 2011), https://www.youtube.com/watch?v=oRtzmNMGILo&index=19&list=FLeDkoYbc2YqmOTN6BcfU0JQ [https://perma.cc/DMA3-UP7X]; *see also* Community Network Map, Community Networks, http://muninetworks.org/communitymap (last visited July 7, 2020) [https://perma.cc/ZAT6-R6UY]; Exec. Office of the President, Community-Based Broadband Solutions the Benefits of Competition and Choice for Community Development and Highspeed Internet Access (2015), http://muninetworks.org/sites/www.muninetworks.org/files/White-House-community-based-broadband-report-by-executive-office-of-the-president_1.pdf [https://perma.cc/D52Q-PC55]; Masha Zager, *Census of Community Fiber Networks Rises to 165*, BROADBAND COMMUNITIES (Aug./Sept. 2015), http://www.bbpmag.com/Features/0815Census-of-Community-Fiber-Networks-Rises-to165.php [https://perma.cc/59N5-2A84].

12. This "unfair" concept has many elements, including debt costs, tax advantages, and so forth. For example, in some instances, municipal broadband systems do make payments to the city (but not usually to the state or federal governments) that are analogous to taxes. City systems may also face requirements that private providers do not.

13. *National Broadband Plan, supra* note 2.

potent warning regarding the risks and likely consequences of such ventures.[14] Such arguments have proven compelling: twenty-three states have passed laws overseeing how their political subdivisions enter the communications business.[15] In a few states, cities are prohibited by law from doing so. Like municipal broadband itself, these laws are highly controversial and there is a movement afoot to have them either repealed or preempted by the federal government.[16] In 2015, the FCC preempted such laws in the states of Tennessee and North Carolina at the request of cities in those states.[17] While the Agency's efforts to preempt ultimately did not withstand judicial scrutiny,[18] its actions confess to the intense political nature and emotional investment in this issue. While the mounting evidence of near inevitable financial failure of municipal systems has weakened interest, the push for

14. *See, e.g.*, Sonia Arrison et al., *Wi-Fi Waste: The Disaster of Municipal Communications Networks,* PACIFIC RES. INST. (Feb. 2007), https://www.heartland.org/publications-resources/publications/wifi-waste-the-disaster-of-municipal-communications-network [https://perma.cc/HB4G-RS2A]; John Barrett & David G. Tuerck, *Municipal Broadband in Concord*, BHI POL'Y STUDY (March 2004), http://www.beaconhill.org/BHIStudies/ConcordCable.pdf [https://perma.cc/2UMC-PLB5]; Charles M. Davidson & Michael J. Santorelli, *Understanding the Debate over Government-Owned Broadband Networks*, ADVANCED COMMS. L. & POL'Y INST. (June 2014), http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP-%E2%80%93-Chattanooga-Case-Study-%E2%80%93-June-2014.pdf [https://perma.cc/6JGK-S5J4]; Joseph P. Fuhr, *The Hidden Problems with Government-Owned Networks*, COALITION FOR THE NEW ECON. (2012), http://www.coalitionforthenewеconomy.org/wp-content/uploads/2012/01/1-6-12-Coalition-for-a-New-Economy-White-Article.pdf [https://perma.cc/FNT3-RYG7]; *GON with the Wind: The Failed Promise of Government Owned Networks Across the Country,* TAXPAYERS PROTECTION ALLIANCE (May 13, 2020), https://www.protectingtaxpayers.org/report/gon-with-the-wind [https://perma.cc/YG4Q-9ZP7]; Ronald J. Rizzuto, *Financial Performance of Tennessee's Municipal Cable and Internet Overbuilds in 2009*, U. OF DENVER (Feb. 25, 2010), http://media.timesfreepress.com/docs/2010/05/Rizzuto_report_on_Tennessee_telecoms.pdf [https://perma.cc/UNH8-8U3D]; David G. Tuerck, et. al., *Cashing in On Cable: Warning Flags for Local Government*, BEACON HILL INST. (2001), http://www.beaconhill.org/BHIStudies/BHIcablestudy103001.pdf [https://perma.cc/H88B-9ZRB]; James Valvo, *Municipal Broadband's Record of Failure*, AMS. FOR PROSPERITY (Mar. 2009), https://www.heartland.org/publications-resources/publications/municipal-broadbands-record-of-failure-1 [https://perma.cc/UEJ3-ARV7].

15. *See, e.g.*, *Comments of the Coalition for Local Internet Choice (Appendix)*, WC Docket No. 14-116 (Aug. 29, 2014), http://apps.fcc.gov/ecfs/document/view;NEWECFSSESSION=Z2h2Wh7Ytt5SXkcGyfL8hny1gcl33YwpLqdhWmmW0Glqs22bmcCq!-729788805!-681833196?id=7521826171 [https://perma.cc/5VTL-PXJE]; Sherry Lichtenberg, *Municipal Broadband*, NRRI REPORT NO. 14-11, NAT'L REG. RES. INS. (Nov. 2014), https://pensacolabroadband.files.wordpress.com/2015/08/11-2014-municipal-broadband-a-review-of-rules-requirements-and-options.pdf [https://perma.cc/9JT5-FZX6].

16. *See, e.g.*, John Eggerton, *FCC, States Square Off in Court Over Municipal Broadband*, BROADCASTING+CABLE (Mar. 17, 2016), https://www.nexttv.com/news/fcc-states-square-court-over-municipal-broadband-154745 [https://perma.cc/6PAA-A94S].

17. *2015 Preemption Order, supra* note 6.

18. *See infra* Section IX.

municipal broadband remains strong in some cities and political circles.[19] Whether they want to or not, federal and state legislatures will be addressing the question of municipal broadband networks, and laws related to them, for years to come.

While the controversy surrounding municipal broadband has generated a rich, varied, and informative literature on the phenomenon, what is missing is a careful economic analysis of the underlying nature of municipal broadband and its advocacy,[20] and why we see government entry in an industry where private investment is abundant.[21] In this Article, we try to fill that gap. As we see it, the economic essence of the municipal broadband debate can be boiled down to a simple question: *why is the municipality the only one willing to build the network?* Evidently, the answer is "*because no one else will*."[22] This question and its restatement as an answer help frame up the economic analysis of the issue, or at least key parts of it.

The reader should be aware, however, that our effort is admittedly and necessarily modest. It is unlikely that a single exercise will tell us all we need to know about the advisability of municipal entry in cities as diverse as Seattle, Washington (population 670,000), Chattanooga, Tennessee (population 173,000), Barbourville, Kentucky (population 3,200), Lenox, Iowa (population 1,359), and American Samoa (population 55,000).[23] Admittedly, our analysis may lead to more questions than answers, but we do believe the contemplation of these new questions will improve policy making

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19. *See, e.g.*, Conor McCormick-Cavanagh, *Citywide Broadband Initiative Could Be on Denver Ballot in 2020,* WESTWORD (Oct. 12, 2019), https://www.westword.com/news/denver-could-vote-on-municipal-broadband-in-2020-11508093 [https://perma.cc/9TR6-97X2]; Malia Spenser, *Portland-Area Municipal Broadband Study Group Kicks Off,* PORTLAND BUS. J. (Oct. 21, 2019), https://www.bizjournals.com/portland/news/2019/10/21/portland-area-municipal-broadband-study-group.html [https://perma.cc/9GNE-2BUM]; *see also* Jonathan Sallet, *Broadband for America's Future,* BENTON INST. FOR BROADBAND & SOC'Y (Oct. 2019), https://www.benton.org/sites/default/files/BBA_full_F5_10.30.pdf [https://perma.cc/Z5JZ-KHWM]; Elizabeth Warren, *Here's How We Get Broadband Internet To Rural America,* WASH. POST (Aug. 27, 2019, 12:06 PM), https://www.washingtonpost.com/opinions/elizabeth-warren-heres-how-we-get-broadband-internet-to-rural-america/2019/08/27/adc63c4e-c5c8-11e9-9986-1fb3e4397be4_story.html [https://perma.cc/M2XW-64HD].

20. A list of numerous studies is maintained at: *Reports Highlighted by Muninetworks.org,* COMMUNITY NETWORKS, http://muninetworks.org/reports (last visited July 7, 2020) [https://perma.cc/5F6F-PLU8].

21. *See supra* note 6; *see also* Michael Mandel, *U.S. Investment Heroes of 2015*, PUBLICATIONS. (Sept. 28, 2015), http://www.progressivepolicy.org/issues/economy/u-s-investment-heroes-of-2015-why-innovation-drives-investment [https://perma.cc/YQ2C-2F2Q].

22. This "no one else will" sentiment is widely held. *See, e.g.*, Allen S. Hammond & Chad Raphael, *Municipal Broadband* (Sept. 2006), https://digii.files.wordpress.com/2008/02/a-background-briefing-Article.doc [https://perma.cc/KB8U-68B3]; Harry, *US Lagging Behind in Broadband*, GRID INTERNET & TV (May 23, 2011), http://gridcommunications.net/lagging-broadband [https://perma.cc/2WYT-9X6T]; Laura Leslie, *Liveblog: H129 Municipal Broadband Hearing,* WRAL (Mar. 23, 2011), http://www.wral.com/news/state/nccapitol/blogpost/9313335 [https://perma.cc/N4BJ-C6NH].

23. Saad Bashir, *Gigabit availability*, SEATTLE.GOV (June 2015), http://www.seattle.gov/broadband/broadband-study [https://perma.cc/CT7T-CFX5]; Zager, *supra* note 11. Population data from the U.S. Census Bureau.

in this space. As is posted on the reading room door at Tromsø University in Sweden: "We have not succeeded in answering all our problems. The answers we have found only serve to raise a whole set of new questions. In some ways we feel we are as confused as ever, but we believe we are confused on a higher level and about more important things."[24]

II. SUMMARY OF FINDINGS

Our analysis relies heavily on (somewhat basic) economic theory, so our findings are general in nature.[25] Nevertheless, much of the evidence and anecdotes on municipal broadband fits nicely into this general framework. The economics also have a long-run view, revealing the underlying yet powerful forces that produce outcomes. Much of the evidence has, unlike the theory, a short-run view, whether for or against municipal broadband.[26] While there is always the possibility of the exceptional anecdote showing a short-run departure from prediction, policy should not be based solely (if at all) on anecdote and naïve, short-run considerations. Systematic departures of the evidence from the theory presented here, if they occur, point to areas for further research. Our review of the available evidence is broadly consistent with theoretical predictions.

Our purpose is not to disparage or promote municipal broadband as a policy option, but rather to provide an economic framework that aids in understanding what municipal broadband is and how one might reasonably support or oppose it. Municipal broadband is a complex issue, and this Article is but one entry into a portfolio of analysis on the topic (much of which remains to be done).

Our findings may be summarized as follows: First, the exceedingly high standards set for ubiquitous deployment and universal adoption of broadband are not based on the private benefits of the service, but on the *social benefits*

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24. BERNT ØKSENDAL, STOCHASTIC DIFFERENTIAL EQUATIONS 4 (5th ed.) (quoting EARL C. KELLY, THE WORKSHOP WAY OF LEARNING 2 (1951)).

25. We have studied municipal provision of communications services, on and off, for over twenty-five years, both as an academic exercise and as consultants. In fact, some of our research on the topic is frequently cited in the debate, and usually by the municipal broadband advocates. *See, e.g.*, George S. Ford, *Does a Municipal Electric's Supply of Communications Crowd Out Private Communications Investment?*, 29 ENERGY ECON. 467, 467-78 (2007), http://sites.udel.edu/broadbandplanning/files/2012/01/MunicipalCommunicationsSupply_2006.pdf [https://perma.cc/4EEZ-C3V3]; George S. Ford &Thomas Koutsky, *Broadband and Economic Development: A Municipal Case Study from Florida*, 17 REV. OF URB. & REGIONAL DEV. STUD. 216, 216–29 (2005), http://Articles.ssrn.com/sol3/Articles.cfm?abstract_id=925973); *cf.* George S. Ford & Thomas W. Hazlett, *The Fallacy of Regulatory Symmetry*, 3 BUS. & POL. 21, 21-46 (2001) (the Hazlett and Ford Article is not about municipal broadband but is nonetheless frequently cited in the debate.).

26. Building a communications networks requires sizable upfront investments, thus ensuring the builder will incur losses in the early years of operation. Such losses are not an indictment of the network. Profits must be evaluated over many years using discounting analysis.

of it.[27] Broadband policy is motivated by a positive externality.[28] As a consequence of positive third-party effects (to the extent they exist), the private incentives of consumers to pay for and the private incentives of firms to deploy the "right amount" of broadband are systematically *too low* from a social perspective.[29] Disappointment in the deployment and adoption of broadband is guaranteed absent an effective policy to close the gap between private and social benefits. Competition is not a solution to the externality problem, so the competition justification for municipal broadband is misguided. Traditionally, externalities are dealt with by using subsidies to alter private incentives so that they coincide with the social perspective, thereby increasing consumer welfare.

Second, the economics predict (and the evidence confirms) that municipal broadband is in almost all scenarios *subsidized entry*, covering capital costs and losses with tax dollars and other internal transfers. Advocates of municipal broadband do not generally contest this fact. In Chattanooga, Tennessee, for example, the city's system received a federal grant equal to about $2,000 per subscriber, and millions more in subsidies from the city's electric ratepayers. In Bristol, Virginia, direct subsidies received from various sources equaled about $7,000 per subscriber. And in a recent audit of the municipal system in Lafayette, Louisiana, the auditor discovered sizable and improper cross-subsidies between the city's services (electricity, sewer, water) and its broadband network.[30] The auditor concluded that the director of the city's services "was aware of the improper activity and may have violated several state laws."[31] Yet, proponents of municipal broadband are often quick to criticize these state laws, including the North Carolina law that the FCC preempted in 2015, because these laws limit subsidization and

27. Governments may be used for the purpose of manipulating markets to obtain advantages for one party or another, but we ignore these purely political motivations.

28. *See* MACMILLAN DICTIONARY OF MODERN ECONOMICS 146 (David W. Pearce ed., The Macmillan Press Ltd., 3rd ed. 1986)) ("Externalities involve an interdependence of utility and/or production functions. . . . For example, a beekeeper may benefit neighboring farmers by incidentally supplying pollination services. . . . A distinction is drawn between marginal and inframarginal externalities. In the former small changes in the level of the externality-generating activity will affect the production or utility of the externally affected party. In the latter, while the activity itself generates an externality, small or marginal changes in the level of the activity do not have any effect on the production or utility of the externally-affected party. A Pareto-relevant externality occurs when the extent of the activity may be modified in such a way that the externally-affected party can be made better off without the acting party being made worse off, that is, where there exists the possibility of gains from trade.").

29. *See* Theodore A. Chapman & Judith G. Waite, *Summary: Chattanooga, Tennessee; Retail Electric*, STANDARD & POOR'S, (Oct. 10, 2012), https://ecfsapi.fcc.gov/file/7521737337.pdf [https://perma.cc/7VUB-DAF3] ("These positive externalities are unlikely to be considered by private providers when making FTTH deployment decisions.").

30. *Lafayette City-Parish Consolidated Government Lafayette Utilities System LUS-Fiber,* CARR, RIGGS & INGRAM (Aug.12, 2020), https://drive.google.com/file/d/1Qp1DHRutc4-11DZqD-6pH4oAWm4jPwwv/view?_ga=2.62748716.1898275301.1598036956-1924561232.1598036956 [https://perma.cc/6KEC-GFA4].

31. *Id.* at 31.

thereby serve, it is claimed, as an entry barrier.[32] The asymmetric subsidization of municipal entrants (or any entrant) is a legitimate and serious concern. Entry by a subsidized government-owned firm with no regard for profit reduces the incentives of private firms to invest in modern communications infrastructure and may reduce consumer welfare.

Third, the economics indicate that subsidized municipal broadband is incapable of increasing competition (in the long run), if competition is measured as the number of firms offering service in each area. The number of providers in a market is determined by economic forces, not the whims of federal, state or city politicians. In the long-run, either the municipal entrant will fail or a private provider will exit or materially reduce its investments. Municipal systems regularly obtain significant market shares and often remove a major anchor tenant (the government) from private networks, thereby weakening the economic case for private investment in upgrades. If municipal systems are truly not interested in profit maximization, as is frequently claimed, then municipal entry may be a poison pill for all private sector investment.[33]

Fourth, and following from the prior findings, subsidized municipal entry is prone to be predatory (i.e., prices below incremental cost). Municipalities operating broadband networks are not, as the Supreme Court observed, acting only "to serve the public weal."[34] Instead, the municipal entrant seeks to capture market share from private sector providers. As such, if one discusses municipal broadband in the context of competition, the

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32. Jeff Stricker, Note, *Casting a Wider 'Net: How and Why State Laws Restricting Municipal Broadband Networks Must Be Modified*, 81 GEO. WASH. L. REV. 589, 591–92, 615, http://www.gwlr.org/wp-content/uploads/2013/03/Stricker1.pdf [https://perma.cc/23TG-KGUD].

33. Matthew Halverson, *Disbanded: No Broadband Utility for Seattle*, SEATTLE MET (June 20, 2012), http://www.seattlemet.com/articles/2012/6/20/disbanded-no-broadband-utility-for-seattle-july-2012 [https://perma.cc/CR39-YA4T] ("A municipal network should be evaluated on the same basis of how we evaluate roads and other infrastructure," says Christopher Mitchell, founder of muninetworks.org, which tracks community broadband issues. "Which is to say that the point of the road is not to produce revenue for the general fund. It's to produce economic development and other benefits."); Christopher Mitchell, *Broadband Payback Not Just About Subscriber Revenues*, COMMUNITY NETWORKS (July 15, 2011), https://muninetworks.org/content/broadband-payback-not-just-about-subscriber-revenues [https://perma.cc/LK3W-VRCY] ("[I]n doing a cost/benefit analysis on telecom infrastructure investment, it's important to take into account not only the direct revenues that the infrastructure generates but also the dollars that flow into a community as a result of the investment."); Henry Rosoff, *Tacoma Could be First Major Washington City with Publicly-Owned Broadband Network*, KIRO7.COM (Nov. 30, 2015), https://www.kiro7.com/news/utility-board-tacoma-council-decide-click-cable-tv/19126115/?_website=cmg-tv-10090 [https://perma.cc/A45J-9X8F] (quoting Tacoma Public Utility Board Chairman Bryan Flint) ("Publicly-run means we don't have a profit motive."); David St. John, *Municipal Fiber to the Home Deployments*, FIBER TO THE HOME COUNCIL 3 (Apr. 2008), http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/article-st-john.pdf [https://perma.cc/TT4V-PGBA] ("In the case of muni systems, which are not-for-profit enterprises, one measure of 'success' is defined as the level of their 'take rate'—that is, the percentage of potential subscribers who are offered the service that actually do subscribe").

34. City of Lafayette v. La. Power & Light Company, 435 U.S. 389, 403 (1978).

asymmetric subsidized entry of a municipal system is better characterized as anticompetitive in nature and may raise antitrust concerns.

Fifth, because municipal systems are disconnected from profit maximization and asymmetrically subsidized, the mere threat of municipal entry can reduce private sector investment. This deterrence effect is particularly pernicious at a time when private providers are undergoing widespread and costly upgrades to their networks. Paradoxically, the resulting lack of private supply may then be used to justify the municipal entry that caused the perceived lack of competition in the first place.

Sixth, economic theory reveals that the unqualified support of "more competitors" cannot be supported. As is well-documented in the economics literature, because of profit maximization and fixed costs, free entry into a market typically leads to excessive, not too little, entry. It may be a bitter pill to swallow when consumers face relatively few suppliers, but the risks of welfare-reducing entry are particularly acute in broadband markets where fixed costs are high, and services are not much differentiated. Lower prices (and thus higher quantities) must be paid for by the high cost of building a new network. Thus, the consumer welfare implications of forced entry via municipal broadband may very well be unfavorable. The dependence on asymmetric subsidies worsens the welfare consequences because subsidy dollars are expensive; research suggests that every dollar of spending by government costs much more than a dollar to gather and distribute.[35] Hundreds of millions in federal subsidies have been used to support municipal networks and it is well known that the federal budget deficits and federal spending are out of control.

Seventh, given the above, some (but not all) of the provisions of state laws overseeing municipal broadband have a sound economic basis. As noted a moment ago, many of these state laws attempt primarily to limit the subsidization of municipal systems, to encourage first the pursuit of alternatives to municipal entry, and to protect taxpayers from undue risk (or at least inform them of it by, say, requiring a referendum). In doing so, certain provisions may very well reduce the likelihood of municipal entry, but they do so for sound economic and policy reasons. Even laws that prohibit municipal broadband altogether, while admittedly an extreme approach, can be supported by legitimate economic arguments, at least in markets where private providers already provide service.

Eighth, if subsidies are to be used, then theory indicates that subsidies to existing firms are more efficient than municipal networks at achieving positive externalities by boosting output. Subsidies are continuous and can be fine-tuned and targeted. Entry is a clumsy approach in that it is discrete, untargeted, relatively expensive, risky for taxpayers, and arguably predatory.

Ninth, broadband is economically important, but most of the economic gains attributed to municipal broadband systems are based on economic

35. *See, e.g.*, E.K. Browning, *On the Marginal Welfare Cost of Taxation*, 77 AM. ECON. REV. 11, 11–23 (1987) (estimating a marginal cost of funds of $0.21); Don Fullerton, *Reconciling Recent Estimates of the Marginal Welfare Cost of Taxation*, 81 AM. ECON. REV. 302, 302–308 (1991).

migration rather than economic development. Certainly, such "economic migration"—as opposed to economic growth—is "privately" advantageous to a city, but whatever gains the city obtains from recruiting business is a loss to the city from which that business came. Since there are costs to moving and large costs of building the network, it may be that the migration is net detrimental to society as a whole. While it is easy to see a city's leadership wanting to advantage its city over others, it is not clear why the federal and state governments should approve. Business stealing is also not a sustainable policy. A "first mover" advantage is, by definition, not available to late comers. Newer and proposed deployments of municipal systems are perhaps already late to the party; the incentive to migrate to a particular city for high-speed broadband, and the economic gain realized from such migration, gets smaller by the day.

Tenth, we review the recent empirical literature on the economic benefits of municipal broadband. The most thorough empirical analysis of the topic to date looks at changes to the labor market in Chattanooga, Tennessee, following the city's deployment of a broadband network. Relative to comparable cities, an analysis of U.S. Census data finds no improvement in the labor market in that city. A few other studies point to the uneconomic nature of municipal entry. Finally, a few informal surveys reveal government-owned systems do not offer lower prices for services.

Eleventh, and finally, a multitude of legal issues continue to swirl around the municipal broadband debate. To wit, precedent indicates that it is unlikely that opponents of state municipal broadband laws will be able to achieve preemptive relief from either the FCC under the Communications Act or even new law from Congress. As a Constitutional matter, the Supreme Court appears to hold that the federal government cannot intervene into the relationship between states and their political subdivisions. Moreover, given the predatory nature of municipal broadband, GONs which have been found to have improperly cross-subsidized their operations could be in violation of the antitrust laws. Most importantly, because operators of GONs act as both regulator and competitor, recent caselaw indicates that municipal broadband raises significant Constitutional due process concerns.

The analysis presented below prescribes a heavy dose of caution regarding municipal entry into the communications business, perhaps explaining why much of the debate is political rather than economic in nature. Economics does not, however, offer an unequivocal indictment of municipal broadband. The benefits of broadband Internet service are perceived to be large and include externalities, and most of the welfare gains from broadband are obtained with even a single provider. Municipal broadband may have a role to play in broadband deployment in markets where private entry is not profitable, even if municipal entry is subsidized heavily. Such subsidies should be subjected to cost-benefit tests, however, as the benefits of broadband are finite and the costs very high in some areas. In markets already served, there are *potentially* more efficient and less controversial alternatives to capture the benefits of broadband service than adding a government-owned competitor, which, according to economic theory, is an action better

characterized as anticompetitive than it is competitive. Municipal broadband should be the last-ditch effort, and we suspect that many cities took it to be so but eventually built a network anyway.[36] Desperate times may call for desperate measures, and when the toolkit is limited, the chosen fix may appear to be a kluge. Undoubtedly, desperation is a lousy climate for good decision-making.[37] In that light, municipal broadband may be a symptom of the lack of coherent, economically informed federal and state policies for broadband deployment and adoption in economically-marginal communities.

III. THE ECONOMICS OF THE BROADBAND BONUS

If one were to condense the FCC's 2010 *National Broadband Plan* down to a single sentence, it might sound like this: *broadband is really important and we need people to use more of it*.[38] Broadband's importance stems from both its private value and its social value, but it is the social value that drives the need for social policy. While activities are not always easily categorized as one or the other, the *Plan's* depiction of broadband as a "platform to create today's high-performance America" suggests that the Internet is useful for more than just shopping and watching high-definition movies and cat videos (which provide benefits primarily of a *private* nature). Downloading a movie in five seconds rather than five minutes is a private issue, not a social good worthy of taxes and subsidies.[39] Alternately, widespread high-speed broadband use may permit governments, school systems, and healthcare providers to operate more efficiently and at lower costs by conducting business online, and some part of these efficiencies may be viewed as rendering social benefits not fully captured by private parties. In this Article, we will use the term "positive externality" to account for those

36. *Oregon Municipal Broadband*, LEAGUE OF OR. CITIES 30 (July 2011), http://www.orcities.org/Portals/17/Headlines/BroadbandReport%20July%202011%20FINAL forWEB.pdf [https://perma.cc/Y5LZ-BT7H] ("In 1999, the cities of Monmouth and Independence asked their local cable company when high-speed Internet would be introduced to the cities. The cities were told services would be available no sooner than 2020. With the new millennium approaching, both cities realized that to be economically viable, high-speed Internet services were desperately needed. Accordingly, the two cities conducted a feasibility study regarding an intergovernmental broadband network. This study also included a public survey, which showed that the citizens of Monmouth and Independence were receptive to the idea of a municipal broadband utility. Furthermore, a major client was eager to receive better telecommunications services, Western Oregon University. These and other factors illustrated to the two city councils that a municipal broadband utility was a viable and necessary project.").

37. *See, e.g.*, T. Randolph. Beard, *Bankruptcy and Care Choice*, 12 RAND J. OF ECONS. 626, 626–634 (1990).

38. Blair Levin & Denise Linn, *The Next Generation Network Connectivity Handbook*, GIG.U (July 2015), http://www.gig-u.org/cms/assets/uploads/2015/07/Val-NexGen_design_7.9_v2.pdf [https://perma.cc/54JL-LCFN]; *National Broadband Plan*, *supra* note 2.

39. It could be argued that such a difference may serve as a recruitment device for a city, but this does not contribute to any social net gain. Whatever benefits arise from one city recruiting a business is offset by the loss to the community from which the business originated. In fact, the recruitment motivation for cities is likely to be welfare reducing in that it encourages the premature deployment of new networks.

uses that produce a benefit above and beyond what consumers are willing to pay for themselves and what firms can turn into revenues.

An important aspect of a positive externality is that such benefits accrue neither to broadband providers nor their consumers, but to a third party. Consumers are not inclined to pay for benefits that accrue to others. Likewise, firms are profit-maximizers, so any benefit that does not affect revenues and profits does not impact its decisions. In the presence of a positive externality, the private incentives of consumers to pay for and the private incentives of firms to deploy the "right amount" of broadband are *too low* from a social perspective. This lack of attention to the full social values of broadband to others results because consumers, or the veil we call a "firm" that masks a group of consumers, are normally willing to pay only for benefits they receive. Altruism is noble, but not universal. The wedge between private and social benefits is the source of the dissatisfaction with both the deployment and adoption of broadband service, and this displeasure in turn drives a heightened attention to broadband policy. All the wishful thinking, complaining, and name calling people can muster won't close this gap; only a change in the economics of deployment and adoption will make the difference. Municipal broadband does not alter the economics of broadband.

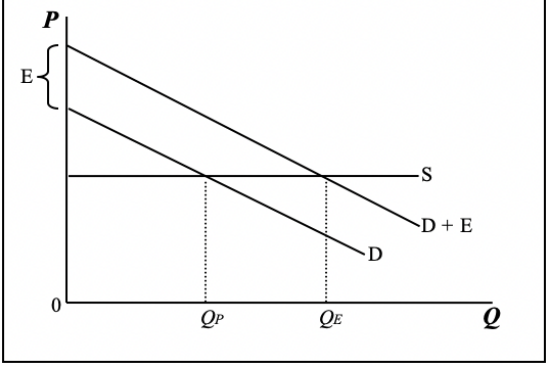
A. The Externality Issue

Figure 1 illustrates the nature of the externality problem using the basic supply-demand graph, where quantity is measured along the horizontal axis and price along the vertical axis.[40] The private demand for the good is the downward sloping curve labeled D. Given constant cost and perfect competition, the equilibrium quantity based on private incentives alone is Q_P, where demand and long-run supply (S) intersect. Assuming the good produces a positive externality of value E, the social demand curve is the downward sloping curve labeled D + E, which is shifted up and to the right by the amount E to account for the positive externality. For society, which includes the third parties receiving the external benefit, the desired quantity is Q_E. When accounting for the externality, private incentives produce a quantity that is too low (by the amount Q_E less Q_P). By subsidizing consumers by an amount equal to E, the effective demand of the consumers seen by the sellers is now D + E, so the externality problem is resolved and Q_E becomes the equilibrium quantity.[41]

40 For a discussion of the economics of externalities, *see generally* ROBERT B. EKELUND & ROBERT D. TOLLISON, ECONOMICS: PRIVATE MARKETS AND PUBLIC CHOICE (1999); Thomas Helbling, *What Are Externalities?*, 47 FIN. & DEV. 48, 48–49 (Dec. 2010), http://www.imf.org/external/pubs/ft/fandd/2010/12/basics.htm [https://perma.cc/PC6L-HMXK].

41 A subsidy to the firms of the same amount would lower the perceived marginal cost, thus increasing quantity by the same amount.

Figure 1. Effect of Externalities



If the private incentives of consumers and producers produce too little quantity by a failure to internalize the externality, then a subsidy is a policy solution (taxes are used to solve the negative externality problem). Broadband service is believed to provide positive externalities and these externalities lead to calls for ubiquitous deployment and universal adoption.[42] Yet, because these goals are based on social rather than private gains, neither goal will be met without some type of intervention. In this simple scenario, that intervention is a subsidy.[43]

B. Competition is Not the Solution to Externalities

The fact that quantity is too low in the presence of a positive externality is the source of much confusion in the broadband policy sphere, especially regarding municipal broadband. Specifically, basic economics indicates that competition reduces prices and, in turn, increases quantity by the law of demand. This leads to the belief that if quantity is "too low," then an increase in competition is a suitable solution. It is not. Indeed, in Figure 1, perfect competition is assumed, and yet quantity remains too low. Competition is not a solution to the externality problem; no amount of competition will close the gap between the private and socially desired quantity. Calls simply to "promote competition" ignore the true nature of externality and its solution.[44]

A review of the vast literature on municipal broadband reveals the same confusion between the effect of *positive externalities* and of *competition*.[45] Positive externalities are realized when people "consume" broadband, and the

42. *See* Robert D. Atkinson, *The Case for a National Broadband Policy*, INFO. TECH. AND INNOVATION FOUND. 6 (June 2007), https://www.itif.org/files/CaseForNationalBroadbandPolicy.pdf [https://perma.cc/LX2C-FM5N].

43. A subsidy intervention may involve the public supply of the good or service, as with public education.

44. Statement of Tom Wheeler, Chairman, Fed. Commc'ns Comm'n, Where There is "Competition, Competition, Competition," the Need for Cable Rate Regulation is Diminished (on file at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-62A2.pdf).

45. *See, e.g.*, Sallet, *supra* note 19.

more of it they consume, the larger the social well-being (i.e., consumer welfare, economic welfare, or social welfare). Municipal broadband networks do not solve the externality problem by competing with the private sector. *To solve the externality problem, we need more quantity, not more firms*. Adding more sellers to the market does not address the underlying problem, because that problem is a wedge between private and social values. Certainly, in the presence of excessive market power, additional competition may bring down prices. Even so, these marginal reductions in price can never solve the real problem—that is, the externality problem. How these price reductions are obtained is also important, and we address that question in more detail in the following sections.

As deployment data shows, private incentives are enough for the deployment of high-speed networks, and usually multiple networks, in most cities and places across the country. Where broadband is not available, the FCC has stepped in to subsidize broadband deployment (by a single firm) through its Connect America Fund ("CAF") and now its Rural Digital Opportunity Fund ("DOP"). These subsidy schemes focus almost exclusively on areas that are not served at all (or served with very low speed connections).[46] These programs may leave gaps. Enlightened management of rights-of-way and using the government as an anchor tenant for private providers may be effective tools in some areas, but may not always be adequate to induce the widespread availability of very high-speed broadband networks at privately uneconomic prices. Municipal broadband is prone to manifest as an option in areas where private incentives are insufficient for deployment and gaps in the subsidy system manifest.

C. Economic Development and Municipal Broadband

Perhaps the most common argument used in favor of municipal systems is economic development. Several studies allegedly provide evidence that advanced communications networks "cause" economic growth, and these

46. Details on the FCC's Connect America Fund may be found at: *Connect America Fund (CAF)*, FED. COMMS. COMMISSION, https://www.fcc.gov/encyclopedia/connecting-america (last visited July 7, 2020) [https://perma.cc/7C2X-2L2V]. The Rural Digital Opportunity Fund is detailed at: Rural Digital Opportunity Fund; Connect America Fund, *Notice of Proposed Rulemaking*, 34 FCC Rcd 6778, 8 (2019), https://www.fcc.gov/document/fcc-proposes-204-billion-rural-digital-opportunity-fund-0.

studies are often cited in support of municipal broadband.[47] Case studies are also used to support the argument. However, the economic development motivation is defective. Broadband is, no doubt, important to economic infrastructure—and by extension, jobs—but it is no magic elixir.[48] In the context of municipal broadband, economic development is a local, not a global, phenomenon.

D. Economic Migration Versus Growth

Most of the gains attributed to municipal broadband systems are based on *economic migration* rather than *economic development*. Consider, for example, former FCC Chairman Tom Wheeler's description of the economic gains attributed to the municipal network in Chattanooga-Tennessee: "Smaller businesses such as Claris Networks, Co.Lab, EDOps, and Lamp Post Group *relocated* to the city, and Chattanooga is also emerging as an incubator for tech start-ups."[49] Note the operative word here is "relocated." For the most part, the economic development from municipal broadband systems appears to be based on stealing businesses from other cities.[50] Certainly, such "economic migration"—as opposed to economic growth—is advantageous to a city, but whatever gains the city obtains from recruiting business is a loss to the city from which that business came. Since there are costs to moving and large costs of building the network (usually prematurely from an economic viewpoint), it may be that the migration is net detrimental to society as a whole. Most troubling is that the federal subsidies used to support financially municipal networks are funded through federal taxation; therefore, the people in cities losing businesses are perversely funding the broadband networks doing the stealing. The basis for such federal favoritism is unclear.

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47. There are many studies—of varying quality—on the relationship between broadband and economic growth. *See, e.g.*, Robert W. Crandall et al., *The Effects of Broadband Deployment on Output and Employment*, BROOKINGS INSTITUTION, ISSUES IN ECON. POL'Y (June 1, 2007), http://www.brookings.edu/research/Articles/2007/06/labor-crandall [https://perma.cc/F3YJ-V3VB]; *Impact of Broadband on the Economy*, INT'L TELECOMM. UNION (April 2012), https://www.itu.int/ITU-D/treg/broadband/ITU-BB-Reports_Impact-of-Broadband-on-the-Economy.pdf [https://perma.cc/WP5Z-B4B5]; Michael Minges, *Exploring the Relationship Between Broadband and Economic Growth*, WORLDBANK (Jan. 2015), http://pubdocs.worldbank.org/pubdocs/publicdoc/2016/1/391452529895999/WDR16-BP-Exploring-the-Relationship-between-Broadband-and-Economic-Growth-Minges.pdf [https://perma.cc/ZH68-SKMS]; *Socioeconomic Effects of Broadband Speed*, ERICSSON (Sept. 2013), http://www.ericsson.com/res/thecompany/docs/corporate-responsibility/2013/ericsson-broadband-final-071013.pdf [https://perma.cc/F4YR-W4GW].

48. George S. Ford & R. Alan Seals, *The Rewards of Municipal Broadband,* PHX. CTR. (May 2019), http://www.phoenix-center.org/pcpp/PCPP54Final.pdf [https://perma.cc/H7YK-UZS3].

49. Tom Wheeler, *Removing Barriers to Competitive Community Broadband,* FED. COMM. COMMISSION BLOG (June 10, 2014, 4:17 PM), http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband [https://perma.cc/YYL7-KL5W] (emphasis added).

50. *See, e.g.*, Heather B. Hayes, *Businesses Benefit from Municipal Broadband*, BIZTECH, https://biztechmagazine.com/article/2016/03/businesses-benefit-municipal-broadband ("Many communities have realized that if they do not invest in themselves, they will be left behind in the digital economy.").

Also, economic migration—i.e., business *stealing*—is not a sustainable policy. Chattanooga and other cities were perhaps wise to get a first-mover advantage in stealing businesses from other cities, but as the deployment of very high-speed broadband networks becomes more pervasive, early-mover advantages dissipate. A "first mover" advantage is, by definition, not available to late comers. Newer and proposed deployments of municipal systems are perhaps already late to the party; the incentive to migrate to a particular city for high-speed broadband, and the economic gain realized from such migration, gets smaller by the day.

The discussion of an externality—that is, some activity that causes a difference between private and social valuations—is also relevant to the economic development issue. Cities building municipal networks justify doing so because those networks permit them to steal businesses from other cities. The cities view such economic gains as "social" in nature—and they may be social within the city limits—but in fact they are mostly private. Society includes both the city doing the stealing and its victims. Taking a city to be a collective of private (and political) interests, economic theory points to an inefficiency caused by the private motivations of a city's leadership. This *economic war among the cities* supports a role for state and federal governance over municipal broadband, since the private and individual decisions of cities may not coincide with broader social goals.[51]

IV. MUNICIPAL BROADBAND, COMPETITION, AND WELFARE

A professor of economics stands before her class of fifty students with $101 in her hand. She offers an even cut of that $101 to every student willing to pay $20 to enter into the sharing scheme. At first, most of the fifty raise their hands to participate for an easy profit, but since a share is worth only about $2 if split among all fifty students, hands soon begin to fall. How many hands are up in the end? If six, then each participant gets only $16.80, which is less than the $20 entry fee. So, the final number must be less than six. If four, then each participant gets $25.25, earning a $5.25 profit on the $20 investment. While a good deal, the sum of these profits equals $21 ($= 5.25 \times 4$), so there is room for one more participant to make a profit at the $20 entry fee. In the end, there are five participants, with each student earning a return of $0.20 on their $20 investment. There is no motivation for a sixth student to enter, and no motivation for one of the five final participants to exit. Five participants form an *equilibrium*.[52]

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51. *See, e.g.*, Melvin L. Burstein & Arthur J. Rolnick, *Congress Should End the Economic War Among the States*, FED. RES. BANK OF MINNEAPOLIS (Jan. 1, 1995), https://minneapolisfed.org/publications/annual-reports/congress-should-end-the-economic-war-among-the-states [https://perma.cc/2UL5-H6SM].

52. For purposes of exposition, the discussion of this example is simplified somewhat. In particular, we ignore the possibility of equilibria in mixed strategies. One consequence of such solutions is that the observed number of entrants will be random, although the point being stressed in the text remains correct.

The simplicity of this game belies its significant economic insight. If a firm believes it can enter and serve a market profitably, then it will enter. If an existing firm is losing money and sees no way to turn that around, then it will exit. When entry and exit stop (or balance), the market is said to have reached equilibrium. Just like prices and quantities have equilibrium levels, there exists an *equilibrium number of firms* that arises naturally out of the economic conditions of the marketplace. Whether this equilibrium industry structure is satisfactory to parties or policymakers is beside the point; the supply-side and demand-side conditions determine the number of firms that can profitably serve the market. That number may be big or small. If market conditions only permit two firms to operate profitably, then three firms cannot do so, and no amount of wishful thinking will change that fact.

As discussed above, the case for aggressive competition policy in broadband markets is based on data showing that most households have few options (if any options at all). While two or three providers is unarguably few, this fewness is not an accident. It is driven primarily by the supply- and demand-side conditions for the services offered over wireline communications networks. As the FCC recognized in its *National Broadband Plan*:

> Building broadband networks—especially wireline—requires large fixed and sunk investments. Consequently, the industry will probably always have a relatively small number of facilities-based competitors, at least for wireline service.[53]

Because wireline communications networks are exceedingly expensive to build, maintain, and operate, "fewness" is expected. The more there are of them, the less market share is available to any single firm, making it difficult to earn a return sufficient to justify the investment. Financial studies of municipal broadband proposals often find that a GON will require a market share of at least 40% or so to be financially self-sufficient.[54] If so, then how many networks can serve this market? If a network needs no less than a 40% penetration rate (with the typical 80% of total homes subscribing), then the answer is two. While the "relatively small number of facilities-based competitors" is often lamented by advocates and policy makers, it is, in many respects, Mother Nature that has produced that outcome. Certainly, there may be policies that make entry more difficult (e.g., local franchise laws, net neutrality) and there may be policies that ease entry (e.g., tax incentives, easy rights-of-way rules, and so forth). Even so, the nature of providing wireline services prohibits large numbers of firms and there is little public policy can

53. *National Broadband Plan, supra* note 2, at 36.

54. Jennifer Karami, *What Can Tacoma Teach Seattle About Muni Broadband?*, SEATTLE WEEKLY NEWS 9 (June 1, 2015), https://issuu.com/pnwmarketplace/docs/i20150630181432650 [https://perma.cc/H2R2-WJPJ] ("[T]o be sustainable, this new network would need to capture over '40 percent of the broadband market at a subscriber cost of $75 per month to be financially viable over the long term,' . . . .").

do to alter those underlying economic forces with the possible exception of massive and sustained subsidization (which presents its own set of issues).

As for those of us who have studied communications policy for the past twenty-five years, we think a little perspective is in order. Let's not forget that not that long ago there was essentially no competition for communications and video services and households were faced with buying from regulated monopolists, if they were regulated at all. In the mid to late-1990s, even the thought of having two wireline providers of voice and video service was a cause for celebration.[55] It was understood, both practically and theoretically, that even a little competition goes a long way. In fact, the U.S. Congress codified that idea. In the Cable Competition and Consumer Protection Act of 1992, for example, Congress imposed rate regulation on cable television systems.[56] Rate controls were eliminated, however, if a cable system faced *half a competitor* (i.e., a rival that passed half the homes in a franchise area).[57] Congress determined that half a competitor is better than a regulated monopolist, and the evidence has affirmed this view.[58] Interestingly, the rate reductions imposed on cable systems after the 1992 Cable Act were based on a statistical study of rate reductions found in markets with *two* competitors. Rate regulation, at its best, could only mimic the duopoly outcome. Two competitors in wireline broadband was taken to be very good stuff, and two wireline providers may be the best the unsubsidized market can do in many cities and rural areas. If the full costs of the subsidies are considered in a cost-benefit analysis, then there is no guarantee such subsidies will increase consumer welfare.

Also, it is important to keep in mind that the "number of competitors" is not the equivalent of "competition." Consider a market where there are two firms. These two firms may compete very aggressively or not at all (i.e., collusion). Either is a possibility. The number of competitors alone does not say much about the intensity of price competition.[59] In fact, if firms compete intensely, only a few firms can survive, implying that few competitors in a market may be an indicator of intense price competition rather than a lack of it. In the Professor's game, imagine what would happen if for every hand raised, the prize shrunk by $5. There would fewer students—only four in fact—willing to raise their hand in the end. A look at the financials of firms

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55. George S. Ford, *Reflecting on Twenty Years Under the Telecommunications Act of 1996*, 68 FED. COMM. L.J. 17 (2016); Lawrence J. Spiwak, *Reflecting on Twenty Years Under the Telecommunications Act of 1996*, 68 FED. COMM. L.J. 62 (2016).

56. *See* Rafael G. Prohias, Longer than the Old Testament, *More Confusing than the Tax Code: An Analysis of the 1992 Cable Act*, 2 COMMLAW CONSPECTUS 81, 93 (1994); Edmund L. Andrews, *Bush Rejects Bill that Would Limit Rates on Cable TV,* N.Y. TIMES, Oct. 4, 1992, § 1, at 1, https://www.nytimes.com/1992/10/04/us/bush-rejects-bill-that-would-limit-rates-on-cable-tv.html.

57. 47 U.S.C. § 542(l).

58. THOMAS HAZLETT & MATTHEW L. SPITZER, PUBLIC POLICY TOWARD CABLE TELEVISION: THE ECONOMICS OF RATE CONTROLS (1997).

59. *See* George S. Ford et al., *Competition After Unbundling: Entry, Industry Structure and Convergence*, 59 FED. COMM. L. J. 331, 333 (2007), http://www.phoenix-center.org/Articles/FCLJCompetitionAfterUnbundling.pdf [https://perma.cc/9244-YQDL] for a detailed discussion.

that offer wireline services and the lack of widespread competitive entry certainly does not suggest they are earning huge returns. Accounting profits for these firms are below average for firms in the S&P 500.[60]

The fact is that the outcomes we observe in markets, whether we like them or not, are what the inherent supply- and demand-side conditions of the market permit. Changing such outcomes will require costly regulatory interventions, and history suggests such interventions are often politically motivated, ham-handed, and ineffective at increasing the number of providers for wireline communications services.[61] Policymakers are swimming upstream; wireline communications is a hard business. Economic theory indicates that without subsidization, the observed number of firms from a free entry scenario equals or exceeds the number of firms chosen by a capable regulator intent on maximizing consumer welfare subject to a zero-profit constraint. Of course, in the presence of such a benevolent, omniscient, and all-powerful social planner, perhaps there's no need for competition in the first place since the competitive outcome could be produced by the planner's mandate. Yet, experience suggests that the performance in even workably competitive markets dominates either regulated monopoly or industry nationalization. Almost all advanced economies have abandoned nationalized communications networks and have done so for good reason.

A. The Equilibrium Number of Firms

We can formalize the analysis with a basic economic model to get a more precise understanding of the issue. Our goal here is to keep it as simple as possible (e.g., a linear model) but rich enough that the key elements of the issue can be addressed. Numerical examples and figures are provided to illustrate the logic of the analysis, which is quite intuitive. This bit of rigor disciplines the argument, and if intellectual discipline is needed anywhere today, it is in communications policy generally and the municipal broadband issue specifically. Nevertheless, the classroom example above illustrates the prescriptions of this more technical analysis.

Consistent with the standard view that more competitors leads to lower prices and firm profits, we employ the Cournot Model of Competition, which results in a smooth movement from monopoly to perfectly competitive prices (and profits) as the number of rivals increases (see Figure 2 below).[62] Also, in policy debates, the number of firms is often taken to measure the degree of competition, and the Cournot Model is consistent with that view. So, to begin,

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60. George S. Ford & Lawrence J. Spiwak, *Substantial Profits in the Broadband Ecosystem: A Look at the Evidence*, PHX. CTR. PERSPECTIVE (Apr. 22, 2010), http://www.phoenix-center.org/perspectives/Perspective10-04Final.pdf.

61. George S. Ford & Lawrence J. Spiwak, *Lessons Learned from the U.S. Unbundling Experience*, 68 FED. COMM. L.J. 95, 101, 123–25 (2016), http://www.fclj.org/wp-content/uploads/2016/01/68.1.3-Spiwak-and-Ford.pdf [https://perma.cc/DPS8-JRYH].

62. In the Cournot model, rival firms choose the quantity they wish to offer for sale. Each firm maximizes profit on the assumption that the quantity produced by its rivals is not affected by its own output decisions. *See, e.g.*, DENNIS W. CARLTON AND JEFFERY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION (2000).

consider a Cournot Oligopoly model with N symmetric (or identical) firms and a linear market demand curve given as:

$$P = A - Q, \tag{1}$$

where P is market price, Q is market quantity, and A is the intercept of the market demand curve (which is also a measure of market size). For convenience, we assume that each firm has zero marginal costs and fixed costs equal to f. The firms are symmetric so they all charge the market price and sell quantities Q/N, where N is the number of firms. The Nash Equilibrium is characterized by the following price (P_e):

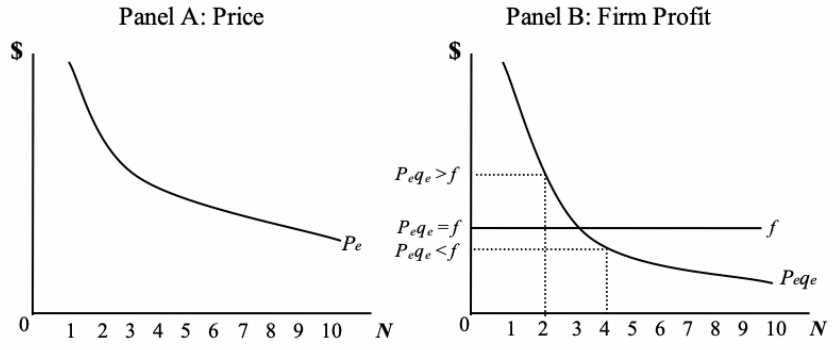
$$P_e = A/(N + 1) ; \tag{2}$$

and total quantity (Q_e):

$$Q_e = N \cdot A/(N + 1) . \tag{3}$$

Equation (2) reveals the familiar result that equilibrium price falls as the number of firms (N) increases. Likewise, Equation (3) shows that total quantity rises in the number of firms (in response to the price decline). Each firm has a quantity of $q_e = Q_e/N$, so each firm's profits are just $P_e q_e$. Figure 2 illustrates the relationship between the number of firms, N, and price (Panel A) and firm profits (Panel B).

Figure 2. Prices, Profits and the Number of Firms



As shown in Panel A of Figure 2, as the number of firms (N) increases, the market price falls. Panel B shows that firm's profits also fall as N increases. Profits fall at a faster rate than prices because not only are total industry profits falling as N rises but also because those lower profits are being split among more firms (a shrinking pie is being cut into more and more pieces). The number of firms is obviously quite important to competition policy, so what determines N? The answer is: *profits do*.

If a firm can enter and earn a profit large enough to pay *f*, then it will. At some point, however, falling prices from additional entry will lead to prices and quantities so low that *f* cannot be covered. When that happens, entry stops. Or, if too many firms enter, then all firms lose money, some must exit. When the entry and exit stop (or balance), then the equilibrium number of firms, N^*, is obtained. In Panel B of Figure 2, with fixed cost *f*, if *N* were 4, all firms lose money ($P_e q_e < f$). If *N* is 2, then profits are positive ($P_e q_e > f$) and sufficiently so that a third firm can enter and still make a profit. Thus, the equilibrium number of firms is $N^* = 3$; no firm wants to exit, and no firm wants to enter.

The figure indicates that to determine the long-run equilibrium number of firms, we must first set firm profits equal to zero:

$$P_e q_e - f = 0, \tag{4}$$

and then we solve this condition for the long-run number of firms which is (the integer part of):

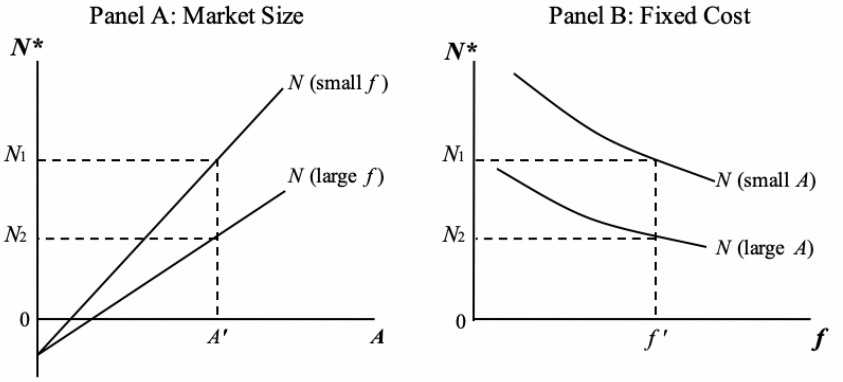
$$N^* = A/\sqrt{f} - 1. \tag{5}$$

This equation is simple but it contains a basic insight for competition policy.[63] That is, the larger the market size (*A*) is relative to the (square root of the) fixed cost of providing the service (*f*), the larger the number of firms in equilibrium. Going back to the example of the Professor's game, if the prize was raised from $101 to $201, then 10 students would be willing to pony up the $20 fee (recall only five did so at a prize of $101). When the prize (that is, the market) gets bigger, more students are willing to participate in the game.

The relationships implied by Equation (5) are illustrated in Figure 3. In Panel A, market size (*A*) is measured along the horizontal and the number of firms along the vertical axis. Two curves are shown with one reflecting high fixed costs (*f*) and the other low fixed costs. As market size gets larger, so does the number of firms. But, the number of firms grows faster as market size rises when fixed costs are relatively lower. At *A'*, there are N_1 firms when fixed costs are low and N_2 firms when fixed costs are high. In Panel B, fixed costs are measured along the horizontal axis. With market size constant, as fixed costs rise, the number of firms declines (non-linearly, given Equation (5)). The number of firms will be larger for any given *f* when market size (*A*) is larger. At *f'*, there are N_1 firms when fixed costs are low and N_2 firms when fixed costs are high.

63. The theory of equilibrium industry structure is well-developed, and much research has stemmed from the pioneering work of Professor John Sutton. John Sutton, SUNK COST AND MARKET STRUCTURE (1991). For an explanation of this work, *see* Ford, *supra* note 57; *see also* Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report*, 9 FCC Rcd 7442, App'x H (1994).

Figure 3. Market Size, Fixed Cost and the Number of Firms



The implications are clear. A large market with low capital costs will have many sellers (*A* is large, *f* is small) and a small market with large fixed capital costs will have few sellers (*A* is small, *f* is large). Even in a large market, few providers may exist if fixed costs are also large (*A* is large, *f* is large too). Large fixed costs create scale and density economies, and these economies favor large firms and thereby limit their numbers. In many cities across the U.S., and in many cities where municipal systems are being built or considered, the markets are small by low population and the fixed costs relatively high given the low density of that population. Both factors work against the presence of many firms (or even the presence of one firm).

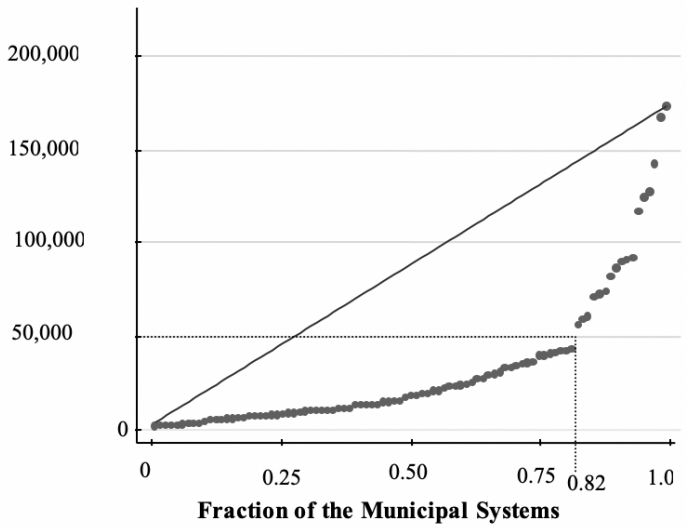
Equation (5) indicates that the number of firms in a market is finite and may be determined by factors mostly outside the control of public policy (or exogenous), such as consumer preferences and the costs of building and maintaining a network. The theory further reveals that public policy cannot choose *N** directly.[64] If policymakers are unhappy with the number of providers, then public policy usually must either increase the size of the market or reduce the fixed costs of providing the service. Equation (5) also provides a detailed explanation for the *National Broadband Plan's* statement that "[B]uilding broadband networks—especially wireline—requires large fixed and sunk investments. Consequently, the industry will probably always have a relatively small number of facilities-based competitors, at least for

64. It is perhaps more accurate to say that policymakers cannot make *N* exceed *N**. Regulations can always be used to reduce *N* below *N** (i.e., a franchised monopoly), though there will be pressures to eliminate such restrictions if more competition is possible. In the early days of the mobile wireless industry, the FCC allocated licenses in order to maintain a large number of firms. Competition was excessive, and eventually mergers and acquisitions reduced the number of rivals. *See, e.g.*, T. Randoplh Beard, et al., *Wireless Competition Under Spectrum Exhaust*, 65 FED. COMM. L. J. 79 (2012). In the radio industry, the FCC also limited the number of stations a single owner could own, but inefficiencies eventually led to the relaxation of those ownership rules. *See, e.g.*, Robert B. Ekelund Jr. et al., *Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration*, 43 J. L. & ECON. 157, 158, n.3 (2000).

wireline service."[65] In effect, the *Plan's* statement says that if *f* is large, *N* is likely to be small.

As the theory indicates, there will be fewer firms and less investment in areas where market size is small relative to entry costs. Thus, it is the smaller, rural town where broadband availability is expected to be the most limited, and, in turn, where municipal broadband networks are more commonly found. In Figure 4, the quartile distribution of the populations of cities listed in a recent census of fiber municipal broadband networks is shown.[66] From this figure, we see that 82% of systems in the survey are in cities with less than 50,000 in population (or about 20,000 homes).[67] About 60% of these communities had populations less than 25,000 (10,000 homes), about half had populations less than 18,000 (7,200 homes), and one-third have populations less than 10,000 (5,000 homes). Municipal networks are being built mostly in smaller communities, many of them with a significant rural footprint, where investment in network and/or network upgrades may not be justifiable on purely private incentives alone.[68] While there are some deployments in larger cities (Chattanooga, for example), they are relatively few and these special cases may be explainable by special economic (or political) considerations. Figure 4 comports with theoretical expectations.

Figure 4. Municipal Broadband Systems and Population



65. *National Broadband Plan, supra* note 2, at 36.

66. *See* Zager, *supra* note 11.

67. The average U.S. household has 2.58 persons. *See*, *e.g.*, U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010 (Apr. 2012), https://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf [https://perma.cc/F6T3-KVW7].

68. Emily Badger, *Why Are There No Big Cities with Municipal Broadband Networks*, BLOOMBERG CITYLAB (Mar. 4, 2013), http://www.citylab.com/cityfixer/2013/03/why-are-there-no-big-cities-municipal-broadband-networks/4857 [https://perma.cc/BC5Z-JCWF].

There is great practical significance to this theory as well. When someone says, "we need to promote competition," the retort is to ask, "what are you doing to increase market size or reduce entry costs?" If competition is taken to be the number of firms as it often is, then economics tells us that changing market size or entry costs (or both) is the only real mechanism by which to increase the number of competitors. Municipal broadband does neither while ignoring the underlying economic factors. It is, consequently, no surprise that many of the municipal systems have experienced profound financial difficulties. While it is possible to construct more sophisticated models that introduce more factors, it is also true in these models that market size and fixed costs are the key determinants to the number of firms. In fact, these additional factors often just scale market size or costs. Most policy actions can be collapsed into either market size or fixed costs, and therefore the influence of policy on the number of firms can be readily assessed.[69] More intense price competition and taxes, for example, shrink market size and thus produce equilibriums with fewer firms. Subsidies may reduce fixed cost (or increase market size), thereby increasing the number of competitors in equilibrium, but subsidies are not free and threaten the profitability of firms not receiving them, perhaps causing exit and no change in *N*.

B. Welfare and the Number of Competitors

Much of the conversation regarding communications policy generally, and municipal broadband policy specifically, is about promoting competition. Yet, *competition is a means, not an end*. Competition is not valued because it lowers prices. In fact, prices can be too low. Competition is valued because it increases consumer welfare by bringing prices in line with costs and ensuring that services consumers want and are willing to pay for get produced at the lowest possible cost.[70] What is advantageous about competition is that it forces firms to weigh both consumer interests as well as the costs of production, thereby increasing consumer (or total) welfare by an invisible hand.

If competition works via an *invisible* hand, we must at least question the wisdom of introducing the *visible* hand of policy. Should policymakers promote competition in wireline markets at any costs? Of course not. To see why, let us analyze the effect of the number of firms on consumer welfare (labeled *W*), where consumer welfare is the sum of benefits to consumers and

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69. T. Randolph Beard et al., *Network Neutrality and Industry Structure*, 29 HASTINGS COMM. & ENTERTAINMENT L.J. 149 (2007), http://www.phoenix-center.org/Articles/CommEntNetworkNeutrality.pdf [https://perma.cc/ZSG6-ZHUT]; Ford, *supra* note 59, at Section IV.

70. In this Article, consumer welfare is defined to be the sum of all the benefits provided society (both consumers and producers) by the consumption of a good less the cost of producing that good. In some instances, consumer welfare is narrowly associated with consumer surplus, but here a more inclusive definition is used that encompasses producer surplus as well. *See*, *e.g.*, Gregory J. Werden, *Essays on Consumer Welfare and Competition Policy* (Mar. 2, 2009), http://ssrn.com/abstract=1352032 [https://perma.cc/9K8Y-M8M7].

firms less the cost of producing those benefits. Consumer welfare (the sum of all surplus of all humans) is the standard by which policy is typically judged, at least by economists.[71]

Let us look at consumer welfare more formally to see the point. As a function of the number of firms, the welfare function is:

$$W(N) = 0.5(A^2 - P_e^2) - Nf. \quad (6)$$

The first term of Equation (6) is the benefits to consumers and producers. The second term is the costs of making the good or service available, which is just the number of firms in the market multiplied by their fixed costs (recall, marginal costs are assumed to be zero for convenience).

What happens to welfare if we increase the number of firms? We can figure that out by taking the derivative of the consumer welfare function with respect to the number of firms (N), rendering:

$$W'(N) = P_e^2/(N + 1) - f. \quad (7)$$

From Equation (7), we can clearly see the two contrary effects of additional entry. The first term of Equation (7) shows that adding an additional firm to the market adds to consumer welfare by reducing the equilibrium price. Note that this positive effect will be smaller the larger the number of firms is (see Figure 2), since adding a third firm has a much larger effect than, say, adding a tenth. The second term of Equation (7) implies, however, that adding another firm reduces consumer welfare by replicating fixed cost f, which is a constant. Equation (7) reveals the tradeoff from additional entry—lower prices versus higher fixed costs. In effect, the price paid for the lower price is the fixed cost f, so for welfare to rise, the benefits of the price cut must exceed the additional fixed cost. This point is important—*price cuts from additional competitors must be purchased, and in broadband markets, they are purchased at the high cost of building an additional network*. Society desires (from a welfare perspective) not to pay too dearly for a price cut, so looking to competition to drive price reductions may not be the wisest policy.

Consider a hypothetical where 80 million broadband consumers could organize, without cost, to build their own fiber network to serve every customer. This company must be financially sustainable without subsidies, which is, of course, a stretch, since if it were possible to enter profitably, a private firm already would have done so. For argument's sake, let us set aside this logical nuisance for the moment. Suppose the business model suggests that this new firm would, through competition, reduce the price by 10%. Even so, the network is calculated to remain financially viable. The average price before entry is $80 so the discount is $8 per month, reducing the price to $72 per month, and producing an annual savings of $96 per subscriber. Total payoffs from the discount are measured as the net present value of the savings over 15 years discounted at a rate of 5%, which is approximately equal to ten-

71. By "economists" we mean those practicing Neoclassical Economics.

times the annual effect of the discount. So, the payoff per customer of the network is $960, with total network benefits of about $77 billion across the 80 million subscribers. These benefits must be compared to the cost of producing them. Very conservative estimates of the cost of a nationwide Google-style fiber network are $140 billion (closer to $300 billion over the fifteen-year window if you assume a 10% maintenance and upgrade factor), but the benefits to consumers are only $77 billion.[72] Consumers, at least rational ones, would not wish to construct such a network (as the costs exceed the benefits by a long shot).

Alternately, assume that a social planner is considering building such a network.[73] Unlike the consumers, the social planner also considers the effect of the price discount on sellers; after all, sellers are just consumers engaged in a supply-side role. Thus, the $77 billion of benefits from the discount calculated above are merely a transfer from sellers to consumers, which to the social planner are a wash. Only the gains to new consumers are of any value to the social planner. Assuming that a 10% discount would lead to a 10% increase in adoption, the total welfare effects of the new network are only $3.8 million.[74] At a cost of no less than $140 billion, it is clear that the social planner would not construct the network, absent an unreasonable assumption about the size of the externality.

C. Adding Competitors to a Market Already in Equilibrium

In many policy-relevant contexts, there is frustration with the number of competitors that Mother Nature has produced in broadband markets (that is, N^*). In those cases, it is not the general welfare tradeoffs that are of interest, but rather the welfare consequences arising from the addition of a competitor to a market already in a private-entry equilibrium (see Eq. 5). Thus, we need to evaluate the welfare function at the equilibrium levels of N^* and P_e^*. By substitution, this yields the long-run market price:

$$P_e^* = \sqrt{f}. \tag{8}$$

Evaluating the derivative of the welfare function of Equation (6) at the long-run number of firms (and price), we have:

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72. Jay Yarow, *How Much It Would Cost Google To Become A National Cable Company Like Comcast*, BUS. INSIDER (Dec. 7, 2012), http://www.businessinsider.com/how-much-it-would-cost-google-to-build-a-cable-network-2012-12 [https://perma.cc/7TBG-XWU4]. The estimates are based on actual spends, but those figures come from more densely populated areas and do not account for the exceedingly high cost of rural buildouts. The FCC estimates a nationwide buildout would cost $350 billion. *See Broadband Plan Presentation*, *September Commission Meeting*, FCC (Sept. 29, 2009), https://apps.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf [https://perma.cc/N3QZ-2TB4].

73. By "social planner," we mean an entity that maximizes social welfare, which is equal to the benefits to both buyers and sellers.

74. It is assumed the new customers are responding only to the price cut and not availability.

$$W'(N^*) = f \cdot N^*/(N^* + 1) < 0. \quad (9)$$

Equation (9) indicates that the derivative of the welfare function with respect to the number of firms is negative *at the long-run equilibrium level of private sector firms*. That is, the entry of an equally efficient firm to a market in equilibrium would cause a decrease in consumer welfare. Promoting "more firms" for the sake of competition is not in all circumstances a good thing. Certainly, policies that remove government activities that shrink market size or raise fixed costs are valid targets for reform, but forcing N to be larger for the sake of a larger N, even accounting for any associated price reduction, may be bad policy.

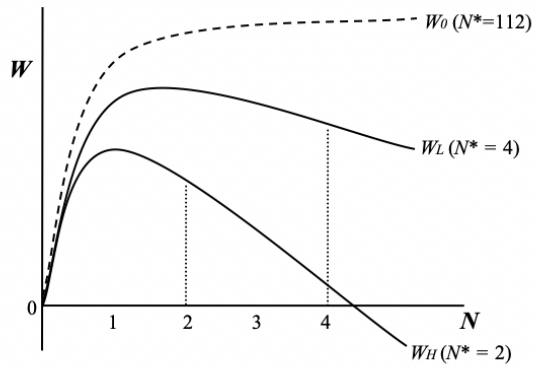
Figure 5 illustrates the relationship between consumer welfare and the number of firms under three scenarios—nearly zero fixed costs (W_0), low fixed costs (W_L) and high fixed costs (W_H). To generate the curves in the figure, we assume A is 36 and f is 0.1 (essentially zero fixed cost), 50 (low fixed cost) or 144 (high fixed cost) and then compute Equation (6) accordingly.[75] With essentially no fixed costs, N is just over 100 firms, so that welfare rises as the number of firms increases across the range shown in Figure 5.[76] In the low fixed cost case, N* is 4 by Equation (5); in the high fixed cost case, N* is 2. With fixed costs, however, the addition of firms to the market does not always increase welfare. In both cases where fixed costs are larger, the figure reveals that consumer welfare is declining at the equilibrium number of firms and continues to decline for even larger N. More entry is not always better—entry is costly. In fact, with free entry and fixed costs, most models of competition indicate that entry is excessive on welfare grounds.[77] Certainly, entry in excess of the private entry equilibrium seems likely to reduce consumer welfare. Communications policy is more nuanced than a simple "promote competition" agenda suggests.

75. The term N* is undefined at $f = 0$, so we have selected an arbitrarily small value for f.

76. The change in welfare from additional firms will be negative at the equilibrium number of firms (about 112).

77. *See, e.g.*, Avinash K. Dixit & Joseph E. Stiglitz, *Monopolistic Competition and Optimal Product Diversity*, 67 AM. ECON. REV. 297 (1977); N. Gregory Mankiw & Michael D. Whinston, *Free Entry and Social Inefficiency*, 17 RAND J. OF ECON. 48 (1986); Steven Salop, *Monopolistic Competition with Outside Goods*, 10 BELL J. OF ECON. 141 (1979).

Figure 5. Social welfare and *N*



More sophisticated models of competition may render different relationships between consumer welfare and the number of providers, but even so it is typical for economic models to show that free entry results in too many firms in equilibrium. The reason is that a firm only considers its own profits when it contemplates entry, and when it does enter it steals business from existing firms. The movement of profits between firms does not increase welfare but does increase profits to the entrant; it is only the increase in welfare that counts against the fixed cost of entry. From a welfare perspective, the incentive to enter is *too strong*.

This analysis might lead one to conclude that governments should limit entry, but that is not the case. In practice, *free entry* should be encouraged for many reasons, including primarily that there is no reason to suspect that policymakers have the capacity to produce a better outcome.[78] Also, the free entry number of firms is equal to the number of firms chosen by a social planner that maximizes consumer surplus (by choosing N rather than P) subject to a zero-profit constraint (i.e., no subsidies).[79] Also, in most cases, firms offer differentiated products and services, and differentiation adds value for consumers that will at least partially cover the fixed cost of entry. Even so, entry may be excessive in models with product differentiation.[80]

Rather than an indictment against free entry, the welfare result encourages caution in implementing policies designed to *force* entry into markets already in equilibrium (say, a subsidized municipal network). As shown in Figure 5, caution is particularly warranted in markets where N^* is

78. Prior to the Telecommunications Act of 1996, regulations prohibited entry in many telecommunications markets based on the belief that such markets were natural monopolies. The U.S. abandoned that approach, though the rules of the FCC's new CAF only subsidized one firm, which is a policy based (rightfully so) on the natural monopoly logic.

79. Dixit, *supra* note 77, at 301 (". . . we have a rather surprising case where the monopolistic competition equilibrium is identical with the optimum constrained by the lack of lump sum subsidies.").

80. There exists a substantial literature on this topic, much of it pointing back to the seminal Article: Steven C. Salop, *Monopolistic Competition with Outside Goods*, 10 BELL J. OF ECON. 141 (1979).

small, as in wireline broadband service, since the reductions in welfare from excessive entry are relatively large (because fixed costs are large). If public policy is to encourage entry, then it should focus on growing market size and reducing entry costs, looking first at government policies that impede competitive entry. Making markets more suitable for competition is a sensible goal, but forcing competition beyond what markets produce is not likely to be welfare-improving. As we will discuss later, the presence of an externality alters the welfare calculations, but not by much with respect to *N*.

D. The Value of the First Firm

Figure 5 also shows the importance of the first entrant. In almost all cases, adding the first firm to the market produces much of the welfare available from the product. In communities without broadband service, getting that first provider into the market is exceedingly crucial, especially in light of the view that broadband is privately and socially valuable. Getting that first firm in the market is valuable, but costly. Subsidizing a network in an unserved market should be subject to a cost-benefit analysis. The *National Broadband Plan*, for example, estimated that it costs above $50,000 on average to serve each of the six million most costly homes in the country(and even then the most efficient technology).[81] There is no business case, whether private or social, for such expenditures.[82] The returns to broadband, whether private or social, are not infinitely large.

In contrast, additional firms, while perhaps transferring some welfare from producers to consumers, is not all that helpful in increasing consumer welfare when fixed costs are large. We do not wish to belittle the value of competition, as it often brings with it benefits that are not easily incorporated into economic models. Economic theory, for example, is ambiguous about the effects of competition on quality and costs.[83] Yet, experience suggests that in many cases quality is higher with competition (but not always). While monopoly takes a lot of criticism, the fact is that in markets with high fixed costs, a monopoly may deliver the bulk of the available benefits of the service, even if it behaves like a monopolist (see Figure 5).

E. Externalities and the Equilibrium Number of Competitors

Broadband Internet service is not an unqualified good, but its benefits are alleged to be many, like enabling health care, improving education, facilitating job search, reducing depression, and creating "today's high-

81. *See, e.g.*, George S. Ford & Lawrence J. Spiwak, *Justifying the Ends: Section 706 and the Regulation of Broadband*, 16 J. OF INTERNET L. 1, 8 (Jan. 2013), http://www.phoenix-center.org/Articles/JournalofInternetLawSection706.pdf [https://perma.cc/Z3LV-S9YT].

82. *Id*.

83. *See, e.g.,* JEAN TIROLE, THE THEORY OF INDUSTRIAL STRUCTURE 100–02 (1988); Yogmin Chen & Marius Schwartz, *Product Innovation Incentives: Monopoly vs. Competition*, 22 J. OF ECON. & MGMT. STRATEGY 513, 513–528 (2013); Rachel E. Kranton, *Competition and the Incentive to Produce High Quality*, 70 ECONOMICA 385 (2003).

performance America."[84] Given the large benefits of both a private and (alleged) social nature, attention is focused on expanding the adoption of broadband service. Adoption is not possible without availability, so expanding availability is one goal of public policy. But as the *National Broadband Plan* makes clear, availability is a means to an end, and that end is adoption and use.[85] Using the Internet is what is important; without *use* the benefits are not obtained.

Later in this Article, we will analyze the relevance of the positive externalities in more detail, with attention on municipal broadband. For now, let us just see how we can incorporate a positive externality into the model presented above. The easiest way to think about positive externalities is as an additional payoff to consumption. Let z be the value of the positive externalities ($z > 0$) per unit consumed (Q_e). The total value of the positive externalities is, then, just zQ_e. More formally, we can incorporate broadband's externality into the analysis by adding a term to the consumer welfare function of Equation (6):

$$W(N) = 0.5(A^2 - P_e^2) - Nf + zQ_e \,, \tag{10}$$

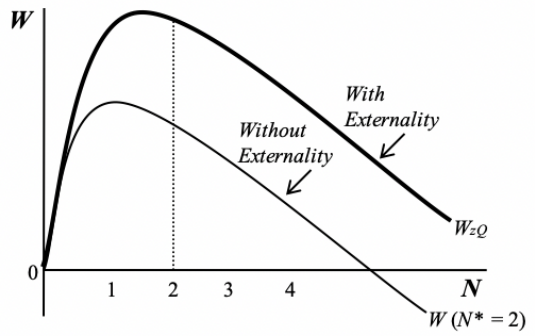
Equation (10) says that the more people that use broadband, the greater the payoff to society from the positive externalities. With the externality, society is better off with more Q than the private equilibrium would produce.

In Figure 6, the relationship between consumer welfare and the number of firms is illustrated for the purposes of seeing the value of the externality. The curve labeled W is based on Equation (6) where A is 36 and f is 144 (the high-fixed cost case from Figure 3). The curve labeled W_{zQ} is the welfare function from Equation (10) that adds in the value of the externality, where z is assumed to be 2 (about 10% of the welfare-maximizing price from Eq. 6). As shown in the figure, welfare is much higher when adding in the externality, but the welfare consequences of additional entry at the equilibrium ($N^* = 2$ is the standard case) are unchanged (welfare is declining at N^*).

84. *See generally*, Ford and Koutsky, *Broadband and Economic Development: A Municipal Case Study from Florida*, *supra* n. 25; Shelia R. Cotton et al., *Internet Use and Depression Among Older Adults*, 28 COMPUTERS IN HUM. BEHAV. 496, 496–499 (2012); Shelia R. Cotton et al*., Internet Use and Depression Among Retired Older Adults in the United States: A Longitudinal Analysis*, 69 J. OF GERONTOLOGY – SERIES B 763-771 (2014), http://psychsocgerontology.oxfordjournals.org/content/early/2014/03/25/geronb.gbu018.full.pdf+html [https://perma.cc/UU5L-87DA]; George S. Ford et al., *Internet Use and Job Search,* 36 TELECOMM. POL'Y 260, 260–73 (2012); *National Broadband Plan, supra* note 2.

85. *National Broadband Plan*, *supra* note 2, at 3 ("[U]biquitous connections are means, not ends. It is what those connections enable that matters.").

Figure 6. Externality, Social welfare and *N*



In the presence of a positive externality, there is a strong case for increasing adoption, but no apparent case for expanding N above the N* determined absent the externality. The question then is how to get more people to adopt broadband? There are numerous approaches to increase adoption, including increasing availability, education programs, subsidy programs, and competition. Municipal broadband is often claimed to be a source of competition that drives up Q and thus increases the benefits from the positive externalities, but increasing competition comes at the high of network construction. We will turn to the efficacy of municipal broadband and competition as a means by which to obtain the externalities of broadband next.

V. SUBSIDIES, PREDATION, AND PRIVATE INVESTMENT

It is now time to turn more directly to the issue of municipal broadband. Our analysis focuses mainly on using municipal broadband to increase competition and, in turn, realize more positive externalities. Where there is no service, municipal broadband is less controversial, so there is less reason to study it in those cases. The analysis above can evaluate municipal broadband in unserved markets, but our discussion will focus mainly on the competitive aspects of the policy.

Whether one is for or against municipal broadband, at first glance one must admit that it is a somewhat radical, or at least unconventional, way to promote competition. In fact, we suspect most city officials see it that way.[86] We doubt there are many city officials wanting to add to their responsibilities the enormous business risk of building a broadband network to compete in the wireline market with well-established professionals like AT&T, Verizon,

86. Tom Sloan, *Why States Should Support Broadband,* 2015 BROADBAND COMMUNITIES 76, https://www.bbcmag.com/pub/doc/BBC_May15_WhyStates.pdf [https://perma.cc/PU43-YE7Z].

and Comcast. Municipal broadband appears to be mostly born out of desperation.

To begin, we will ask whether municipal broadband can increase competition. It is easy to demonstrate that it cannot. In fact, if you take the advocates at their word, municipal broadband may lead to the monopolization of wireline broadband either by the city or a private provider. Next, we will demonstrate that municipal broadband must be, in almost all cases, subsidized entry. The evidence supports this finding and few contest it.[87] Then, by implication, we will show that municipal broadband is prone to be predatory in nature. In fact, we will show that even the threat of municipal entry may discourage private sector investment, a theoretical argument that supports the *National Broadband Plan*'s warning about municipal entry.

A. Municipal Broadband and the Number of Firms

Recall the key question asked above: *why is the municipality the only one willing to build the network*? And, recall the frequently provided answer: "*because no one else will*." If no one else will, then it must be the case that the equilibrium number of firms has been obtained (see discussion around Eq. 5), even if that number is zero. There is no incentive for any other private firm to enter (or upgrade). Since no private firm will enter because expected profits are negative, the municipality itself becomes the entrant (ignoring, as is frequently claimed, profits). As such, municipal broadband is, quite explicitly, an attempt to increase N by increasing N directly (at nearly any cost) rather than expanding market size or reducing costs. Whether or not the additional entrant is a government-owned firm or not, after entry the market now has $N^* + 1$ firms in it. This situation is financially unsustainable and, when the dust settles, a firm must exit for the market to return to the equilibrium. As noted in the *National Broadband Plan,* "[m]unicipal broadband has risks. Municipally financed service may discourage investment by private companies."[88]

How exactly the market will adjust to municipal entry will vary. The economic model presented here is an abstraction pointing to a long-run phenomenon—an underlying current, so to speak, pushing the market participants in a particular direction. Changes will likely come slowly. Broadband networks involve sunk costs in long-term assets and often

87. Doug Dawson, *Creative Financing for Fiber Networks*, BROADBAND COMMUNITIES (Sept. 2014); Joanne Hovis, *The Business Case for Government Fiber Networks*, BROADBAND COMMUNITIES (Mar./Apr. 2013), http://www.bbpmag.com/2013mags/mar-apr/BBC_Mar13_BusCase.pdf [https://perma.cc/5PLD-MEK8]; Craig Settles, *Show Me the Money*, BROADBAND COMMUNITIES (Sept. 2015), http://www.bbcmag.com/2015mags/Aug_Sep/BBC_Aug15_ShowMeTheMoney.pdf [https://perma.cc/69ZS-JFTD]; Costas Troulos, *Driving Deployment Of Fiber to the Home* , BROADBAND COMMUNITIES (Sept. 2012), http://www.bbpmag.com/Features/0912feature-diffraction.php [https://perma.cc/6RCQ-6Q8M] ("Public endeavors can be supported by public funds [] or by public or semipublic businesses such as electric and water utilities."); *The Next Generation Network Connectivity Handbook, supra* note 38, at 47–51; *Oregon Municipal Broadband*, *supra* note 36, at 17–18.

88. *National Broadband Plan, supra* note 2, at 153.

somewhat stable customer relationships, so we should not expect private firms to abandon their assets soon after municipal entry. Rather, the effects of municipal entry on private investment will manifest over time and will most acutely impact the decisions to invest in upgrades. "Decay" may be a more practical description of the response than is "exit." There have, however, been a few cases where the private sector abandoned a market after municipal entry (as discussed *infra*).

Also, given the observed failures of many municipal systems, incumbents may, in the short term, choose to weather the storm and wait for the municipal entrant to fail, for the political winds to change, or for the taxpayers to tire of subsidizing a communications network (a common occurrence). It is also a competition; incumbents may invest in upgrades in hopes of being a survivor or to establish a strategic posture.[89] We may very well see prices fall in the short run to protect market share, but this is less a legitimate competitive response than it is the same response we would see to predation by a private firm (and we do not view predation as a good thing). Only time will tell how the market gropes to equilibrium, but economic theory and common sense tell us that the addition of another entrant to a market already in equilibrium puts stress on the finances of the providers, reducing the returns on investments and, in turn, reducing the incentive to continue making investments. Quite simply, if there is only room for two, then three is a crowd.

While we normally expect the full equilibrium effect of municipal entry to take time, there are cases where exit by the private sector has occurred in a more dramatic fashion. The municipal broadband system in Glasgow, Kentucky (Glasgow Electric Power Board) acquired Comcast's cable system in 2001.[90] Paragould Light Water & Cable (in Paragould, Arkansas) acquired its rival Cablevision in 1998.[91] Private incumbents were also acquired in other cities, including, but not limited to, Muscatine, Iowa and Poplar Bluff, Missouri.[92] We do not disparage the purchase of the incumbents by the municipality; it is a far more reasonable strategy than to force their exit through predatory actions (as discussed later).

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89. *See, e.g.*, Drew Fudenberg & Jean Tirole, *The Fat-Cat Effect, the Puppy-Dog Poly, and the Lean and Hungry Look*, 74 AM. ECON. REV. 361, 36–366 (1984).

90. Press Release, Glasglow, Ky., Purchase of Comcast by Glasgow EPB Now Complete (Apr. 2, 2001), http://www.glasgow-ky.com/releases/#Comcast%20Purchase%20Completed%20040201 [https://perma.cc/RQT4-Y22H].

91. George Waldon, *Cable TV War is Over*, ARK. BUS. (Dec. 15, 1997), http://www.arkansasbusiness.com/article/72284/cable-tv-war-over [https://perma.cc/4S8Q-LF55].

92. Sarah Passick, *Mediacom Sells Muscatine Business*, QUAD-CITY TIMES, (Nov. 27, 2002), https://qctimes.com/business/mediacom-sells-muscatine-business/article_1ad08661-5f6d-5ec7-8ba9-e3942b942458.html [https://perma.cc/E54P-93G9]; *Rural Broadband Investments Acquires Poplar Bluff Cable Assets*, BUSINESSWIRE (Apr. 1, 2014), http://www.businesswire.com/news/home/20140401005585/en/Rural-Broadband-Investments-Acquires-Poplar-Bluff-Cable#.VfbQfhHBzRY [https://perma.cc/HJ87-MYD6]; *see also Wi-Fi Waste, supra* note 14, at 19.

The risk to private sector firms is increased if, as advocates and municipal providers often claim, the municipal system is unconcerned about profits and is mostly interested in obtaining the positive externalities of broadband service. As observed by one system's management (and echoed by many others), "[w]e price our services aggressively because we have a lot of flexibility as a municipal broadband provider. We are here to take care of our citizens."[93] If a municipal broadband system prices aggressively, which the advocacy suggests is the case, then the effect of municipal entry will be to reduce N^* by more than the entry of just another profit-maximizing private firm.[94] Broadband networks are characterized by both scale and density economies, so a large market share confers advantages. If a municipal entrant gains significant market share and prices at its (perceived) average cost, which is below true economic costs due to the often sizable and asymmetric subsidies, then no unsubsidized private firm can match that price and survive in the long run. Since municipal entry often occurs where there are few wireline broadband providers (and thus large density economies), an aggressive municipal entrant could displace all private provision of broadband service.[95] Doing so would lead to a government-owned monopoly (or a private one, if the municipal system fails). Considering the advocacy for municipal broadband networks, which frequently asserts that municipal systems are unconcerned with profit and act more aggressively on pricing than do private firms, monopolization is a serious concern. In fact, some advocates of municipal broadband suggest monopolization is the goal.[96] If there are to be few providers, the argument is that the market might as well be served by a benevolent, government monopolist.

History is not kind to the benevolent monopolist idea, but there is evidence that municipal broadband systems do behave differently than do private providers. For example, a 2007 Article showed that Competitive Local Exchange Carriers ("CLECs") were more likely to say they had operations in cities (in Florida) where a municipal electric utility had deployed some

93. *Navigating the Winding Municipal Broadband Road: A Case Study of Bellevue, Iowa,* INNOVATIVE SYSTEMS 5, http://www.telecompetitor.com/clients/innovativesystems/casestudy/Bellevue_Case_Study.pdf (last visited July 10, 2020) [https://perma.cc/PWC4-KGZF].

94. *See* Ford et al., *supra* note 55, at 349 (explaining that the number of firms in equilibrium is smaller when price competition is more intense).

95. With fixed entry costs, if the incumbent firm prices such as to earn a zero profit, then there is no incentive for another firm to enter. *See National Broadband Plan, supra* note 2, at 136 (When "service providers in these areas cannot earn enough revenue to cover the costs of deploying and operating broadband networks, including expected returns on capital, there is no business case to offer broadband services . . . ."); *see also The Broadband Availability Gap*, FED. COMMC'NS COMM. 1 (Apr. 2010), http://download.broadband.gov/plan/the-broadband-availability-gap-obi-technical-Article-no-1.pdf ("Private capital will only be available to fund investments in broadband networks where it is possible to earn returns in excess of the cost of capital. In short, only profitable networks will attract the investment required.").

96. *See, e.g.*, SUSAN CRAWFORD, CAPTIVE AUDIENCE (2013). For a thorough critique of Crawford, *see* George S. Ford, *Sloppy Research Sinks Susan Crawford's Book*, LAWANDECONOMICS BLOG (Jan. 18, 2013), http://www.phoenix-center.org/blog/archives/1075 [https://perma.cc/8YMA-9DQR].

communications facilities.[97] These CLECs did not build local networks, but acquired portions of the local phone networks in a regulatory scheme called "unbundling," sometimes mingling these local network elements with their own facilities.[98] Our experience suggests that this increase in CLEC activity likely had to do with the more cordial relationships between CLECs and municipalities than with private providers regarding the locating of interconnection equipment. At the time, the private phone companies were forced to deal with CLECs on regulated terms, poisoning the relationships.[99] Due to unfavorable court rulings and FCC decisions, as well as technological advances, very few CLECs exist today, and those that do are servants to the regulations that protect them.[100]

Nevertheless, it is possible that the different (non-profit) objectives of municipal networks may stimulate some new types of retail competition not often seen with private networks. In fact, some municipal networks are "open networks" that permit retailers to offer services over the underlying network.[101] These types of investments do not, however, increase the number of providers of wireline service, which for some is the primary goal of modern policy. Also, the retail overlay on municipal systems has not proven to be a solid business plan, but that may change over time as the video distribution and voice services continue their dynamic transformation.

If we embrace the idea of a benevolent fiber-to-the-home monopolist, then we may very well ask what is the point of competition among private firms? This question, we believe, is at the hidden core of the municipal broadband debate, though it rarely surfaces in the advocacy. Broadband may be privately provided or publicly provided, but likely not both in the same market. A hybrid approach—a public-private partnership—may be the most

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97. Ford (2007), *supra* note 25. The conclusions of this Article have been frequently exaggerated to claim that municipal broadband increases all forms of entry even though the empirical analysis does not support such a claim. *See, e.g.*, Harlod Feld et. al, *Connecting the Public: The Truth About Municipal Broadband*, COMMUNITY NETWORKS (Apr. 2005), https://muninetworks.org/reports/connecting-public-truth-about-municipal-broadband [https://perma.cc/W9EN-BT87]. Conflicting evidence is presented in Janice Alane Hauge et al., *Bureaucrats as Entrepreneurs: Do Municipal Telecommunications Providers Hinder Private Entrepreneurs?*, 20 INFO. ECON. AND POL'Y 89, 89–102 (2008), http://ssrn.com/abstract=1082823 [https://perma.cc/4EQQ-P4U5].

98. Ford & Spiwak, *supra* note 61.

99. Regulation creates the incentive to sabotage rivals even when such incentives are absent without regulation. *See, e.g.*, Ford & Spiwak, *supra* note 61, at 116. The concept of "sabotage" is explored in technical detail in T. Randloph Beard et al., *Regulation, Vertical Integration, and "Sabotage"*, 49 J. OF INDUS. ECON. 319 (2001), http://onlinelibrary.wiley.com/doi/10.1111/1467-6451.00152/abstract [https://perma.cc/4DA4-G8T3]; *see also* David Mandy & David E. Sappington, *Incentives for Sabotage in Vertically Related Industries*, 31 J. OF REG. ECON. 235, 235–260 (2007).

100. Ford & Spiwak, *supra note* 61, at 113–14.

101. Masha Zager, *Municipal Utilities Deliver Fiber to the Premises*, 2009 BROADBAND PROPERTIES 52, 54, http://www.broadbandproperties.com/2008issues/may08/BBP_May08_FiberDeployments.pdf [https://perma.cc/L65D-MXXX]; Andrew M. Cohill, *Worst Practices in Community Broadband – Part Two*, 2014 BROADBAND COMM. 30, 30, https://www.bbcmag.com/pub/doc/BBC_Aug14_WorstPractices.pdf [https://perma.cc/4276-QWTA].

sensible approach for economically-marginal communities (as detailed later). Evidence suggests that municipal involvement in broadband is moving in the direction of such partnerships, a change driven largely by the poor financial history of government-run networks.

B. Municipal Broadband is Subsidized Entry

Evidence shows that municipal broadband systems are always, and sometimes heavily, subsidized by various levels of government, including the municipality. In fact, the "*no one else will*" argument for municipal broadband networks implies the need for subsidies.[102] It also indicates that the subsidies are asymmetric, since if the funds were generally available, we would likely see more private entry using those subsidies. While hardly disputable, we will nevertheless provide a simple economic analysis to illustrate the need for subsidies. This analysis syncs up well with the preceding discussion, but the discussion now changes a bit by looking at a simple incumbents-entrants game.

Say there is a market served by two identical firms (a symmetric duopoly). The incumbents each earn a stream of profit equal to D. Another firm is deciding whether or not to enter the market in competition with the duopoly knowing that, upon entry, it must spend an amount F to enter. If the firm chooses to enter the market as the third provider, then the three firms split the market evenly and each earns a gross profit of T. The potential entrant enters only if it can do so profitably, so it enters if $T > F$; that is, the expected gross profit from selling the good in competition with the incumbents (T) exceeds the entry fee (F). If $T < F$, then the potential entrant stays out and the market remains served by a duopoly. If we observe the persistence of duopoly, then entry as the third competitor is not profitable ($T < F$). Note that T is determined by the intensity of competition. If competition is intense, then T will be small and entry less likely. If competition is weak, then T will be larger and entry more likely. Paradoxically, the presence of few providers may be evidence of intense competition rather than a lack of it.

A numerical example may be helpful. Say that each duopolist earns a profit of $50 (for a total industry profit of $100). If a third firm enters, then

102. Some cities have apparently tried to minimize the subsidization of the networks and have claimed to not use taxpayer funds. *See, e.g.*, Jon Brodkin, *Where Broadband is a Utility, 100Mbps Costs Just $40 a Month*, ARS TECHNICA (Aug. 4, 2015), http://arstechnica.com/business/2015/08/how-a-small-city-offers-60-gigabit-fiber-with-no-taxpayer-subsidies [https://perma.cc/UU6X-CA65] (where the author and city manager indicated the system did not require subsidy dollars). However, the Sandynet network received a federal grant, so it is a subsidized system. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-203, FEDERAL BROADBAND DEPLOYMENT PROGRAMS AND SMALL BUSINESS, (2014), http://www.gao.gov/assets/670/660734.pdf [https://perma.cc/SSM2-RCLV]. It could be argued that these subsidy funds were generally available. It is also often hard to detect the extent of subsidization, especially when resources are shared between the city and broadband system. We cannot exclude the possibility that some of the networks are not subsidized in any way, but we would be very surprised to see it. Many municipal systems readily admit to subsidization.

each firm earns a profit of $25 (for a total industry profit of $75).[103] If entry costs are less than $25, then the potential entrant can profitably enter. If entry costs exceed $25, then it will not enter, and the duopoly persists. What we observe about a market tells us a great deal about the economics of that market.

On average, U.S. households may obtain wireline broadband service from two providers, so this "no entry" by the third firm scenario is a reasonable approximation of the existing situation. While there was some activity by private sector firms to increase that number to three providers—including, most prominently, Google—those efforts often met with failure.[104] Yet, municipal systems, particularly in cities with their own municipal electric utility, continue to be contemplated by cities and pop up across the country.[105]

Why are the municipalities doing something the private sector is not, or else has failed to do successfully when it has tried? To explain this, consider a case where one firm has an advantage over other potential entrants. Say, for instance, that one firm is offered a subsidy of some sort (labeled *S*). This subsidy may improve revenues, lower expenses, or reduce entry costs, but in all cases it alters the entry condition for this potential entrant. The third firm will enter if $T + S > F$. The larger the subsidy, of course, the more likely this condition is satisfied, and the firm can profitably enter. Going back to the numerical example, say entry costs are $30 so that being the third competitor is not profitable (i.e., $25 < $30). One potential entrant, however, qualifies for a $10 subsidy if it enters. Now, the benefits of entry include the post-entry profit and the subsidy ($25 + $10 = $35), which is above the entry cost of $30 (giving a net payoff from entry of $5). In this scenario, in the absence of a subsidy the duopoly persists, but with the subsidy a firm enters and we have three firms offering services.[106] The incumbent firms do not get the subsidy, so their ability to remain in business at below-cost rates is up for question.

The logic of this entry game is straightforward and useful. In most areas of the U.S., additional private entry is not profitable (or, from the model above, $T < F$) as is demonstrated by the lack of it. Even if a municipal entrant is as efficient as private sector firms, it is unprofitable for the municipality to

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103. The additional competition is expected to reduce prices and industry profits.

104. Jon Brodkin, *Google Fiber's Biggest Failure: ISP Will Turn Service Off in Louisville*, ARS TECHNICA (Feb. 8, 2019), https://arstechnica.com/information-technology/2019/02/google-fiber-exits-louisville-after-shoddy-installs-left-exposed-wires-in-roads [https://perma.cc/5F5H-63R3]; Chris Mills, *What's Happening to Google Fiber?*, BGR (Jan. 31, 2018), https://bgr.com/2018/01/31/google-fiber-availability-new-cities-nope; Jim Burress, *The Big Disconnect: What Happened to Google Fiber in Atlanta?*, ATLANTA (May 15, 2018), https://www.atlantamagazine.com/great-reads/what-happened-google-fiber-atlanta [https://perma.cc/9PC9-HNZF].

105. Municipal electric systems operate as monopolies for electric services and thus do not require much, if any, subsidization. Economic studies suggest that municipal electric systems operate as efficiently as investor-owned utilities, at least if the municipal system is small or moderately sized. *See, e.g.*, Dong-Soo Koh et al., *A Comparison of Costs in Privately Owned and Publicly Owned Electric Utilities: The Role of Scale*, 72 LAND ECON. 56, 56–65 (1996).

106. Eventually, the equilibrium is likely to return to two firms as continued investments must be made to maintain and upgrade the network.

enter as the third seller.[107] The argument that the municipality's decision to enter because "no one else will" requires that the municipality has an advantage that private firms do not.[108] That is, the municipal entrant receives a subsidy (*S*) of some sort sufficiently large to make entry profitable. If "no one else will," then this subsidy (or advantage) must be unique to the municipal entrant; *the government is subsidizing the government entity through asymmetric policies that grant subsidies only to the municipality's system.*

What do we mean by a subsidy? There is no standard definition of "subsidy." Rather, what is and is not a subsidy depends on the circumstances. Subsidies do take familiar forms. Most obviously, a subsidy may involve a direct cash transfer from the government to an entity, which is common for municipal networks. Subsidization can take many other and less direct forms. Loan guarantees or preferential interest rates on debt are types of subsidies also commonly seen for municipal networks. Another type of subsidy is when a government provides goods or services at no cost or below market prices to an entity. The use of a city's resources by its own municipal network is almost certain to occur, whether explicit or implicit. Such sharing may very well constitute a subsidy.

Also, municipal networks today are very common in cities that provide their own electricity through a municipally-owned utility. The sharing of a municipal electric utility's resources with its broadband network and the shifting of broadband costs to electric customers are other potential sources of subsidy. Normally, policymakers, regulators, and even political interest groups frown upon cross-subsidization by a monopoly utility into a competitive market, yet municipal broadband systems are routinely recipients of such subsidies.[109] Differential regulation can also result in a subsidy to firms that have a more favored status. Are municipal systems forced to engage in the same type of franchising procedures as are private firms? Does the municipality charge the sometimes pole attachments rates paid to it by private

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107. *See, e.g.*, Davidson & Santorelli, *supra* note 14, at 154 ("Municipalities are unlikely to have either scale in purchasing telecommunications equipment or experience in constructing and running broadband networks."); Michael J. Balhoff & Robert C. Rowe, *Municipal Broadband*, BALHOFF & ROWE, LLC (Sept. 2005), http://broadband.cti.gr/en/download/Municipal-Broadband--Digging%20Beneath%20the%20Surface.pdf [https://perma.cc/5FFA-K5BX].

108. Municipalities cannot point to the social benefits because they are not monetized.

109. The cross-subsidy issue was litigated for the Bristol, Virginia municipal system. Virginia law prohibits such cross-subsidies. Virginia's State Corporation Commission found the evidence did not support a cross-subsidy from the electric to the broadband network. Paul Miller, *Bristol's Broadband Push*, VIRGINIABUSINESS.COM (Nov. 2006), http://www.baller.com/wp-content/uploads/Bristol_VBM_Nov06.pdf. In other cities, however, transfers from the electricity utility and broadband system are not so limited. *See, e.g.*, Steven Titch, *Spinning its Wheels: An Analysis of Lessons Learned from iProvo's First 18 Months of Municipal Broadband*, REASON FOUND. (Dec. 2006), http://reason.org/files/33224c9b01e12f3b969f4257037c057e.pdf ("[R]equest $1 million in additional funds from the Provo's electric utility to meet its costs.").

providers to its own broadband division?[110] If not, then the regulatory system is providing a subsidy to the municipal system.

In contemplating the costs of subsidized municipal entry, it is important to recognize that subsidy dollars are costly. Monies used to support the losses incurred by government-run networks are obtained through various forms of taxation, whether national, state, or local. Taxes introduce distortions and create welfare losses. Economists refer to such costs as the marginal cost of public funds, and economic research indicates that subsidy dollars can be quite expensive.[111] Say, for example, that a dollar raised through taxation costs society $1.25 in resources, which is at the lower end of the estimates of the marginal cost of public funds. If the dollar of spending does not produce at least a return of $0.25, then the whole tax-subsidy scheme is socially wasteful. The higher the marginal cost of public funds, the harder it is to justify a subsidy.

When the finances of a municipal system are evaluated (usually for the policy debate), not only are the sometimes-enormous subsidies ignored, but the cost of producing the subsidy dollars is overlooked. Just because the federal government pays huge portions of the network costs of a municipal system does not mean those costs are nonexistent. Ignoring subsidies is especially problematic when municipal systems compete with unsubsidized private firms, as the municipal system is making decisions based on a cost level that is not equal to the true cost of providing service; the private firm must do so. The municipal system's managers may very well believe that they are pricing in a manner to cover costs, but if many of the costs are ignored, the pricing policies are anticompetitive in nature. Later in the text, we will discuss in more detail this "predatory" nature of municipal broadband.

C. Direct Subsidies

As the theory suggests would be the case, the evidence shows that subsidies to municipal broadband systems are commonplace. In fact, it is difficult to find an example where a direct subsidy was not provided, though we cannot exclude the possibility that it has happened. Many municipal systems received grants and favorable loans from federal programs including

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110. *A Working Model for Broadband Expansion*, COALITION FOR THE NEW ECON. (May 14, 2014), http://www.coalitionforthenewеconomy.org/blog/2014/05/a-working-model-for-broadband-expansion [https://perma.cc/K5YP-T6CE] (claiming Chattanooga's broadband network does not pay the very high pole attachment rates that are set by the municipality and paid by private firms); Mattthew Glans, *Research & Commentary: Pole Attachment Fees*, HEARTLAND INST. (Mar. 12, 2013), https://www.heartland.org/publications-resources/publications/research--commentary-pole-attachment-fees [https://perma.cc/CRX6-KUZN]; Lawrence J. Spiwak, *Pole Tax: Government Slows Down Broadband*, TIMES FREE PRESS (Apr. 3, 2013), http://www.timesfreepress.com/news/opinion/freepress/story/2013/apr/03/pole-tax-government-slows-down-broadband/104172 [https://perma.cc/K3ML-EP67].

111. BEV DAHLBY, THE MARGINAL COST OF PUBLIC FUNDS 1 (2008); Edgar K. Browning, *The Marginal Cost of Public Funds*, 84 J. OF POL. ECON. 283, 283 (1976); Arthur Snow & Ronald S. Warren, *The Marginal Welfare Cost of Public Funds: Theory and Estimates*, 61 J. OF PUB. ECON. 289, 289 (1996).

those made available from the American Recovery and Reinvestment Act of 2009 (for which funding has now ended) and programs offered by the Rural Utilities Service.[112]

Take, for example, Chattanooga's broadband system. It received a $111 million grant from the U.S. Department of Energy—funds made available by the American Recovery and Reinvestment Act.[113] This grant (not loan) covered about one third of the total construction costs. There are a number of interesting facts about this grant worth noting. First, this grant represents a gift from *all* Americans, not just Chattanoogans, of about $2,000 per subscriber.[114] The municipal broadband system in Bristol, Virginia has received $90 million in grants, which equals about $7,200 per-customer for its 12,500 customers.[115] Verizon, alternately, spent about $750 per home passed and $600 (without subsidies) to connect a customer to its fiber-optic system (located in more urban markets).[116] In this light, the magnitude of the subsidy received by some municipal systems is, quite bluntly, scandalous and should force some skepticism about the wisdom of municipal broadband.

Second, such government subsidies stand in stark contrast to the government's treatment of the private sector, as the nation's major broadband service providers do not receive such generous financial help from the federal government. Indeed, the FCC's subsidization rules for private carriers target only unserved areas, excluding areas already served by an unsubsidized carrier.[117] Plainly, subsidizing municipal systems in markets already serviced

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112. *See, e.g.*, Lennard G. Kruger, Cong. Research Serv., RL33816, Broadband Loan and Grant Programs in the USDA's Rural Utilities Service (2013), https://www.fas.org/sgp/crs/misc/RL33816.pdf [https://perma.cc/B488-TGTU]; Gregory T. Rosston & Scott Wallsten, *The Broadband Stimulus: A Rural Boondoggle and Missed Opportunity*, TECH. POL'Y INST. (Nov. 2013), https://www.techpolicyinstitute.org/files/rosston_wallsten_the_broadband_stimulus.pdf [https://perma.cc/Y8UG-HL7X].

113. CONN. OFFICE OF LEGISLATIVE RESEARCH, CHATTANOOGA HIGH SPEED BROADBAND RESEARCH INITIATIVE, 2012-R-0515 (2012), https://www.cga.ct.gov/2012/rpt/2012-R-0515.htm [https://perma.cc/528J-NAE4].

114. *See Senior Mangament Report & Financial Information 2013*, EPB 16 (2013), https://static.epb.com/annual-reports/2013/downloads/EPB_Financials_2013.pdf [https://perma.cc/794E-9RQJ].

115. David McGee, *Firm Agrees to Buy $50 Million Optinet Deal Approved by BVU Authority Board*, BRISTOL HERALD COURIER (Feb. 5, 2016), https://www.heraldcourier.com/news/local/50-million-optinet-deal-approved-by-bvu-authority-board/article_5619410b-8990-5245-a2c3-8b6ef24c160c.html [https://perma.cc/EX3V-UY66]; Davidson & Santorelli, *supra* note 14, at 49.

116. Marguerite Reardon, *Verizon Nears Fios Network Completion*, CNET.COM (Mar. 29, 2010), http://www.cnet.com/news/verizon-nears-fios-network-completion [https://perma.cc/3P65-KMH6].

117. Connect America Fund ETC Annual Reports and Certifications Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks, *Report and Order*, 29 FCC Rcd 15644, para. 73 (2014), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-190A1.pdf [https://perma.cc/YTK7-UAWT] ("[T]o ensure support is targeted to areas lacking 4/1 Mbps, we will exclude from the offer of Phase II model-based support to price cap carriers any census block served by a subsidized facilities-based terrestrial competitor that offers fixed residential voice and broadband services meeting or exceeding 3 Mbps/768 kbps speed requirement").

by the private sector is asymmetric subsidization by the government to a government entity. Even in areas where subsidization of the private providers does occur, the average subsidy available is much lower than that seen for many municipal systems, even though the private carriers would receive no subsidy to serve many cities where municipal systems have been deployed.[118]

Another interesting calculation is the subsidy size for a private carrier equivalent to the subsidy given to some municipal projects adjusted for subscriber counts. For example, a federal grant of $111 million to Chattanooga's system is the unit-passed equivalent ($650 per home) of a $35 billion grant to Comcast, which is about 11-times the annual investment of Comcast in its broadband infrastructure.[119] At the subsidy rate of the Bristol, Virginia system, the customer-equivalent grant to Comcast would be a whopping $390 billion, or over 100-times Comcast's annual capital expenditure and greater than all annual investment in broadband infrastructure.[120] When put into context, the sizes of the subsidies received by some municipal systems are shockingly large.

D. Indirect, Implicit, and Cross-Subsidies

The explicit subsidization of municipal broadband systems is nearly ubiquitous, but there are also plenty of indirect and implicit subsidies as well. Subsidies flow not only from the federal government, but also from the cities themselves. In many cases, there is no attempt to hide such subsidies. In Paragould, Arkansas, for example, the city raised the property tax from 2.76 mills to 2.825 mills to fund the municipal system after financial projections did not meet the target.[121] In Ashland, Oregon, in addition to sizeable transfers from the electric and water utilities to the broadband network, the city approved a $7.50 per month fee on electric customers to subsidize the broadband network.[122] A manager for the system in Sallisaw, Oklahoma said,

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118. Press Release, Fed. Comm'ns Comm'n, Up To 600,000 Rural Homes and Businesses in 44 States and Puerto Rico Will Gain Access to Broadband for First Time: Over $385 Million From FCC's Connect America Fund To Leverage Private Investment For Expanding Broadband In Unserved Areas (Aug. 21, 2013), https://www.fcc.gov/document/connect-america-fund-expands-broadband-600k-homes-businesses [https://perma.cc/NZ8A-XUP9].

119. *Form 10-K Annual Report*, COMCAST CORP. (Feb. 27, 2015), https://www.cmcsa.com/static-files/fda80671-77bb-4dd6-bafa-f8d6a7e2d1f5 [https://perma.cc/7U32-WHLW]; *Form 10-K Annual Report*, COMCAST CORP. (Feb. 12, 2014), https://www.cmcsa.com/static-files/975711e7-9dd8-45e8-b34e-7507dfd55594 [https://perma.cc/8G9C-NN6P].

120. *Research*, USTELECOM, http://www.ustelecom.org/broadband-industry/broadband-industry-stats (last visited July 9, 2020) [https://perma.cc/TKR2-7RDM].

121. *Wi-Fi Waste*, *supra* note 14, at 24.

122. George S. Ford, *The Impact of Government-Owned Broadband Networks on Private Investment and Consumer Welfare*, ST. GOV'T LEADERSHIP FOUND. 41, https://sglf.org/wp-content/uploads/sites/2/2016/04/SGLF-Muni-Broadband-Study-1.pdf [https://perma.cc/PT8R-84MR] (citing Vickie Aldous, *Ashland, Ore., Transfers Funds to ISP*, MAIL TRIB. (Jan. 19, 2006)). The $.7.50 fee was later dropped in response to public outrage.

"[o]ur project is not yet paying for itself. We're still using other utility funds to pay for it."[123]

Internal subsidies are not always so apparent. Consider again the system in Chattanooga. Chattanooga's broadband system is constructed and maintained by the city's municipal electric firm (Chattanooga Electric Power Board, or "EPB"). The initial justification for Chattanooga's fiber deployment was the cost savings it might generate for the electricity division.[124] As such, the construction of the broadband network was paid for by $229 million in revenue bonds and a $50 million loan to the broadband division from the electric division.[125] It appears that the larger debt ($229 million) is being serviced by captive ratepayers, not the broadband customers, for the purposes of Smart Grid technologies. Yet, Smart Grid applications do not require fiber optic connections to households, and home metering and real-time pricing can be accomplished using cheaper and available technologies (capable of a 500 Kbps connection).[126] Also, financial analyses, including one by an independent auditor, indicate that only about 4-6% of the costs of a broadband network are reasonably assigned to a municipal electric utility.[127] Even assuming a generous 10% allocation to Smart Grid, Chattanooga's captive ratepayers were forced to assume $206 million in debt for the broadband customers, or about $3,500 per broadband subscriber.[128] Shifting the costs of the fiber network to electricity customers is a subsidy. In fact, it is a cross-subsidy from the captive ratepayers of a monopoly electric utility to an affiliated broadband network in a competitive market.

Beginning in 2013, the city of Opelika, Alabama, became the state's first "Gig City," offering broadband Internet services to its 11,000 households over a $43 million fiber-optic network constructed and operated by the city's

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123. City Wire Staff, *Results Mixed with Municipal Cable Systems*, TBP (Apr. 3, 2012), https://talkbusiness.net/2012/04/results-mixed-with-municipal-cable-systems [https://perma.cc/K6QV-XF6B].

124. *See* The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601, *Memorandum Opinion and Order*, 30 FCC Rcd. 2408, para. 22–23 (2015), https://www.epb.net/downloads/legal/EPB-FCCPetition.pdf [https://perma.cc/4EMT-7CSU].

125. *See, e.g.*, Christopher Mitchell, *Broadband at the Speed of Light: How Three Communities Built Next-Generation Networks* (2012), http://www.ilsr.org/wp-content/uploads/2012/04/muni-bb-speed-light.pdf [https://perma.cc/3P9C-QG9Z]; Davidson & M. Santorelli, *supra* note 14.

126. TAKURO SATO, ET AL., SMART GRID STANDARDS: SPECIFICATIONS, REQUIREMENTS, AND TECHNOLOGIES 250 (2015); *An In-Depth Look at Click! Financials*, TACOMA PUB. UTIL. 23–24 (May 20, 2015), http://stickwithclick.com/images/Click!-May-20-PUB-Meeting-Presentation-Final.pdf [https://perma.cc/KLS4-YXWH] ("Tacoma Power doesn't need a wired telecommunications network for metering . . . [d]id not foresee the industry evolution to wireless power metering systems"); Kartheepan Balachandran et. al, *Bandwidth Analysis of Smart Meter Network Infrastructure*, 16TH INT'L CONF. ON ADVANCED COMM. TECH. (ICACT) (Mar. 27, 2014) http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.667.2265&rep=rep1&type=pdf.

127. *An In-Depth Look at Click! Financials, supra* note 126.

128. Subscriber count (58,000) obtained from *Financial Report 2014*, EPB 13 (2014), https://static.epb.com/annual-reports/2014/EPB-Financials-2014.pdf [https://perma.cc/5NH7-6HY7].

electric utility, Opelika Power Services ("OPS").[129] Like many other smaller cities struggling in the information economy, Opelika's city government saw the lack of the latest broadband technology as a key, if not only, handicap to success. And, like many cities operating both an electric utility and broadband network, the finances of Opelika's electric and telecommunications businesses were commingled.

Opelika expected the broadband network to cost the city $43 million.[130] The city initiated the construction of the network in 2011 when the electric utility (not the telecommunications division) borrowed $28.1 million. The revenue to finance the annual interest payment of $1.44 million, as well as the expenses and depreciation from the assets acquired with those funds, comes from the city's electric ratepayers. In addition to this first round of debt, an additional $13.5 million in loans was taken a few years later and assigned to the telecommunications division. Interest payments for this debt are about $390,000 annually.[131] Thus, about two-thirds of the debt related to the broadband network had been assigned to the electric rather than the telecommunications division.

Assets purchased with the first round of debt also appear on the electric utility's books, impacting revenues, expenses, depreciation, and interest payments of the electric division. This rich mix of the financials of the electric and telecommunications division makes it difficult to clearly see the financial impact of the broadband network. Nevertheless, a full accounting of the finances of the broadband network can be approximated by constructing a *financial counterfactual* of the city's electricity operation; that is, what would be the finances of the electric division "but for" the construction of the broadband network. Comparing the commingled financials of the electric and telecommunications divisions to this counterfactual provides a clear picture of the financial impact of the broadband network.

Conceptually, the counterfactual is constructed as follows. We assume, for simplicity's sake, that only expenses are commingled. Let the observed revenues of the electric utility and broadband system be R_E and R_B, respectively, and let the observed costs of the electric and broadband divisions be divided into three types: costs that are identifiable for each division (c_E, c_B) and a commingled cost (c_X). Using historical data, the full costs of the electric division are estimated to be C_E. The full costs of the broadband division, C_B, are unknown, but can be computed by summing the costs for both divisions and then subtracting C_E: $C_B = (c_E + c_B + c_X) - C_E$. The same procedure could be used for revenues.

The finances of Opelika's electric utility were quite stable over time, making the construction of a counterfactual straightforward. Although

129. Jessica Armstrong, *Opelika Puts Itself on the Main Line*, BUSINESSALABAMA.COM (Aug. 27. 2014), https://businessalabama.com/opelika-puts-itself-on-the-main-line [https://perma.cc/AQ4W-ST83]. Demographic data available at: *Household Types in Opelika, Alabama*, STAT. ATLAS, http://statisticalatlas.com/place/Alabama/Opelika/Household-Types [https://perma.cc/8Z79-GPQJ] (last visited July 9, 2020).

130. *Household Types*, *supra* note 129.

131. *Id.*

revenues of the electric division have risen to cover the financial losses of the broadband network, we will not separate these cross-subsidies from the analysis. An approximation suggests that the cross-subsidy through an electric rate increase equals about $3 million.[132] The utility purchases wholesale electricity (it does not generate electricity), which it then distributes over its distribution network. Assuming electricity expenses are unaffected by the broadband network, all that is required to produce the counterfactual is a calculation of non-power expenses of the electric division; that is, non-power expenses free from the influence of the broadband network. Between 2007 and 2010, the four years before construction began, non-power expenses (depreciation and other costs) grew about $400,000 annually. We apply a linear trend based on expense over this period to approximate the non-power cost of the electric division for the 2011 to 2020 period.

Combining the finances of the electric and telecommunications division is straightforward, as the data are available in the city's financial statements. First, all operating revenues and expenses are included in the analysis. Second, as the electric utility receives a transfer from the telecommunications division for "Fiber Optic Line Leases," we include those (non-operating) revenues since they appear as operating expenses to the telecommunications division. (Thus, the two are a wash). Third, we also include all interest expenses (a non-operating expense) related to the broadband network, since these expenses arise solely because of the construction of the fiber network.

The financial losses for years 2012-2016 are reported in Table 1. In considering these figures, it is important to keep in mind that, for communications networks, losses are expected in the early years of operation. These networks require large upfront investments and revenues are not realized until after the network is constructed. For the network to be profitable (that is, have a positive net present value), it is necessary for revenues not only to exceed expenses on an annual basis in future years, but to do so by an amount sufficient to recoup all losses accumulated during the early years. As such, cumulative losses are reported in the table, and shed significant light on the prospects for the network's future profitability. The larger the cumulative losses, the less likely the network will ever break even (at least by any traditional financial metric).

132. *Id.* Over the 2010-2014 period, the average ratio of electric revenues to power costs was 1.394. In 2015-2016, that ratio increased to 1.45, a $3 million differential in the markup of wholesale electric expenses.

Table 1. Financial Analysis of Opelika's Broadband Network

	2012	2013	2014	2015	2016
Electric + Broadband					
Revenues	35,271,849	34,131,980	40,218,323	44,874,861	47,001,981
Expenses	30,950,669	32,591,461	41,466,152	43,459,692	43,549,454
Income (loss)	4,321,180	1,540,519	(1,247,829)	1,415,169	3,452,527
Electric (no Broadband)					
Revenues	35,271,849	34,131,980	38,137,587	40,477,434	41,672,172
Expenses	31,033,161	30,748,699	34,148,994	35,535,759	35,290,399
Income (loss)	4,238,689	3,383,281	3,952,594	4,941,675	6,381,774
Broadband (Estimated)					
Income (Loss)	82,492	(1,842,762)	(5,200,423)	(3,526,506)	(2,929,247)
Cumulative Income (Loss)	(161,535)	(2,004,297)	(7,204,719)	(10,731,225)	(13,660,472)

To begin, we look at the finances of the standalone electric utility. Income averages about $4.6 million annually, which is consistent with the financial results prior to the construction of the broadband network (at $5 million for 2007 through 2010). In looking at the combined electric and telecommunications division, the cross-subsidy from the electric to the telecommunications division becomes plain. For the combined divisions, income is much lower than for the standalone electric division, but the joint income remains positive in all years but 2014. Income from the electric division was sufficient to cover the losses for the broadband network, but this does not imply the broadband network has had minimal financial impact. Prior to the broadband network, the city benefitted from the internal transfer of millions in profits from the electric division, and now those profits are substantially lower, impacting all taxpayers.

The true financial impact of the broadband network is the difference between the combined divisions and the standalone electric utility. For instance, in 2013, the standalone electric utility would have had a positive income of $3.38 million. The combined divisions, however, only had a positive income of $1.54 million. Thus, the broadband network reduced the city's income by $1.8 million (= 1.54 – 3.38), raising cumulative losses to $2 million when added to the cumulative loss of $160,000 in 2012.

The financial impact of Opelika's broadband network is shockingly large. In 2016, for instance, the annual financial losses equaled $2.9 million, which is only slightly smaller than the $3.5 million loss in 2015. Over the four-year life of the network, cumulative losses are $13.7 million. This loss in income to the city equals about $1,140 per household in Opelika. At the rate of loss accumulation, the Opelika network is unlikely ever to be "profitable" by any meaningful financial definition of the term.

In addition to these losses, the city has taken on $41.6 million in debt. At the end of 2016, the broadband network had the city in a $55 million hole without any reasonable expectation of escape. The market value of the system is unknown, but faltering municipal systems typically sell for pennies on the dollar. In Groton, Connecticut, the city took on $38 million in debt to build a

broadband network.[133] The network was sold to a private investor for $550,000 (about 1.4 cents on the dollar). In Provo, Utah, a network built with $39 million in debt was sold for $1.[134] Provo, like Opelika, added a $5.35 monthly fee to electric bills to cover the losses of the broadband network, but still could not rescue the faltering finances of the network. By these indicators, the market value of the OPS network is likely to be pennies on the dollar.

The difference between the actual losses of the Opelika broadband network and those reported for the telecommunications division by the city are likewise sizable. In 2016, for instance, the city's books reported a loss for the telecommunications division of $1.36 million (operating losses plus interest expense), about $1.6 million below the actual loss computed here. The difference is, in part, related to the shifting of broadband expenses to the electric division, including (but not limited to) the $1.4 million in interest expenses assigned to the electric division but caused by the broadband network. Other hidden expenses include the expenses related to the assets purchased with the $28.1 million loan and assigned to the electric division. The margins of the electric utility also were rising prior to the construction of the broadband network. Over the life of the broadband network, the city reports cumulative losses for the telecommunications division equal of only $6.45 million, when actual losses (see Table 1) are more than twice that at $13.7 million.

Opelika is a small Alabama town of approximately 11,000 homes, and OPS provides service to 12,142 electric customers. In 2016, OPS's telecommunications division had over 3,200 customers, or about one-third of broadband subscribers.[135] Using these figures, it is possible to see the impact of the cross-subsidy on a more personal basis. In 2016, $20 of the average OPS electric customer's bill was used to subsidize the broadband network. By the end of 2016, the average electric customer had funded a subsidy of $1,125 from the electric to the telecommunications division. Not everyone subscribes to OPS's broadband service. In 2016, electric customers paid a subsidy of $900 per broadband account; through 2016 the electric customers had accumulated a total of $4,300 in subsidies per broadband account.

Table 1 above shows that the financial effect of the broadband network is sizable. Over the life of the broadband network, the cumulative losses through 2016 are $13.7 million, with $2.9 million added that year. Revenue growth in the broadband sector is far too slow to overcome this enormous deficit, so the losses will continue to mount. It is natural to ask how the

133. *See* discussion *infra* Section VII.D.

134. *See* discussion *infra* Section VII.B.

135. Letter from Gary Fuller, Mayor, City of Opelika, Response to Yellowhammer Article (Feb. 16, 2017), https://opelika-al.gov/Archive/ViewFile/Item/353 [https://perma.cc/XJQ8-NQTL]; Andrew Burger, *LRG: U.S. Broadband Penetration Rises to 79% of Households, Smartphone Role Increasing*, TELECOMPETITOR (Oct. 24, 2014), http://www.telecompetitor.com/lrg-u-s-broadband-penetration-rises-to-79-of-households-smartphone-role-increasing [https://perma.cc/3F65-TM4X]; *Electric Sales, Revenue, and Average Price: 2015 Utility Bundled Retail Sales – Total*, ENERGY INFO. ADMIN. (Oct. 2016), https://www.eia.gov/electricity/sales_revenue_price/pdf/table10.pdf [https://perma.cc/RC8A-AUHJ].

financial situation will change over the next few years. To do so, we forecast the financials through 2020. Using simple forecast models, revenues and expenses are projected through 2020.[136] All non-operating revenues and expenses are set equal to the 2016 levels as they do not change much over time.

The forecasts through 2020 are summarized in Table 2. As the earlier data predict, the annual losses decline slightly over the years as telecommunications revenue increases. Still, the financial impact from the addition of the broadband networks to the city's business services results in a nearly $1 million loss in 2020. Cumulative losses in 2020 are $18.6 million. Before the network "breaks even," this sizable and growing cumulative loss must be recovered from annual income. Given the predicted loss in 2020, and the slow financial progress of the telecommunications division (reducing the loss by a few hundred thousand each year), the losses are expected to accumulate for many years after 2020. The broadband network has resulted in a sizable financial hole from which there is little hope the city would ever emerge. The city's network was sold in 2018 for $14 million, well below the debt and cumulative losses of the network, which summed to about $58 million.

Table 2. Financial Forecast for Opelika's Broadband Network

	2016	2017	2018	2019	2020
Electric + Broadband					
Revenues	47,001,981	47,941,112	49,755,977	51,448,272	53,055,983
Expenses	43,549,454	$44,691,877	$46,205,453	$47,650,617	$49,048,571
Income (loss)	3,452,527	$3,249,236	$3,550,524	$3,797,655	$4,007,412
Electric (no Broadband)					
Revenues	41,672,172	41,659,798	42,804,662	43,949,527	45,094,391
Expenses	35,290,399	36,809,063	37,925,091	39,041,118	40,157,145
Income (loss)	6,381,774	4,850,735	4,879,572	4,908,409	4,937,246
Broadband (Estimated)					
Income (Loss)	(2,929,247)	(1,601,499)	(1,329,047)	(1,110,754)	(929,834)
Cumulative Income (Loss)	(13,660,472)	(15,261,971)	(16,591,018)	(17,701,772)	(18,631,606)

The effect of shouldering the debt for the broadband network on electric ratepayers affected power rates in Opelika. In 2015, OPS raised it electricity rates to cover a $800,000 million revenue shortfall for its electric division.[137] The loss equaled a little over half the annual debt expense the electric division shoulders for the broadband network ($1.4 million), so the rate increase would have been unnecessary absent the broadband network. The rate increase—an

136. Linear and log-linear trend models are employed, depending on which fits the data best.

137. Opelika, Ala., Ordinance No. 126-14 (Sept. 17, 2014), http://opelikaobserver.com/2014/09/ordinance-no-126-14-919 [https://perma.cc/P9W2-J4H4]; *Opelika City Council, Regular Meeting Agenda*, CITY OF OPELIKA 15–18 (Dec. 15, 2015), http://opelikacityal.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=1033&Inline=True [https://perma.cc/ND92-W54X].

explicit cross-subsidy—represented an increase in electricity rates of $5.39 per month for OPS's electric customers, both residential and commercial.[138] This rate increase is sizable for a city with an median household income a third of the nation's and just over 20% of its population living below the poverty level.[139]

State regulators would almost certainly forbid such cross-subsidization by investor-owned utilities, indicating that municipalities are operating under different standards than private companies. Indeed, the lack of fiber-to-the-home networks being built by investor-owned electric utilities is a potent piece of evidence. The incremental cost of adding broadband to an electric utility may be lower than it is for a firm without infrastructure and resources already deployed in the relevant market. Such spillovers need not be subsidies. Indeed, spillovers allowed the cable companies into the phone business, the phone companies into the video business, and both into the broadband business. But if there were sizable spillovers from the electric utility into the residential communications business, then we should see investor-owned utilities doing so. We do not.

When the Telecommunications Act of 1996 was passed, there was hope that electric utilities would enter aggressively into telecommunications markets.[140] For the investor-owned utilities, however, that aggressive entry never occurred. Why? The principle reason is that politicians and regulators see it as their job to protect captive ratepayers from unnecessary risk and building, and operating a broadband network is exceedingly risky. For this reason, investor-owned utilities are closely-scrutinized by state Public Utility Commissions ("PUCs") to make sure that anything that goes into a utility's rate base is "used and useful" to the utility's core electric business.[141] If a utility tried to sneak in the costs of entry into the rate base—any costs not related to the core electric business—the prudency hearing would not be pleasant. The risk-averse investment culture that characterized electric utilities and their regulators effectively precludes investor-owned utilities from leveraging their electric monopoly into the communications business.

Yet, while entry from investor-owned utilities over the past twenty years has been minimal, municipal entry has been aggressive. In large part,

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138. The revenue shortfall was $784,935, an amount less than the costs the electric division covered for the telecommunications division. Dividing the shortfall by 12,142 total customers results in an increase of $5.39 per household, per month. *See Electric Sales*, *supra* note 135.

139. *QuickFacts: Opelika, Alabama*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/opelikacityalabama (last updated July 1, 2019) [https://perma.cc/885D-SK7C]; *QuckFacts: United States,* UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/SEX255218 (last updated July 1, 2019) [https://perma.cc/4WWW-GD65].

140. *See* Implementation of Section 34(A)(1) of the Public Utility Holding Company Act of 1935, as Added by Section 103 of the Telecommunications Act of 1996, *Report and Order,* 11 FCC Rcd. 11377 (1996).

141. *See, e.g.*, *Electricity Regulation in the US: A Guide*, REG. ASSISTANCE PROJECT 29 (Mar. 2011), http://www.raponline.org/docs/RAP_Lazar_ElectricityRegulationInTheUS_Guide_2011_03.pdf [https://perma.cc/VS7L-GDFZ].

we can attribute such entry by municipal utilities to the lack of regulatory oversight aimed at protecting the customers of the electric utility. Unlike their investor-owned counterparts, municipal utilities generally face no oversight from state PUCs as to what and what may not be included into the rate base. *Self-regulated* by their own city councils, municipal utilities have much more leeway to use captive electric ratepayers to subsidize entry into broadband.[142] State laws can act as a check, if not the only check, on municipal government's cross-subsidy of broadband services. The ease with which a cross-subsidy may be implemented between an electric utility and an affiliated broadband network goes a long way to explain why municipal networks are often built in cities operating an electric utility. In numerous cases, the captive ratepayers are paying for failed municipal broadband projects.[143] While it is not possible to eliminate the potential for legitimate positive spillovers from the electric utility to the broadband network, the lack of investor-owned utility entry into the broadband market indicates that such spillovers are not large enough to motivate entry. Thus, subsidization is likely required to induce entry even by municipal electric utilities into the broadband business.

E. Private Investment and the Threat of Municipal Entry

When the FCC preempted state municipal broadband laws in Tennessee and North Carolina in 2015, the FCC's action was intended to spur municipal investment in networks.[144] Naturally, in response to the FCC's action, private firms will increase their assessment of the threat of municipal entry. In the FCC's *2015 Preemption Order*, the Agency expressed the view that "threat of entry or actual entry of a municipal provider spurs positive responses by the incumbent broadband provider" [which] serves the goals of section 706.[145] In contrast (and as noted above), the FCC observed the risk of municipal broadband in its *National Broadband Plan*: "Municipally financed service may discourage investment by private companies."[146] As is typical of the FCC, no supporting analysis is provided of either of these *conflicting* claims; a shortfall we make some attempt to remedy here. We have discussed the likelihood that municipal entry will lead to the exit of either the public or a private provider. Here, we will show, using the economic model presented above, that *the mere threat* of municipal entry may discourage private investment.

142. *See* Nixon v. Missouri Municipal League, 541 U.S. 124, 134 (2004) ("[W]hen a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated. Legal limits on what may be done by the government itself (including its subdivisions) will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command.").

143. *See, e.g.*, Davidson & Santorelli, *supra* note 14.

144. *2015 Preemption Order, supra* note 6.

145. *Id.* at ¶ 49.

146. *National Broadband Plan, supra* note 2, at 153.

Consistent with the general claim that wireline broadband services are provided by a duopoly, take the model from the previous section and set $f = A^2/9$ so that $n^* = 2$. Suppose, however, that there is only one firm in the market and the second firm is only now considering the possibility of entering the market. Furthermore, suppose the second firm assigns the probability θ to the possibility that an equally efficient municipal firm (leading to a symmetric outcome) will also enter the market to compete with the existing private monopoly. As always, the second private firm would only enter the market if the expected profit were greater than or equal to zero. Hence, the private firm will enter if:

$$E\{\theta\} = (1 - \theta)0 + \theta A^2(1/16 + 1/9) \geq 0. \quad (11)$$

The first part of the left-hand side of Equation (11) is the realized profit after entry (the marginal profit is 0 in the equilibrium structure) multiplied by the probability the municipality does not enter; the second part is the profit with three firms multiplied by the probability the municipality does enter.

Equation (11) can only be met if $\theta = 0$. In other words, if there is any credible threat of municipal entry ($\theta > 0$), then the second private firm would not enter, thus generating a private monopoly in the market. However, if there is no threat of municipal entry ($\theta = 0$), then the second private firm would enter. This example shows that even a small probability of municipal entry can prevent private sector entry, thus artificially generating monopoly conditions in the marketplace. States with laws overseeing municipal broadband may have some advantage in attracting private investment. The logic of this argument has a more general application. Broadband technology is constantly improving. Thus, at any given time, the technology used is somewhat dated. Of course, companies cannot invest in every technological advance that comes along, especially when an even better one is soon expected. At some point, however, the companies must upgrade their networks to provide the service quality their customers demand, knowing that it will not be long before the next upgrade At present, we are amid a massive technological upgrade—the move to very high-speed networks. Fiber is one technology, but the cable companies have proven their fiber-coaxial networks are capable of very high speeds as well. Private providers are making their computations about upgrading their networks and have already begun to deploy in many cities. The threat of municipal entry, or the realization of municipal entry, alters that calculation, likely weakening the case for investing in upgrades. In this respect, it is a bad time to push municipal entry. On the other hand, as larger cities get their upgrades, smaller cities likely feel an increasing pressure to keep up. Given the long-term nature of broadband investments, the temporal issues are complex and interesting.

VI. EXTERNALITIES, COMPETITION, AND SUBSIDIES

The "promoting competition" argument for municipal broadband is logically unsound. And we doubt most city officials are at all concerned about

increasing competition and probably wish they didn't have to share the market with private firms. Most of the city officials involved in these projects simply want to increase broadband adoption to help their community transition more smoothly and robustly to the information economy. Building a network is difficult, expensive and risky, yet some city officials do so nonetheless, suggesting they perceive the stakes to be high but their options limited.

A. Subsidies vs. Entry

If obtaining positive externalities of broadband is the goal, then it is important to ask whether there are better methods to reap them than the financial risk of building a municipal broadband network. The presence of these positive externalities implies that the socially optimal aggregate quantity is above the level achieved in the private long-run equilibrium because private firms cannot capture the value of the external effects.[147] We will now consider a subsidy as an alternative solution to the externality problem and compare it to the addition of a firm to a market already in equilibrium.

As noted above in Expression (12), to incorporate the external effects into the analysis, an additional term appears in the consumer welfare function, zQ_e, where z is the value of the external effect ($z > 0$) per unit consumed (Q_e). To make the case that a subsidized government-owned firm is worth the benefit of broadband's positive externalities requires that the additional positive term in the welfare function is sufficiently large to make the socially-optimal number of firms greater than the private long-run equilibrium. This argument, however, rests upon the assumption that the only available tool to increase aggregate quantity is an increase in the number of firms in the market, and to do so in a way that only the government is willing to be that firm. As noted above, what we need for broadband is more quantity, not more firms.

Rarely is it the case that the number of firms in the market is the only available tool. For example, various types of consumer subsidies can be utilized to achieve the same outcome in a far more efficient manner than the entry of a new firm.[148] As noted in one article about municipal broadband, "[L]ocal and state governments generally are not interested in operating broadband systems; most prefer to provide regulatory and financial incentives for private-sector carriers to make the necessary investments."[149]

To illustrate this point, consider a straightforward numerical example. Going back to the economic model, suppose that A=36 and f=\$144 so that the long-run equilibrium number of private firms is $N^* = 2$. The private long-run equilibrium would have an aggregate quantity of $Q_e = 24$. Suppose that

147. In the presence of a negative externality (e.g. pollution), competitive markets produce too much. In the presence of a positive externality, competitive markets produce too little.

148. Governments may also eliminate taxes, regulations, or procedures that discourage private sector investments.

149. *Why States Should Support Broadband, supra* note 86.

this level is too small from a societal point of view due to a positive external effect associated with broadband. If a municipal firm enters ($N = 3$), then the competitive effect would increase the aggregate quantity by three units (up to 27). There would, however, be the additional societal burden of another 144 units of fixed costs. The predatory nature of additional entry can be seen here (though we have not specifically modeled the subsidization of the firm to induce entry). With three firms, each of the firms would sell 9 units at a price of $9, resulting in revenue of $81 compared to their fixed investment of $144. Here, prices are below incremental cost.

As an alternative to entry, suppose we attempted to generate the same three-unit increase in aggregate quantity by a uniform consumption subsidy of s per unit. Hence, the demand curve would now be:

$$P = A - Q + s. \tag{12}$$

With two firms in the market, the size of the subsidy required to generate the three-unit increase in the aggregate quantity would be $s = \$4.50$. The total cost of the subsidy would be $\$4.50 \times 27 = \$121.50$. Clearly, this is less than the fixed costs associated with setting up a municipal firm ($144). Furthermore, the two incumbent firms would cover their average total costs and profits would be positive. The firms would each have revenue of $\$13.50 \times 13.50 = \$182.25$ versus a fixed investment of $144. There would be no issues of predation or potential exit. Moreover, the profits could even be extracted via a lump sum tax to pay partially for the subsidy if necessary.[150]

In this example, we have shown that a simple uniform subsidy dominated the alternative of the entry of an additional competitor even though a uniform subsidy is not the most efficient type that can be used to increase the aggregate quantity. A subsidy targeted to those consumers with a lower willingness to pay, perhaps dubbed "broadband vouchers" would be even more efficient than a uniform subsidy since there is no benefit to subsidizing those that are already consuming the service in the private equilibrium.[151] Even in cases where substantial upgrades are required, some targeting may be possible, reducing the social cost of obtaining positive externalities. Some private companies are presently active in similar private programs without subsidies, including Comcast's *Internet Essentials* program (providing low-cost broadband and computers to low-income households)[152] and Facebook's *Free Basics* program (offering free but somewhat limited Internet access in developing economies).[153]

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150. Economic theory indicates that lump-sum taxes are the most efficient form of taxation. Such a tax would not fully pay for the full cost of the subsidy. N. Gregory Mankiw et al., *Optimal Taxation in Theory and Practice* (NBER Working Article No. 15071, 2009), https://www.nber.org/Articles/w15071.pdf [https://perma.cc/7JEH-8MYE].

151. In the same way, there is no benefit from offering households a quality of broadband that they couldn't possibly use (e.g., 1 Gbps). Targeted deployments may be more sensible.

152. *See* Internet Essentials, https://internetessentials.com (last visited July 10, 2020) [https://perma.cc/W7AE-ZCSD].

153. *See* Internet.org by Facebook, https://www.internet.org (last visited July 10, 2020) [https://perma.cc/UN73-HFTU].

Furthermore, subsidies are a continuous (or scalable) instrument that can be easily adjusted in magnitude and targeted to particular groups to achieve the desired increase in quantity. The addition of a firm, by contrast, is a discrete (and inefficient) instrument that only provides a very imprecise targeting of desired increases in market quantity. In our example above, if the socially optimal quantity was really 26 units, then the use of firm entry could not hit the target but must either miss it on the low side with two firms (24 units) or miss it on the high side with three firms (27 units). The subsidy, however, could easily achieve the optimal 26 units by adjusting the size of the uniform subsidy down to 3 units.

Without doubt, the best argument for municipal broadband is that significant positive externalities result from broadband. Yet, as we show here, entry with a high fixed-cost technology is a terribly costly and clumsy way to increase quantity to obtain an externality. It is also, by any standard, a radical and controversial approach. Theoretically, subsidies to existing firms and/or households is a far more efficient way to increase adoption and investment. Such subsidies avoid the controversy surrounding municipal broadband and do not lead to below-cost (predatory) pricing. For cities, practical problems implementing a subsidy scheme and the FCC's failure to craft any meaningful plan (other than passing the buck to municipalities to take on highly risky projects) may move municipal entry up the list of potential remedies, but entry is not pro-competitive. It is decidedly anticompetitive. In fact, municipal broadband makes far more sense when competition is not the goal.

VII. PRACTICAL CONSIDERATIONS FOR REASONABLE POLICY

Broadband is valuable and it is believed to have value above and beyond private values alone. As such, the private incentives to deploy and adopt broadband are too low. What is needed, consequently, are policies that encourage an increase in the deployment of modern broadband networks and the adoption of the services offered over those networks. We have a *quantity* problem (where quantity may be considered in terms of bandwidth as well), not a *competition* problem. Competition cannot solve a positive externalities problem—the private incentives are never enough. Again, we don't need more providers. We need higher quantities.

Forcing an additional provider into a market—especially a government-owned and highly-subsidized one—is a very poor and untargeted policy to deal with a quantity shortage. This option is better characterized as anticompetitive than competitive and may very well lead to a government or private monopoly in broadband. This approach to solving the broadband externality issue may have its advocates, but experience suggests the cracks in it will eventually begin to show (and already are). Subsidies may very well be necessary to address the externality, but it is hard to find rational, economic support for the asymmetric subsidization of a government-owned broadband network intent on "competing" with existing private-sector firms.

Not only are the economics of municipal broadband questionable, but the risks are great. In the vacuum created by the failure of federal policy for broadband deployment in marginal communities, more and more cities are contemplating the construction of networks, placing themselves at great financial and possibly even litigation risk.[154] A few examples of the downsides of municipal systems may clarify the nature of the problem. Opelika was detailed above, so we do not repeat that analysis here.

A. Burlington, Vermont

One of the earlier municipal fiber projects was in Burlington-Vermont. The city elders, confident in their business plan, promised taxpayers that the broadband network would "be financially self-supporting, pay for all its own cost, and yield a return to the City budget."[155] Municipal broadband advocates took them at their word and praised the Burlington project as an example where "[c]ommunities can build a telecommunications network to provide better services at a lower cost while raising revenue."[156] Despite such potential, the Vermont legislature, exercising a bit of Yankee sensibility, passed a law which forbade the City of Burlington from providing any financial support to the fledgling telecommunications network.[157] While the legislature was pleased to see the project go forward, its intention was clear:

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154. David Elliot Berman & Victor Pickard, *Cities and states take up the battle for an open internet*, GCN (Nov. 19, 2019), https://gcn.com/articles/2019/11/19/municipal-broadband.aspx [https://perma.cc/VFZ6-L6YK]; Mike Farrel, *More Muni, More Money*, MULTICHANNEL NEWS (Nov. 18, 2019), https://www.multichannel.com/news/more-muni-more-money [https://perma.cc/TG2D-YBJF]; Chris Teale, *Municipal Broadband Internet: The Next Public Utility?,* SMARTCITIESDIVE (Mar. 5, 2019), https://www.smartcitiesdive.com/news/municipal-broadband-internet-public-utility/549461/ [https://perma.cc/4N9E-T6FT]. A recent document from the White House, *Broadband Opportunities Council*, *supra* note 4, offers a few and quite general recommendations on how to improve federal policy with respect to broadband deployment.

155. *Annual Financial Report*, BURLINGTONVT.GOV 62 (June 30, 2007), https://www.burlingtonvt.gov/sites/default/files/Mayor/AnnualReports/2007/burlington_vermont_fy2007_annual_report.pdf [https://perma.cc/K8ZT-ANK2].

156. *See, e.g.*, Christopher Mitchell, *Burlington Telecom Case Study*, INST. FOR LOCAL SELF-RELIANCE 5 (Aug. 2007), http://ilsr.org/wp-content/uploads/files/bt.pdf [https://perma.cc/595L-NPL4].

157. 24 V.S.A. App., § 3-438(c)(1) ("If the city exercises its authority under subdivision 431(4) or section 449 of this title, the public service board, in considering any application for a certificate of public good, shall ensure that any and all losses from these businesses, and, in the event these businesses are abandoned or curtailed, any and all costs associated with investment in cable television, fiber optic, and telecommunications network and telecommunications business-related facilities, are borne by the investors in such business, and in no event are borne by the city's taxpayers, the state of Vermont, or are recovered in rates from electric ratepayers.").

taxpayers will not be on the hook in the event of bad times.[158] The legislature's concerns were prescient.

Soon after the project got underway, reports of mismanagement began to percolate. In response, the Vermont Public Service Board ("PSB") launched an investigation into Burlington Telecom, and its findings were staggering. Among other problems, including failing to meet buildout requirements, the PSB found that not only had the city had improperly advanced funds to keep the network afloat from the city's general cash pool, but that Burlington Telecom had failed to pay the money back to the treasury, leaving the taxpayers on the hook for $16.9 million—conduct, by the way, to which Burlington Telecom freely admitted. In the PSB's view, "the City's admitted conduct displayed a *wanton disregard* not only for a significant condition of the [network's certificate of public good], but also for provisions of the city charter that were enacted by the state legislature specifically to prevent such conduct."[159]

Burlington countered that the advance was no big deal because the cash pool was the "City's general bank account" in which the "majority of City funds are comingled." The PSB didn't buy this argument, finding that the "distinction that Burlington Telecom is seeking to make between city money and taxpayer money is largely immaterial." As the PSB observed:

158. *See, e.g.*, Christopher Mitchell, *Burlington Telecom Case Study*, INST. FOR LOCAL SELF-RELIANCE 1 (Aug. 2007), http://ilsr.org/wp-content/uploads/files/bt.pdf [https://perma.cc/8EJP-WSCS]; Christopher Mitchell, *Learning From Burlington Telecom: Some Lessons for Community Networks*, INST. FOR LOCAL SELF-RELIANCE (Aug. 18, 2011), https://www.muninetworks.org/sites/www.muninetworks.org/files/bt-lessons-learned.pdf [https://perma.cc/4LDW-A3CM].

159. Petition of City of Burlington, d/b/a Burlington Telecom, for a certificate of public good to operate a cable television system in the City of Burlington, Vermont (In Re: Amended Petition to amend Condition No. 17 of CPG related to completion of system build-out and to grant temporary relief from limitation in Condition No. 60 of CPG on financing operations, *Order On Motions And Cross-Motion For Partial Summary Judgment*, Docket No. 7044, 12 (2010) (emphasis added).

> It was clearly the legislative intent to avoid having the residents of Burlington saddled with a debt resulting from a failed venture. It would undermine this intent to accept the argument that dollars may be contributed by the City to BT from parking receipts, sales tax, license fees, or whatever, but not from the property tax. Dollars are the ultimate fungible, and have no identity as to their source. Even were that not the case, clearly, a dollar (or a million dollars) removed from the City's checking account leaves a hole that must be filled from somewhere, and the residual source is the property tax.[160]

The PSB concluded that "Burlington Telecom now owes the cash pool $16.9 million with no immediate or probable prospects of full repayment by Burlington Telecom."[161]

But this is not the end of this story: Burlington Telecom was subsequently sued by a major vendor for $33 million for defaulting on an equipment lease. This case was eventually settled for $10.5 million, forcing the private sector to absorb the loss.[162] To help finance this settlement, the City of Burlington entered into a sale/leaseback arrangement with a local businessman in November 2014, effectively privatizing what was once a poster child of municipal broadband.[163]

B. Provo, Utah

City officials in Provo, Utah, began constructing a municipal broadband network in 2004. Provo's business plan was to forge partnerships with various Internet Service Providers ("ISPs") under which Provo would own and operate the network while the ISPs would sell the service to the end consumer. To pay for the network, the city issued $39 million in bonds, committing to monthly payments of $278,000 for 20 years. Over time, most of the ISPs on the network were unprofitable and the network eventually went bust. In 2008, Provo sold the network to the one remaining ISP on the network, but it too

160. *Id.* at 15.

161. *Id.* at 16. It should be noted that given such chicanery, the FBI also investigated whether the City of Burlington had violated Federal law. *See Vt. Officials Say FBI on Burlington Telecom Case,* ASSOCIATED PRESS (Dec. 1, 2010), http://www.boston.com/news/local/vermont/articles/2010/12/01/vt_officials_say_fbi_on_burlington_telecom_case [https://perma.cc/85DW-2DJA].

162. *See* Robyn Estabrook, *City Council Approves Burlington Telecom Settlement*, WPTZ NEWS (Nov. 17, 2014, 11:31 PM), http://www.wptz.com/news/city-council-approves-burlington-telecom-settlement/29788148 [https://perma.cc/T9YS-VAYJ].

163. *Burlington Telecom Sale OK'd by State*, BURLINGTON FREE PRESS (Nov. 3, 2014), http://www.burlingtonfreepress.com/story/news/local/2014/11/03/state-oks-burlington-telecom-sale-lease/18432671 [https://perma.cc/8SQM-NLZW].

could not sustain financial viability. Eventually, the network reverted back to Provo.[164]

As a stop-gap measure, city officials in November 2011 began charging $5.35 a month on residents' electric bills to pay the bond payment (an explicit cross-subsidy).[165] Finally, in 2013, the City of Provo sold the network to Google for $1 in exchange for providing a free basic 5 Mbps service to all Provo residents for seven years (a below-cost price under nearly any measure of cost), as well as offering a free gigabit service to 25 public institutions, including public schools and recreation centers.[166] It's hard to compete with free services, and the loss of public customers certainly hurt the financial prospects for private providers.

Provo taxpayers were left holding the bag, forced to pay off a $39 million bond that the city originally issued to build the network. With interest, taxpayers still have to pay $3.3 million in bond payments per year for the next 12 years. And on top of that, the city will have to front an additional $1.7 million to cover costs not assumed by Google. These additional costs include (a) $722,000 for equipment in order to continue using the gigabit service for government operations already using the network, such as the operation of traffic lights and police and fire services; (b) $500,000 to a civil engineering firm to determine exactly where the fiber optic cables are buried because the construction company originally retained by the city to install the fiber cables underground did not keep records of where they buried all of them; and (c) $500,000 for an insurance policy to help mitigate any possible legal damages should Provo's network not be presented to Google as promised.[167] Finally, if things don't work out for Google, it was reported that the city has to buy-back the network for $1.[168]

C. Tacoma, Washington

In 1997, Tacoma, Washington approved a plan to build a municipal communications network for about $200 million.[169] Ushered in with great

164. Vince Horiuchi, *Provo Googled its Way Out of Fiber-Optic Network But Costs Live On*, SALT LAKE TRIB. (June 3, 2013, 8:47 AM), https://archive.sltrib.com/article.php?id=56288307&itype=CMSID [https://perma.cc/96CF-76CN].

165. *Id.*

166. Vince Horiuchi, *Council Approves iProvo Sale to Google*, SALT LAKE TRIB. (Apr. 24, 2013, 9:35 AM), https://archive.sltrib.com/article.php?id=56206589&itype=cmsid [https://perma.cc/35U4-RB42].

167. *Id.*

168. Charlie Osborne, *Google to buy $39m Provo fiber service for $1*, ZDNET (Apr. 19, 2013), https://www.zdnet.com/article/google-to-buy-39m-provo-fiber-service-for-1/ [https://perma.cc/6348-JC3L].

169. Kate Martin; *How to Stop Click from Bleeding Money? Tacoma Looks at Option,* THE NEWS TRIB. (June 27, 2015), https://www.thenewstribune.com/news/politics-government/article26354104.html; David Wilma, *Tacoma City Council Approves Click! Network on April 8, 1997*, HISTORYLINK.ORG (Jan. 30, 2003), http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=5149 [https://perma.cc/M7RS-S7AZ].

fanfare, the project earned Tacoma the nickname of "America's most wired city."[170] Like other municipal ventures, the Tacoma system received high praise for its benefits:

> Since its approval in 1997, Tacoma's hybrid fiber coaxial network has, among other things, ushered in a cable television service, offered customers three high-speed retail Internet service providers, enhanced Tacoma Power's electrical system and created a communications network among government institutions. In turn, the network and its programs have drastically reduced market rates for cable TV and Internet subscribers; saved local governments about $700,000 in annual expenses; and created several promising projects, such as "smart meters" that can gauge utility consumption electronically and "pay as you go" account options for electricity customers . . . .[171]

Unfortunately, as with many municipal projects, economic reality finally caught up with the hype. By 2014, Tacoma's municipal network was hemorrhaging $7.6 million a year. It was projected to lose $38 million over the next ten years, and it has yet to pay back off the original investment.[172] The utility thus concluded that "Tacoma Power doesn't need a wired telecommunications network for metering."[173]

The massive financial losses eventually fell to the municipal electric company's captive ratepayers who had to provide an annual subsidy to the failing broadband network to the tune of about $8- to $9 million a year, regardless of whether they buy broadband or not[174] For the consumer, this cross-subsidy is no small matter. This subsidy represents 2.5% to 3% of a customer's electric bill. Therefore, for a typical customer, the subsidy costs about $3.20 to $3.84 on a $128 total monthly bill.[175]

The citizens of Tacoma got fed up. Seventy percent of captive ratepayers said they would rather see the municipal network shut down than have power customers or the city government provide any additional

170. Halverson, *supra* note 33.

171. Christopher Mitchell, *Tacoma Offering Tips to Seattle*, MUNINETWORKS.ORG (Sept. 19, 2010), http://muninetworks.org/content/tacoma-offering-tips-seattle [https://perma.cc/TF3L-U5GZ].

172. The News Tribune, *A New Era Needs a New Plan for Tacoma's Click Cable TV (Opinion)*, BELLINGHAM HERALD (Nov. 7, 2014), http://www.bellinghamherald.com/opinion/article22256331.html; *How to Stop Click From Bleeding, supra* note 172.

173. *An In-Depth Look at Click! Financials, supra* note 126.

174. Kate Martin, *Proposal to Lease Click Network to Private Company Leaves Tacoma Leaders Uneasy*, THE NEWS TRIB. (Mar. 31, 2015 12:00 PM), http://www.thenewstribune.com/news/local/politics-government/article26273497.html.

175. Kate Martin, *Poll Results Differ from Public Feedback on Potential Click Lease*, THE NEWS TRIB. (June 18, 2015, 3:33 PM), https://www.thenewstribune.com/news/politics-government/article26337643.html.

subsidies.[176] This sentiment is important because it demonstrates what constituents are willing to pay for the alleged "positive externalities" of broadband. Given this financial situation, the fact that a senior official from Tacoma's mayoral office conceded that the "utility would not make the same decision today" speaks volumes.[177] After losing a major court case that found that the electric system was improperly subsidizing the broadband operations and floating the idea of a $10/month take on a base cost charged to every Tacoma household regardless of whether they're Click customers (which proved to be politically dead on arrival), as of this writing the City of Takoma continues to contemplate its strategy for the future, including leasing the system to a private provider.[178]

D. Groton, Connecticut

Success isn't guaranteed even in markets where a municipal electric utility builds a broadband network. Consider the case of Groton-Connecticut. Groton Utilities is a municipal utility offering electricity service. The city decided to build a modern cable, telephone, and broadband network to compete with Comcast.[179] The city borrowed $27.5 million to build the network. After incurring $11 million in losses from the operation of the network, the city found itself subsidizing the operating expenses of the company at a cost of about $2.5 million a year. Bankruptcy was not an option because the broadband operation is part of Groton Utilities and the utility is a city department, so the broadband division could not declare bankruptcy unless the city itself declared bankruptcy. Still, the city wanted out of the broadband business. Eventually, the broadband network was sold to a private

176. *Id.* Not surprisingly, many attendants at the public meeting opposed the lease of the system, but this group was not representative of the population ("'It's safe to say a majority of the speakers [at the public meetings] said they did not support the Wave proposal,' said Bob Mack, TPU deputy director for public affairs. 'Not very many expressed concerns about Click's financial distress.' Mack said that's likely because many who attended the meetings have a financial interest in the outcome of the lease discussions and want to defend the status quo. This group includes Click employees and their family members, as well as owners or employees of the companies that sell Internet service on Click's wires.").

177. Halverson, *supra* note 33.

178. John Larson, *Negotiations Underway On Click! Network Transition,* TACOMA WKLY. NEWS (June 21, 2019), https://tacomaweekly.com/news/negotiations-underway-on-click-network-transition [https://perma.cc/D3JM-232U]; *Tacoma Council Asks Public Utility to Investigate Municipal Broadband Service*, The News Tribune Editorial Bd., *$10-A-Month Tax On Every Tacoma Household To Keep Click! Public? That's A Dream Killer,* THE NEWS TRIB. (Aug. 29, 2018), https://www-1.thenewstribune.com/opinion/article217537590.html; *Presentation to the Tacoma City Council and Public Utility Board - Options for Click!*, TACOMA PUB. UTIL. (Sept. 1, 2015), http://www.clickcabletv.com/file_viewer.php?id=2003 [https://perma.cc/N3N4-8SAH].

179. GROTON UTILITIES, http://www.grotonutilities.com (last visited July 10, 2020) [https://perma.cc/PZX6-H5SH]; Greg Smith, *Groton's Deal to Shed TVC Finalized as New Owners Take the Reins*, THEDAY.COM (Feb. 1, 2013), http://www.theday.com/article/20130201/NWS01/130209982 [https://perma.cc/ZF4S-M344]; Deborah Straszheim, *How a Promising Idea Went Terribly Wrong in Groton*, PATCH (Jan. 6, 2013), http://groton.patch.com/groups/politics-and-elections/p/how-a-promising-idea-went-horribly-wrong-in-groton [https://perma.cc/N9RV-238X].

investor for $550,000, far more expensive than the initial agreed upon selling price of $150,000.[180] Now, the $38 million tally of debt and losses will be passed on to the city's captive electric ratepayers.

E. Lake County, Minnesota

In 2010, Lake County, Minnesota decided to build its own GON called Lake Connections. The motivation to construct the GON was the typical refrain. According to one county Commissioner, "No other provider was going to build a broadband network with the speeds and capabilities that we have for our rural constituency."[181] To construct the GON, Lake County received a bounty of federal subsidies, including a $56 million loan and a $10 million grant from the Department of Agriculture's Rural Utility Service ("RUS"), along with a $3.5 million grant from the FCC. On top of that, the county pledged $15 million of its own general funds to pay for local fiber drops for individual home connections.[182]

Despite these massive subsidies, Lake Connections never became financially viable. By 2017, the county owed approximately $48.5 million on the RUS loan and entered into a deferral agreement with RUS for principal and interest on the condition the county sell the network to a private company or entity.[183] In August 2017, the county executed a memorandum of understanding with RUS in which RUS agreed to accept the sale price of Lake Connections in full satisfaction of the county's debt. In June 2019, Lake Connections was ultimately sold to Pinpoint Holdings, Inc., for $8.4 million, effectively transferring to federal taxpayers the $40 million in residual debt.[184]

F. Salisbury, North Carolina

In 2010, the City of Salisbury North Carolina launched a GON called Fibrant. Five years later, Fibrant upgraded their network so it could provide a 10 Gbps service throughout the city both to businesses and residents, proudly

180. Greg Smith, *Groton's Deal to Shed TVC Finalized as New Owners Take the Reins*, THEDAY.COM (Feb. 1, 2013), http://www.theday.com/article/20130201/NWS01/130209982 [https://perma.cc/D9RS-Y885].

181. Jamey Malcomb, *Rural Minnesota County Built a Fiber Network, but Now Taxpayers Face Huge Bills,* LAKE COUNTY NEWS CHRON. (Aug. 3, 2018), https://www.govtech.com/network/Rural-Minnesota-County-Built-a-Fiber-Network-but-Now-Taxpayers-Face-Huge-Bills.html [https://perma.cc/V2RB-QWDG].

182. *Id.*

183. *Id.*

184. Teri Cadeau, *Zito Media Takes Over Lake Connections,* LAKE COUNTY NEWS CHRON. (June 20, 2019), http://econdev.greatriverenergy.com/news/p/item/17266/zito-media-takes-over-lake-connections [https://perma.cc/56CH-VC6R]. Apparently, local taxpayers also were not immune. According to press reports, the Minnesota Auditor's Office found that as of 2016 the county's broadband enterprise fund owed more than $14.3 million to the general fund and $3.3 million to the Health and Human Services fund. *See* Malcomb, *supra* note 181.

proclaiming that Salisbury had become "America's first 10 gigabit city."[185] Although both Time Warner Cable (later acquired by Charter and renamed "Spectrum") and AT&T also provided Internet service in Salisbury, city officials concluded that they needed to construct a GON because they deemed current speeds offered by the private sector to be insufficient.[186]

Despite high expectations, Fibrant could only garner only a 20% take rate, far below expectations, ultimately bringing total losses to about $20 million over its short, six-year lifespan.[187] Equally as important, short and long-term debt for the system grew to just over $34 million.[188] As a result, 81 percent of voters supported a plan to lease Fibrant's network to Florida-based communications company Hotwire.[189] Under the terms of the lease, Hotwire must pay target rents of nearly $1 million annually over the next 20 years.[190] Much of that payment is offset by higher debt costs that arise from the lease deal. Under the agreement, the city avoids operational costs, but still incurs debt and depreciation expenses of about $4 million annually.[191] So, the city will lose roughly $3 million per year if things go as planned, most of it in cash payments for debt. As the city's auditor noted, "Fibrant would have a negative cash flow of $2.2 million after payment of debt service."[192] Tacking on depreciation, the present value of the city's ongoing support of the network is probably about $40 million over the 20-year life of the lease (assuming a 3% discount rate).

If the lease deal falls through in ten years, as the contract permits, then the present value of the subsidies to the network are nearly $48 million. Assigning a probability of about 50% to that event, the expected future subsidies of the network are $45 million. It's not a bad deal for Hotwire. The private company will receive a $3 million subsidy each year from the city to

185. Jon Brodkin, *City-Run ISP Makes 10Gbps Available to all Residents and Businesses,* ARS TECHNICA (Sept. 3, 2015), https://arstechnica.com/information-technology/2015/09/city-run-isp-makes-10gbps-available-to-all-residents-and-businesses [https://perma.cc/H9Y4-YLAU].

186. *Id.*

187. *City of Salisbury and Hotwire Fiber Asset Lease Overview*, COLUMBIA TELECOMMS. CORP. 3 (Mar. 2018), https://salisburync.gov/Portals/0/Documents/Administration/Communication%20Consultant%20Report.pdf?ver=2018-04-04-103810-030 [https://perma.cc/3KBG-88SP]. Author's calculations using city audit documents.

188. Author's calculations using city audit documents.

189. David Boraks, *Private Company Taking Over Salisbury's Money-Losing Internet Network,* WFAE CHARLOTTE (June 1, 2018), https://www.wfae.org/post/private-company-taking-over-salisburys-money-losing-internet-network#stream/0 [https://perma.cc/VPH4-3MRH].

190. Jessica Coates, *An In-Depth Look at the Fibrant-Hotwire Lease,* SALISBURY POST (Apr. 3, 2018), https://www.salisburypost.com/2018/04/03/an-in-depth-look-at-the-fibrant-hotwire-lease [https://perma.cc/FHN5-7PW3].

191. Author's calculations using city audit documents.

192. City of Salisbury, *Analysis of Proposed Broadband System Lease And Business Plan: Comparison Of Expected Lease Payments Versus Continued Fibrant Operations*, BAKER TILLY (Mar. 27, 2018), https://salisburync.gov/Portals/0/Documents/Administration/Independent%20Accountant%20Report.pdf?ver=2018-04-04-103650-713 [https://perma.cc/489X-QP9S].

compete with unsubsidized private providers of broadband service (AT&T and Charter/Spectrum), while the city continues to shoulder the financial risk of the network.

G. Summary

When advocates promote municipal broadband, they don't talk about Groton, Provo, Tacoma, Burlington, Opelika, Bristol, Lake County, Salisbury, or any one of the many financial failures leaving taxpayers holding the bag, even though these financial disasters (among others) are surely part of the story. Instead, advocates point to highly-subsidized systems like Chattanooga (replacing the failed Burlington and Salisbury systems as the poster children for municipal broadband).[193] Cities contemplating broadband networks must, however, weigh the totality of the evidence. All the evidence should be front and center in the policy debate. The need for broadband is real, but there are no simple solutions where broadband service is absent or lacking. There are good reasons why the service is absent or lacking, and those reasons must be overcome in one way or another.

VIII. RECENT EMPIRICAL EVIDENCE ON MUNICIPAL BROADBAND

There is very little empirical evidence on the effects of municipal broadband. In this section, we review recent research projects covering economic development, investment, and prices. The evidence is broadly consistent with the theoretical analysis provided above.

A. Labor Market Outcomes

Though economic development, especially positive impacts in the labor market, is used often to justify municipal investment in high-speed Internet to underserved areas, systematic evidence of economic rewards from city-wide fiber-optic GONs is scarce. Most development claims are informal, anecdotal or else based on the estimated effects of broadband generally. A recent study reviewing the GON in Chattanooga, Tennessee by Ford and Seals (2019) provides a direct test of the labor market effects of municipal broadband.[194] To our knowledge, it is the only empirical analysis of labor market impacts of municipal broadband to date. The study constructs a large dataset (no fewer than about 50,000 observations) on multiple employment outcomes using the U.S. Census Bureau's American Community Survey. With these data, econometric techniques are applied to look for differences in labor market

193. *Cf.* George S. Ford, *Why Chattanooga is not the "Poster Child" for Municipal Broadband,* PHX. CTR. (Jan. 20, 2015), http://www.phoenix-center.org/perspectives/Perspective15-01Final.pdf [https://perma.cc/JHP9-KZP4].

194. George S. Ford & R. Alan Seals, Jr., *The Rewards of Municipal Broadband: An Econometric Analysis of the Labor Market*, PHX. CTR. (May 2019), http://www.phoenix-center.org/pcpp/PCPP54Final.pdf [https://perma.cc/QME8-YENU].

outcomes, including labor force participation, employment, wages, information sector employment, among others, between Chattanooga and a set of matched control areas similar but do not have municipal broadband networks. To obtain plausibly causal estimates, the study applies the difference-in-differences estimator and matching techniques.

Across a variety of empirical models and hypothesis testing procedures, Ford and Seals (2019) report no differences in labor market between Chattanooga and comparable places.[195] Despite multiple claims that Chattanooga's network created jobs in the city, a review of the actual employment activity indicates the broadband network has had no impact on employment, wages, self-employment, and other labor market outcomes.

The absence of evidence is not evidence of absence. Statistically insignificant results may be the result of bad data or inadequate statistical methods. Recognizing this fact, Ford and Seals (2019) also study the labor market impact of an auto plant opened in Hamilton County, Tennessee, about the same time as the city's broadband network began taking customers.[196] As expected, the statistical model revealed substantial increases in automobile manufacturing employment. In fact, the estimated increase in auto manufacturing jobs closely matched the employee count of the plant. Thus, the statistically insignificant findings with respect to the broadband network cannot be blamed on either the data or the empirical strategy used in the study.

B. Incumbent Responses to Municipal Entry

In another empirical study of the effects of municipal broadband, Seamans (2012) evaluates the timing of upgrades by private cable systems from one-way to two-way communications between 2001 and 2009.[197] One factor Seamans believes may affect this timing is the threat of municipal entry, which he defines to be the presence of a municipal electric utility in the cable system's market. Whether or not the cable system is in a state that limits the cross-subsidization of municipal broadband networks is also considered in the empirical model. Setting aside the numerous complexities of his model, the relationships of interest may be written concisely as,

$$y_i = \alpha + \beta M_i + \lambda M_i X_i \tag{13}$$

where y_i is the timing of the upgrade by cable system i, M is a dummy variable equal to 1.0 if the cable system is in a market serviced by a municipal electric utility (0 otherwise), and X is a dummy variable equal to 1 if the cable system is in a state that prohibits the cross-subsidization of a municipal broadband network (0 otherwise). There are many variables in the model accounting for

195. *Id.* at 5.

196. *Id.* at 25.

197. Robert C. Seamans, *Fighting City Hall: Entry Deterrence and New Technology Deployment in Local Cable TV Markets*, 58 MGMT. SCI. 461, 461–475 (2012), https://www.jstor.org/stable/41431664 [https://perma.cc/7JPU-WQAE].

cable system characteristics, market demographic, and geographic indicators, which we subsume into the parameter α for expositional purposes.

If we think of the variable *y* as the *speed of upgrade*, as does Seamans, the model can be interpreted as follows: In a state without a cross-subsidy prohibition ($X = 0$), then the upgrade effect of being in a market with a municipal electric utility ($M = 1$) is measured by the coefficient β. If β is positive, for instance, then the presence of a municipal electric utility makes for a faster upgrade. Alternately, if a cross-subsidy prohibition is in effect ($M = X = 1$), then the effect of the municipal utility on the upgrade timing is $\beta + \lambda$.

The estimates of the parameters of interest are:

$$y_i = \alpha + 0.056 \cdot M_i - 0.068 \cdot M_i X_i \quad (14)$$

where both the estimated coefficients (β and λ) are statistically different from zero at the 10% level or better. The positive coefficient β indicates that cable systems operating in markets with a municipal electric utility and no cross-subsidy law upgrade *faster* ($\beta > 0$). Recall, however, that if the cable system operates in a state with a cross-subsidy restriction, then the effect of the municipal utility is $\beta + \lambda$, which is negative ($\beta + \lambda = 0.056\ 0.068- = -0.012$).[198] A Wald Test confirms this small difference (-0.012) is not statistically different from zero.[199] Since $\beta + \lambda = 0$, the cross-subsidy prohibition appears to entirely eliminate the "threat" of municipal entry into the communications market. This portion of Seamans' empirical results is consistent with what the theoretical analysis predicted—municipal entry requires cross-subsidization. In states where cross-subsidies are prohibited, municipal entry is no longer a threat.

But what about the positive effect on upgrades in markets where cross-subsidized entry is possible? Seamans concludes this faster upgrade decision is strategic in nature. That is, it is an attempt to reduce the incentives of the municipal electric utility to cross-subsidize its entry into the communications market.[200] This conclusion is based on the empirical results indicating that cable systems in markets with a municipal electric utility do not offer advanced services more quickly despite the faster upgrades in network capability. So, while the systems upgrade sooner, they do not offer advanced services sooner because, as Seamans reasons, there is inadequate demand for these advanced services.

Seamans' results are consistent with our analysis suggesting municipal entry is uneconomic. Seamans' results imply that cable systems facing the threat of municipal entry make uneconomic upgrade decisions to deter entry. Even after making such investments, the private systems are unwilling even to incur the additional cost of using those assets to provide advanced services, reflecting low consumer demand. What type of entry is deterred by

198. *Id.* at Table 6, Column 7.
199. *Id.* at 471.
200. *Id.*

uneconomic investments? A plausible answer is that only uneconomic entry is deterred by uneconomic investments. Thus, Seamans' empirical evidence supports our theoretical claim that municipal entry is uneconomic and requires cross-subsidization. Consequently, Seamans' empirical work suggests that municipal entry into communications markets likely reduces economic welfare.

C. Welfare Effects of Municipal Entry

We have also demonstrated theoretically that the threat of municipal entry into communications markets may reduce private investment in broadband networks. Wilson (2016) offers evidence supporting that expectation, concluding: "The probability of private provision of fiber increases by 0.76 percentage points under a ban on municipal provision."[201] While the effect is very small (as municipal entry is rare), the empirical result is consistent with our theoretical prediction that municipal entry crowds out private investment.

Wilson concludes, however, from simulations based on his empirical model that municipal entry increases economic welfare (or, more accurately, that laws limiting municipal entry reduce economic welfare). Specifically, his simulations indicate that a prohibition on entry increases the profits of private providers by $3.01 billion and reduces consumer surplus by $1.21 billion (these sums are discounted over 30 years). Theoretically, this tradeoff between firms and consumers, which increases welfare (the gains exceeds the losses) is uncontroversial. Wilson states further that the ban reduces the profits to municipal systems by $20.87 billion, so that the net effect of the prohibition is a reduction in welfare of $19.07 billion. This "profit" to municipal networks is inconsistent with our analysis and the financial performance of municipal systems. There is no evidence (of which we are aware) that municipal systems are ever profitable, but plenty of contrary evidence exists.

While Wilson's simulation involves a number of questionable assumptions (perhaps necessary for computation), such as assuming that revenues equal profits and that firms offer only a standalone broadband product,[202] there is a simple explanation for this discrepancy related to profit. In Wilson's simulations, he assumes that no private firm will enter a profitable market; that is, if there are two private providers, then it is assumed a third will not enter even if entry is profitable. Municipalities are then permitted to build networks in these areas. If private firms pursue profits, as they do, then there would be no profitable markets for municipalities to enter. Wilson's welfare claims are based, therefore, on assumptions we find implausible. Municipalities enter where private firms will not, implying that there are

201. Kyle Wilson, *Does Public Competition Crowd Out Private Investment* 34 (NET Inst. Working Article No. 16-16, 2017), https://Articles.ssrn.com/sol3/Articles.cfm?abstract_id=2848569 [https://perma.cc/K3EF-G2TD].

202. *Id*. at 21–22, Equation 11.

insufficient returns to justify private entry. These peculiar assumptions apply to Wilson's simulation analysis. His empirical finding that the threat of municipal entry deters investment is not based on such assumptions.

D. Municipal Provider Prices

A few studies have, over the years, attempted to perform price comparisons between municipal and private broadband providers. These studies universally—and incorrectly—compare the prices of municipal systems to the prices of private operators within the same market. By the economic principle of the "law of one price," however, the quality-adjusted prices of firms in the same market must be equal.[203] Within a single market, sellers compete for the patronage by offering attractive price-quality combinations to consumers, and if one firm offers a highly favorable price-quality combination relative to its rivals, then all consumers will choose that firm's offering, leaving the higher-priced firms without revenue. Rational, efficient sellers will keep their price-quality offerings in line with rivals so as remain profitable. Therefore, prices within a market will converge to equal (quality adjusted) prices. The proper comparison is to compare prices across markets and determine whether market prices in cities with municipal broadband systems are systematically lower than in cities without government-run networks.

There are other significant errors in pricing studies. For instance, in order to make meaningful price comparisons across public and private-sector broadband providers, it is first essential to collect prices on nearly identical services, since there is no expectation that prices for different things will be similar. Studies by Cooper (2014) and Talbot, Hessekiel, and Kehl (2018)

203. P. DAVIS AND B. GARCÉS, QUANTITATIVE TECHNIQUES FOR COMPETITION AND ANTITRUST ANALYSIS 170-1 (2010). This idea is normally attributed to George Stigler. G.J. Stigler, *Imperfections in the Capital Market*, 75 J. OF POL. ECON. 287, 287–92 (1967), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.541.5796&rep=rep1&type=pdf ("The function of a market is to permit the exchange of goods, so an efficient market (clearly a normative concept) permits all exchange which the traders prefer to nonexchange. If we assume away all costs of trading, the efficient market will achieve every desired exchange for homogeneous goods when there is only one price. This condition is clearly necessary: with two (or more) prices, one seller is receiving less than some other buyer is paying, and both would prefer to trade with one another than with whomever they are trading.").

were criticized for failing to compare prices for similar services.[204] Like these prior studies, a recent study by Chao and Park (2020) ignores the law of one price by comparing within-market prices.[205] Data errors also plague this recent report. All these reports drew criticism for failing to account for the cross-subsidies inherent in the municipal supply of broadband services.

Like all these mentioned studies, Cooper (2014) ignores the law of one price and conducts within-market price comparisons. That error is fatal, but as detailed in Ford (2014), the analysis is a good example of the failure to compare the prices among like services.[206] In one comparison, Cooper (2014) relates prices between the triple-play service offerings (video, voice, and broadband) of Charter Communications and the municipal provider in Bristol, Virginia (BVU).[207] The municipal provider offered a triple-play service for $54.39 monthly, whereas its private-sector rival offered a triple-play service for $99.97. This near $45 difference is sizeable and incompatible with the law of one price. Upon inspection of the service offerings, however, it is immediately apparent that the services are dissimilar. First, consider the triple-play offer of the municipal provider. For $55, BVU offered the customer a broadband service of 6 Mbps, 27 channels of video (8 in High Definition), and a fully-featured phone service but without unlimited calling. BVU also offered a somewhat limited local calling area. It did not provide long-distance minutes. The customer was charged $0.08 per minute interstate and $0.10 per minute in-state rates for long-distance calls. Charter's offering of service in the city (at the time the review of Cooper's work was written) was $89.97.[208] For this fee, the customer received a 30 Mbps broadband connection (5 times faster than BVU), at least 125 channels of video (60 HD signals), and a fully-featured, unlimited-calling voice service. Plainly, these two services are in no sense comparable.

Cooper (2014) also ignored the fact that in Bristol the corruption-plagued municipal broadband system was cross-subsidizing its broadband service. An audit of that system by the state's Auditor of Public Accounts

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204. Mark Cooper, *Comparing Apples to Apples: How Competitive Provider Services Outpace the Baby Bell Duopoly*, CONSUMER FED'N OF AM. (Nov. 21, 2013), http://www.consumerfed.org/pdfs/comparing-apples-to-apples-11-2013.pdf [https://perma.cc/8L3N-EWHE]; George S. Ford, *A Review of the Berkman Center's Price Survey of Municipal Broadband Markets*, PHX. CTR. POL'Y (Jan. 24, 2018), http://www.phoenix-center.org/perspectives/Perspective18-01Final.pdf [https://perma.cc/NB26-47MH]; George S. Ford, *Do Municipal Networks Offer More Attractive Service Offerings than Private Sector Providers?*, PHX. CTR. POL'Y PERSPECTIVE (Jan. 27, 2014), https://Articles.ssrn.com/sol3/Articles.cfm?abstract_id=2407148 [https://perma.cc/E3FZ-5RS9]; David Talbot et al., *Community-Owned Fiber Networks: Value Leaders in America*, BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y (Jan. 2018), https://cyber.harvard.edu/publications/2018/01/communityfiber [https://perma.cc/PH9W-DFMW].

205. Becky Chao & Claire Park, *The Cost of Connectivity 2020*, OPEN TECH. INST. (July 15, 2020), https://www.newamerica.org/oti/reports/cost-connectivity-2020.

206. Ford, *supra* note 204.

207. Cooper, *supra* note 204. A detailed analysis of Cooper (2014) is provided in Ford (2014).

208. This differential may simply be the consequence of price reduction occurring between surveys.

concluded the system did "not have the resources to continue operating without cross-subsidization."[209] The audit also concluded that the "BVU Authority [had] cross-subsidized services within OptiNet over the years [including] improperly writing off $13.7 million of interfund debt between OptiNet and the Electric Division."[210] This one instance of cross-subsidy from the electric division amounts to over $1,000 per customer. Bristol spent $185 million to build the network ($23 million from the federal government) and it was sold in 2016 for $50 million.[211]

Cooper (2014) also offers several statistical tests of differences between private and municipal providers using data from both domestic and international firms.[212] In all, Cooper conducts fifty-two statistical tests. While Cooper concludes the evidence shows lower prices by municipal systems, only nine of these tests indicate that municipal providers charge lower prices than their private counterparts (at the 5% significance level). For twenty-four comparisons, municipal providers charge higher prices. Sixteen of the tests do not render statistically significant results, implying that the prices between the two types of providers are no different. Cooper's conclusions, therefore, were inconsistent with his evidence. The majority of Cooper's (2014) statistical tests indicate either no difference in prices or that municipalities charge higher prices.

Talbot, Hessekiel, and Kehl (2018) compare prices between municipal and private providers collected from a survey in 2015 (three years prior to the study's release) concluding that municipal systems typically charge lower prices—often substantially lower—for broadband services than do the private providers operating in the same market. Like Cooper (2014), the authors erroneously compare within-market prices and do not compare prices for the same services but rather compare "prices for the lowest-cost program."[213] This selection of packages to compare suffers from a serious statistical problem. The authors are selecting the service package based on prices for the purpose of comparing prices. This error is referred to as selection bias, and any comparison subject to that error is presumably biased.

Like Cooper (2014), the authors compare service packages that are not alike. In a number of cases, the services compared have speed differences (measured in Mbps) of 400% (100 Mbps versus 25 Mbps). It is little surprise that prices differ for different things. This empirical strategy of comparing

209. Martha S. Mavredes, *Review of Bristol Virginia Utilities Authority*, AUDITOR OF PUB. ACCTS. (Oct. 2016), http://www.apa.virginia.gov/reports/BVUA2016-web.pdf [https://perma.cc/76GG-TFZE].

210. *Id*. at Executive Summary.

211. James A. Bacon, *Broadband Boondoggles in Southwest Virginia*, BEARINGDRIFT (Nov. 30, 2017), https://bearingdrift.com/2017/11/30/broadband-boondoggles-southwest-virginia [https://perma.cc/MV2Y-SBBZ]; Tiana Bohner, *Bristol, Va. Approves Sale of BVU's Optinet to Sunset Digital*, WCYB NEWS (Mar. 15, 2016), http://www.wcyb.com/news/bristol-va-approves-sale-of-bvus-optinet-to-sunset-digital/14609711 [https://perma.cc/L3CW-3EC9]; Nick Shepherd, *Sunset Digital Clears Hurdle in Bid to Purchase BVU OptiNet*, KINGSPORT TENN. TIMES NEWS (Aug. 3, 2017), http://www.timesnews.net/Business/2017/08/03/Sunset-Digital-clears-hurdle-in-bid-to-purchase-BVU-OptiNet [https://perma.cc/MEC2-VYLM].

212. Cooper, *supra* note 204.

213. Talbot, *supra* note 204, at 3.

prices of unlike things in a sample collected based on price, is plainly not a good one.

In response to Talbot, Hessekiel, and Kehl (2018), Ford (2018) obtained updated data from several markets for comparison purposes in January 2018.[214] This new survey was limited to markets in which Charter Communications competed with a municipal broadband provider. Charter charges a uniform price across markets whether with or without a municipal system, and it was a listed provider in about half the markets surveyed in the *Berkman Report*.[215] The company imposes no cap on usage and imposes no charge on the modem, thus simplifying the construction of a "price." Ford surveyed 14 cities.

For its 100 Mbps residential service (its baseline service at the time), Charter charged $64.99 with a first-year promotion of $44.99. To account for the promotion, Ford (2018) calculated the average price over a three-year window with the promotion applying only in the first year. The average monthly price over three years was $58.32. To maximize the comparability of the services for the municipal systems, Ford (2018) obtained prices for municipal providers for a standalone Internet service closest to a 100 Mbps service level, which many offered.

Table 3. Price Comparisons (Jan 17, 2018)
(Δ = Muni Price - Charter Price)

City	Mbps	Δ: Year 1	Δ: 3 Year
Morristown, TN	100	-5.04	-18.37
Highland, IL	100	19.96	6.63
Pulaski, TN	100	38.56	25.23
Dalton, GA	100	19.96	6.63
Bristol, VA (1)	75	4.96	-8.37
Bristol, VA (2)	150	14.96	1.63
Opelika, AL	100	20.00	6.67
Clarksville, TN	250	-0.04	-13.37
Monticello, MN	100	0.96	-12.37
Bristol, TN	80	24.96	11.63
Reedsburg, WI	100	4.96	-8.37
Crosslake, MN	90	54.96	41.63
Tullahoma, TN	100	14.96	1.63
Jackson, TN	100	80.01	66.68
Churchill, NV	100	5.00	2.79
Average		19.94	6.61
Conf. Interval (95%)		(10.0, 32.1)	(-3.3, 18.7)

For his statistical analysis, Ford defined P_M as the price for the municipal system and P_C as the price for Charter's service. He computed the average monthly difference in prices between the municipal system and Charter, or $\Delta = P_M - P_C$. A negative number indicates that the municipality charges a lower price than Charter. The differences are summarized in Table 3

214. *Id.*
215. *Id.*

for both the first-year and three-year averages. Charter's prices were lower than the municipality's prices for thirteen of the fifteen comparisons in the sample during the first year of service. For the two municipalities charging lower prices, the monthly difference was only $5.04 in one case and $0.04 the other. On average, Charter's prices were lower by $19.94 per month. Table 3 shows some very large price differences. In Jackson, Tennessee, for example, a residential 100 Mbps service was priced at $125 per month, well above the prices charged by Charter for the same service level. Large differences were also found in other cities, including Bristol, Pulaski, Opelika (Alabama), and Crosslake (Minnesota). Clarksville, Tennessee's minimum service level of 250 Mbps was well above the 100 Mbps benchmark, but the price was roughly equal to Charter's 100 Mbps service. The difference over the three-year span was smaller ($6.61), but Charter's prices remained well below that of the municipal systems.

The sample size is relatively small, but some statistical analysis is feasible. Assuming the price differences in Table 3 reflect the typical pricing differentials in markets where both a public and a private broadband firm (at least a major private provider) operate, Ford (2018) constructed an empirical distribution of price differences using the bootstrap method (Δ_b).[216] The bootstrap is a relatively low power technique, so the confidence intervals could be relatively wide, which favors a finding of "no difference." For the 1-year comparisons in Table 3, the 95% confidence interval of Δ_b is bounded by $10.0 to $32.1.[217] This confidence interval does not include zero (marked by the vertical lines in the figure), indicating that the municipal systems' prices were systematically higher for customers in the first year where promotional discounts were available from private providers. Over the three-year window, Charter's prices were lower in ten of the fifteen comparisons. The average savings offered by the private provider is $6.61 per month. The empirical distribution of this differences has a 95% confidence interval of -$3.3 to $18.7. Though most of the distribution is positive, the confidence interval includes zero, so it was impossible to reject the hypothesis that private and municipal systems charge equal prices for something very close to a 100 Mbps standalone broadband service over a three-year period that includes promotional discounts.

Ford (2018) also conducted statistical analysis of the prices reported by Talbot, Hessekiel, and Kehl (2018). Given the wide disparities in the service offerings—the authors compared, for instance, the price of a 100 Mbps service to a 25 Mbps service in Chattanooga—Ford (2018) converted the

216. BRADLEY EFRON & R.J. TIBSHIRANI, AN INTRODUCTION TO THE BOOTSTRAP (1994). The bootstrap employs 1,000 replications.

217. The bootstrap employs 1,000 replications.

prices into a price-per-megabit index.[218] Price-per-megabit is not a very informative statistic because it is highly non-linear and can render perverse results.[219] For instance, a price-per-megabit of $1 is not necessarily better for consumers than a price-per-megabit of $2. The price-per-megabit of $1 is based on a gigabit service level having a monthly price of $1,000, more than nearly any consumer could afford. The price of $2 per-megabit might be for a 25 Mbps service for a monthly price of $50. Nearly every consumer would prefer the lower priced service despite its lower speed. Despite these flaws, Ford (2018) used price-per-megabit (*PMB*) out of necessity to make comparisons across the widely disparate service levels listed in the Talbot, Hessekiel, and Kehl study.

There were 61 such prices, with 27 belonging to municipal systems and 34 to private providers. For the municipal sample, the average price-per-megabit was $1.464, and for the private providers it was $1.482, for a difference of 0.018. The t-statistic of the means difference was 0.11 with a probability level of 0.91. The null hypothesis of equal prices could not be rejected at anywhere near standard significance levels. Thus, by this measure of price, the prices of the two sorts of providers are the same. Testing for a

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218. U.S. GOV'T ACCOUNTING OFF., GAO-10-49 CURRENT BROADBAND MEASURES HAVE LIMITATIONS, AND NEW MEASURES ARE PROMISING BUT NEED IMPROVEMENT 3 (2009), https://www.gao.gov/new.items/d1049.pdf [https://perma.cc/VQ7L-VC5H] ("While some stakeholders suggested additional measures, such as price per megabit per second, opinions were mixed on these alternatives, with consumer advocacy groups, academicians, and representatives from think tanks generally in favor of and broadband providers and related trade and industry groups generally against them."); *Further Reply Comments of Consumers Union, Consumer Federation of America, Free Press and Public Knowledge*, WC Docket No. 07-38 (Sept. 2, 2008), at 8, https://ecfsapi.fcc.gov/file/6520064157.pdf [https://perma.cc/D26J-F5GS]; Mark Cooper, *The Central Role of Wireless in the 21st Century Communications Ecology: Adapting Spectrum and Universal Service Policy to the New Reality*, Unpublished Manuscript presented at the 2011 Telecommunications Policy Research Conference (2011), https://ssrn.com/abstract=1979789 [https://perma.cc/2BM3-N6Q5]; Cyrus Farivar, *DC Think Tank Tells Americans that Their Broadband is Really Great,* ARS TECHNICA (Feb. 13, 2013), https://arstechnica.com/information-technology/2013/02/dc-think-tank-says-state-of-us-broadband-is-good-and-getting-better [https://perma.cc/L443-E932]; Chiehyu Li & James Losey, *Price of the Pipe*, NEW AM. (Apr. 15, 2010), https://www.newamerica.org/oti/policy-Articles/price-of-the-pipe [https://perma.cc/75HQ-6PEK]; R.D. Atkinson, *The Role of Competition in a National Broadband Policy*, 7 J. ON TELECOMMS. & HIGH TECH. L. 1, 1–18 (2009), http://www.jthtl.org/content/articles/V7I1/JTHTLv7i1.pdf [https://perma.cc/9YFH-89XG]; Robert D. Atkinson et al., *Explaining International Broadband Leadership*, INFO. TECH. & INNOVATION FOUND. (Feb. 2013), https://www.itif.org/files/ExplainingBBLeadership.pdf [https://perma.cc/WTK7-W527]. Others reject it. *See*, *e.g.*, Richard Bennett et al., *The Whole Picture: Where America's Broadband Networks Really Stand*, INFO. TECH. & INNOVATION FOUND. 14 (Feb. 2013), https://www.unh.edu/broadband/sites/www.unh.edu.broadband/files/media/kb-reports/2013-whole-picture-america-broadband-networks.pdf [https://perma.cc/B7QS-YHAC]; *Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy from Around the World*, BERKMAN CTR. FOR INTERNET & SOC'Y (Feb. 2010), http://cyber.harvard.edu/sites/cyber.harvard.edu/files/Berkman_Center_Broadband_Final_Report_15Feb2010.pdf [https://perma.cc/7BM2-NSKX].

219. George S. Ford, *The Misuse of International Broadband Rankings Continues*, @LAWANDECONOMICS BLOG (Feb. 19, 2013), http://www.phoenix-center.org/blog/archives/1156 [https://perma.cc/H9PH-4N9V].

difference of medians rather than means using the non-parametric Wilcoxon rank-sum test, Ford (2018) reported a z-statistic is -0.20 with a probability of 0.83.[220] The non-parametric Hodges-Lehmann test rendered a Δ of -0.069 with a confidence interval bounded by -0.31 and 0.33.[221] Based on both tests, it was impossible to reject the null hypothesis that the medians are the same.

Ford's (2018) analysis of the Cooper (2014) and Talbot, Hessekiel, and Kehl (2018) studies performed within-market price comparisons. As would be expected by the law of one price, the prices were approximately the same. Data from a recent study by Chao and Park (2020), however, permitted a between-market comparison of prices because the study surveyed market with and without municipal broadband systems. While Chao and Park (2020) ignored the law of one price by comparing within-market prices, Ford (2020) used the data from this study to conduct the proper comparison.[222]

Chao and Park (2020) surveyed data on the prices of municipal and private providers in fourteen cities. This data included multiple prices for most providers and included modem fees and promotional pricing. About 10% of the sample prices were by municipal providers; municipal providers operated in five of the fourteen cities. Ford (2020) used this data to conduct *within*- and *between*-market price comparisons by regression analysis. Due to incorrect data, Ford (2020) eliminated one municipal city from the sample.

For the within-market comparison (which is senseless by the law of one price), Ford (2020) analyzed 165 prices across 13 cities and 26 providers for service with at least 100 Mbps download speeds. Mean prices for municipal systems was found to be $74.13 and for private providers to be $74.79, a small difference of $0.66. Statistical tests indicated that the average prices were statistically equal (the t-statistic on the means differences was only 0.16). For broadband services with download speeds of at least 25 Mbps, the price difference was even smaller, with municipal systems charging about $0.26 more. Again, statistical testing indicated that the mean prices were statistically equal. The law of one price holds.

Comparing prices across markets with and without government-run networks, which is the proper comparison, the average broadband prices in cities with municipal systems were found to be higher than those in cities without government-run networks. The average price in cities without municipal networks was $70.85, lower than the $87.80 average in cities with government-run networks (a 24% difference). The price difference was statistically different from zero at the 5% level. Accounting for differences among cities in median income, population age, and average housing rents, the difference was slightly smaller—about 12%—but still statistically

220. H. B. Mann & D. R. Whitney, *On a Test Whether One of Two Random Variables is Stochastically Larger than the Other*, 18 ANNALS OF MATHEMATICAL STAT. 50, 50–60 (1947).

221. Roger Newson, *Parameters Behind "Nonparametric" Statistics: Kendall's Tau, Somers' D and Median Differences*, 2 STATA J. 45 (2002).

222. George S. Ford, *The Open Technology Institute's Cost of Connectivity 2020 Report: A Critical Review,* PHOENIX CTR. POL'Y PERSP. No. 20-06 (July 20, 2020), https://www.phoenix-center.org/perspectives/Perspective20-06Final.pdf.

different than zero. The Chao and Park (2020) data reveal that prices in cities with municipal networks are higher.

In all, the statistical evidence comparing prices for like services between municipal and private providers within the same market mostly indicates that private providers charge equal prices on average. This result is expected by the law of one price. Comparing prices across markets with and without a government-run networks, however, reveals that prices are higher in markets with government-run networks. There is no reliable evidence, either for within- or between-market comparisons, that government-run networks lower prices.

IX. OUTSTANDING LEGAL ISSUES: PREEMPTION, PREDATION, AND DUE PROCESS

Our interest in municipal broadband is not limited to the economics. There are several significant legal issues that come into play when the government provides services in competition with private firms.

To wit, state laws overseeing municipal broadband include (almost exclusively) provisions that restrain the subsidization and cross-subsidization of municipal systems. One critic of such laws sums up the municipal broadband issue, and oddly enough the economic analysis above, quite well, stating:

> While [these subsidy] restraints serve a critical function in preserving private ISPs' ability to compete effectively, they also impede public network construction by making the public network less financially viable. Assuming private ISPs refuse to enter the market because they do not believe they can provide service at a profit, or even at a break-even point, no municipality would be able to enter an unserved market given these restraints. The entire reason for municipal networks in unserved markets is to overcome the private sector's unwillingness to enter the market.[223]

While this quote is from an article *advocating* for municipal broadband, it lays out, perhaps inadvertently, the dangers of municipal entry and the reason state laws exist.[224]

As noted above, municipal broadband is unquestionably subsidized entry, a finding that flows directly from the "no one else will" argument made

223. Jeff Stricker, *Casting a Wider "Net": How and Why State Laws Restricting Municipal Broadband Networks Must be Modified*, 81 GEO. WASH. L. REV. 589, 615 (2013).

224. The FCC's *2015 Preemption Order*, *supra* note 6, at ¶¶ 62, 107, 112, made the same type of argument, describing the North Carolina law's restrains on subsidization as a deterrent to entry ("even if we focus on taxpayer protection, as some request, the evidence before us suggests that the Tennessee and North Carolina laws before us actually increase the likelihood of failure because of the barriers that they erect to the successful deployment of broadband infrastructure by these entities").

in this quote and by advocates of municipal entry. Without subsidies, municipal entry is highly improbable, for the same reasons private entry does not occur. Municipal entry cannot "promote competition." If anything, the count of providers will remain unchanged or fall. Moreover, when the government subsidizes the entry of its own firm into a market and drives down price, there is a reasonable case that the entry is predatory and thus anticompetitive. Finally, it is always the case that a municipality operating a broadband network is simultaneously a regulator of the private sector providers with which it competes. Naturally, important legal questions surrounding preemption, antitrust, and due process arise.

A. Preemption of State Laws Governing Municipal Entry

Considering both the potential predatory nature of municipal entry plus the very real possibility that taxpayers (and captive ratepayers) could be left holding the bag for uneconomic ventures, it is little surprise that some states have passed laws to oversee municipal entry. Municipal broadband is not a means to "promote competition;" it is a means to displace or *eliminate it*. Moreover, it is not unreasonable to question how the private sector can compete with government-owned firms receiving thousands of dollars in subsidies for each of their customers. Unlike the claims of municipal broadband proponents, these laws do not simply reflect the lobbying prowess of the broadband companies;[225] instead, these laws reflect a reasoned assessment by state legislatures of the nature and risks of municipal entry. Perhaps some provisions of these laws are poorly crafted, but state control of municipal entry has sound economic support. State control over its political subdivisions is certainly no more radical and has far better support than does the government subsidizing itself to enter a business to *compete* with the private sector.[226] Still, having lost in state legislatures, opponents of municipal broadband laws have turned to the FCC for relief, hoping that the agency can use its authority under the Communications Act to preempt such laws. In the next section, we review the relevant precedent.

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225. *See, e.g.*, T. O'Boyle & C. Mitchell, *The Empire Lobbies Back: How Big Cable Killed Competition in North Carolina*, INST. FOR LOCAL SELF RELIANCE (Jan. 2013), http://ilsr.org/wp-content/uploads/2013/01/nc-killing-competition.pdf [https://perma.cc/F7EY-F92V]; *2015 Preemption Order*, *supra* note 6, at ¶ 38, and attached Statement of FCC Chairman Tom Wheeler ("In Tennessee and North Carolina, and in 17 other states, community broadband efforts have been blocked or severely curtailed by restrictive state laws—laws often passed due to heavy lobbying support by incumbent broadband providers"). Intense lobbying says nothing about the wisdom of a particular piece of legislation. *See also* Donna Leinwand & Emily Bazar, *Walsh's Murder Had Impact Across State,* USA TODAY (Dec. 17, 2008), http://usatoday30.usatoday.com/news/nation/2008-12-17-walshinside_N.htm [https://perma.cc/PR5N-T4R6] ("Influenced by the Walsh case and intense lobbying by the child's parents, Congress passes the Missing Children Act").

226. *Cf.* Nixon v. Missouri Mun. League, 541 U.S. 125 (2004).

1. *Nixon v. Missouri Municipal League*

One of the boldest provisions in the Telecommunications Act of 1996 was Section 253, which provided the FCC with the then-new and narrow authority to preempt state laws and regulations. Under Section 253(a), "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability *of any entity* to provide any interstate or intrastate telecommunications service."[227] If the FCC determines that a "State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a)" then the "[FCC] shall preempt ... to the extent necessary…."[228] Using this authority, the FCC has a successful track record of preempting state laws and regulations which that deter entry for private-sector network deployment.[229]

Seizing upon the language of Section 253(a), in 2001 proponents of municipal broadband argued that because municipal providers are an "entity," the FCC should preempt those state laws which either prohibit or restrict municipal broadband deployment.[230] While there was tremendous political pressure placed upon the Agency to preempt state legislatures at the time, a Democratic-controlled FCC unanimously (albeit "reluctantly") ruled that the agency lacked any legal authority to preempt such laws.[231]

Undeterred, proponents of municipal broadband appealed the FCC's rejection all the way to the United States Supreme Court in the case of *Nixon v. Missouri Municipal League.*[232] The Court, however, agreed with the FCC, finding that Section 253 does not provide the agency with preemption authority in this instance.[233] According to the Court, the phrase "any entity" in Section 253 did not include "the State's own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors') delivery of [telecommunications] services."[234]

Indeed, the Court's rationale for rejection was straightforward: "[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism,

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227. 47 U.S.C. § 253(a) (emphasis added).

228. 47 U.S.C. § 253(d).

229. *See, e.g*., Public Utility Commission of Texas*, Memorandum Opinion and Order*, 13 FCC Rcd 3460, (2007).

230. Missouri Municipal League*, Memorandum Opinion and Order* 16 FCC Rcd 1157 (2001).

231. *Id.* Concurring Statement of William E. Kennard ("We vote reluctantly to deny the preemption petition of the Missouri Municipals because we believe that HB 620 effectively eliminates municipally-owned utilities as a promising class of local telecommunications competitors in Missouri. Such a result, while legally required, is not the right result for consumers in Missouri. Unfortunately, the Commission is constrained in its authority to preempt HB 620 by the D.C. Circuit's *City of Abilene* decision and the U.S. Supreme Court's decision in *Gregory v. Ashcroft* that require Congress to state clearly in a federal statute that the statute is intended to address the sovereign power of a state to regulate the activities of its municipalities.").

232. *Nixon*, 541 U.S. 125.

233. *See id.* at 131–32.

234. *Id*. at 128–29.

and read in a way that preserves a State's chosen disposition of its own power…"[235] Thus, reasoned the Court, permitting preemption in this circumstance "[W]ould come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, 'are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'"[236]

Significantly, the Court went out of its way to note that "it is well to put aside" the public policy arguments favoring municipal broadband to support any "generous conception of preemption." Why? Because the issue of preemption is one of Constitutional law and, as such, "*the issue here does not turn on the merits of municipal telecommunications services.*"[237] This holding is critical and helpful in sniffing out weak arguments for preemption. In essence, the Court determined that it matters not how sweet municipal broadband can be made to sound, nor how bountiful its alleged benefits—as a matter of Constitutional law, the federal government—and by extension the FCC—has no legal authority to intervene into the relationship between states and their political subdivisions.

2. The FCC's *2015 Preemption Order*

Despite this defeat in *Nixon*, proponents of municipal broadband spent the next decade trying to find an alternative legal theory of preemption of state laws controlling how municipalities offer such services. With the D.C. Circuit's 2014 ruling in *Verizon v. FCC*,[238] many believed they had perhaps finally found one—namely, Section 706 of the Communications Act.[239] As shown below, the use of Section 706 could not pass Constitutional muster.

i. *Background*

Under Section 706(a), the FCC may use, "[I]n a manner consistent with the public interest, convenience and necessity, … regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[240] Section 706(b), in turn, states that if the FCC determines that advanced telecommunications capability is not "being deployed to all Americans in a reasonable and timely fashion," then the FCC "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[241]

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235. *Id.* at 141.
236. *Id.*
237. *Id.* at 131–32 (emphasis added).
238. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).
239. 47 U.S.C. § 1302; George S. Ford & Lawrence J. Spiwak, *Justifying the Ends: Section 706 and the Regulation of Broadband*, *supra* note 81.
240. 47 U.S.C. § 1302(a).
241. 47 U.S.C. § 1302(b).

Whether Section 706 provides the FCC with an affirmative grant of authority has been hotly debated over the last several years. While the FCC had originally viewed Section 706 as hortatory, searching for a sustainable legal theory under which to justify its *2010 Open Internet Rules,* the FCC reversed course and held that Section 706 did provide an affirmative source of regulatory authority.[242] Viewing Section 706 in the context of the broader Communications Act, the D.C. Circuit ultimately held in *Verizon* that the FCC's interpretation of Section 706 as a grant of regulatory authority was "a reasonable interpretation of an ambiguous statute."[243]

While a proper reading of the caselaw would have revealed that the FCC's new-found authority under Section 706 should be limited,[244] the exact opposite occurred: Section 706 became an overbroad tool that the agency believed conferred upon it almost unlimited power.[245] Accordingly, seizing upon this statutory language of Section 706, then-FCC Chairman Tom Wheeler, a vocal proponent of municipal broadband,[246] boldly stated after the *Verizon* decision came down that "I believe the FCC has the power—and I intend to exercise that power—to preempt state laws that ban competition from community broadband."[247]

Taking up Chairman Wheeler's invitation, the municipal provider in Chattanooga, Tennessee, filed a petition with the FCC asking the agency to use its authority under Section 706 to preempt a Tennessee state law which, the municipal entity claims, prevents it from expanding beyond its existing

242. *See* Preserving the Open Internet, *Report and Order*, 25 FCC Rcd. 17905 (2010) at para. 117 et seq., https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf, *rev'd, Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

243. 740 F.3d at 637. There was some debate whether Section 706(a) is independent from Section 706(b), which states that if the Commission determines that advanced telecommunications capability is not "being deployed to all Americans in a reasonable and timely fashion", the FCC "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." While the agency once believed that Section 706(b) was required to trigger Section 706(a), the FCC ultimately read the D.C. Circuit's opinion in *Verizon* to mean that Sections 706(a) and 706(b) are independent grants of authority. For a full discussion, *see* Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?—A Review of the Recent Caselaw,* 18 JO. OF INTERNET L. 1 (2015).

244. *Id.*

245. *See* Lawrence J. Spiwak, *USTelecom and its Aftermath,* 71 FED. COMMS. L. J. 39 (2019).

246. Tom Wheeler, *Removing Barriers to Competitive Community Broadband,* FED. COM. COMISSION BLOG (June 10, 2014), http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband [https://perma.cc/8YKE-R8SU].

247. Tom Wheeler, Chairman, Fed. Comm'ns Comm'n, Remarks before the National Cable & Telecommunications Association (Apr. 30, 2014), http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0430/DOC-326852A1.pdf [https://perma.cc/WU7Q-7K6C].

franchise territory.[248] In addition, the City of Wilson, North Carolina, filed a similar petition for the FCC to preempt "level playing-field" requirements designed to prevent government-owned networks from "crowding out" private sector investment[249] (a risk, by the way, which the FCC specifically recognized in its *2010 National Broadband Plan*).[250] The White House, sensing political gold with its base, jumped on the bandwagon and sent a subtle signal of support for the Chattanooga and North Carolina petitions by having President Obama call for policies that promote broadband connectivity in his 2014 State of the Union speech.[251] Given such Presidential political cover, the FCC, although an independent agency, followed through on President Obama's promise and granted both petitions under Section 706 of the Communications Act.[252]

ii. *The FCC's Legal Argument*

Recognizing that they were bound by the Supreme Court's holding in *Nixon*, the FCC did not seek to preempt the Tennessee and North Carolina laws outright. Instead, the FCC came up with a rather innovative legal argument: According to the FCC, once a state has made the decision to permit municipal broadband generally, then the FCC has the authority under Section 706 to preempt any state laws which impose restrictions on the ability of these municipalities to deploy broadband infrastructure—in the case of Tennessee, territorial restrictions, and in the case of North Carolina, "level playing" field restrictions to ensure that municipal broadband providers did not crowd out private investment. The argument was that such state laws were a "barrier to

248. *EPB Petitions FCC to Enable Local Broadband Choice*, EPB (July 24, 2014), https://www.epb.net/downloads/legal/EPB-FCCPetition.pdf [https://perma.cc/4DV6-QDQJ]. With a speed generally unheard of for the Commission, four days later the agency established its pleading cycle. *See* Public Notice: Pleading Cycle Established for Comments on Electric Power Board and City of Wilson Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks, *Public Notice*, 29 FCC Rcd. 9239 (2014), http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0728/DA-14-1072A1.pdf [https://perma.cc/5K78-T2JR].

249. Petition of the City of Wilson, North Carolina, Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition, WC Docket No. 14-115 (filed July 24, 2014), http://apps.fcc.gov/ecfs/document/view?id=7521737310 [https://perma.cc/PV5S-9Q8W].

250. *National Broadband Plan*, *supra* note 2, at 153 ("Municipal broadband has risks. Municipally financed service may discourage investment by private companies. Before embarking on any type of broadband buildout, whether wired or wireless, towns and cities should try to attract private sector broadband investment.").

251. Barack Obama, President, United States, State of the Union Address (Jan. 28, 2014).

252. *2015 Preemption Order, supra* note 6.

infrastructure investment" generally rather than an outright prohibition (the latter being the focus of the *Nixon* case).[253]

At the root of the FCC's argument was the following logic: (1) broadband Internet access is inherently an interstate service and thus subject exclusively to FCC jurisdiction; (2) Congress charged the FCC to promote the deployment of broadband "to all Americans" under Section 706; (3) under the Supremacy Clause of the Constitution federal laws trumps state laws[254]; and, therefore, (4) the FCC may use Section 706 to preempt state laws which restrict the deployment of municipal broadband overall. As the FCC explained, because in its view the state laws at issue were *not* enacted to protect taxpayers[255] but instead enacted "under pressure from national cable companies, telephone companies, and the American Legislative Exchange Council (ALEC)",[256] the "states here are deciding that incumbent broadband providers require protection from what they regard as unfair competition and regulating to restrict that competition."[257] Thus, according to the FCC, such laws "step[] into the federal role in regulating interstate communications. Where those laws conflict with federal communications policy and regulation, they may be preempted."[258]

iii. *Legal Problems with the FCC's 2015 Preemption Order*

While clever, the agency's legal argument was perhaps too clever by half. Indeed, despite its protestations to the contrary, the FCC still had multiple *Nixon* problems.

For example, while the FCC conceded that it lacked the authority to preempt state laws that prohibit municipal broadband outright, the FCC argued that it has the authority to preempt the state laws in question because "a state has permitted a political subdivision to enter the market as a broadband provider, but also seeks to impose regulations on the municipal

253. *See, e.g.*, *id.* at ¶ 147. ("To be sure, as explained below, a different question would be presented if we were asked to preempt under section 706 a law that goes to a state's power to withhold altogether the authority to provide broadband. But where a state has authorized municipalities to provide broadband, and then chooses to impose regulations on that municipal provider in order to effectuate the state's preferred communications policy objectives, we find that such laws fall within our authority to preempt.").

254. *See, e.g.*, City of New York v. FCC, 486 U.S. 57 (1988); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

255. Indeed, the Commission was quick to dismiss any argument that such laws were designed to protect taxpayers from the well-documented record of municipal broadband failures. Instead, employing a rather remarkable bit of circular logic, the Commission turned the taxpayer protection argument on its head, arguing that "even if we focus on taxpayer protection, as some request, the evidence before us suggests that the Tennessee and North Carolina laws before us actually increase the likelihood of failure because of the barriers that they erect to the successful deployment of broadband infrastructure by these entities." *2015 Preemption Order, supra* note 6, at ¶ 62.

256. *Id.* at ¶ 37.

257. *Id.* at ¶ 147.

258. *Id.*

provider in order to effect separate communications policy goals."[259] In this case, argued the FCC, "[T]he state has crossed from a 'decision of the most fundamental sort for a sovereign entity' into a matter in which conflicting federal law is presumed to preempt under the Commerce Clause."[260] However, while the FCC was correct that federal law generally trumps inconsistent state law when it comes to communications policy, the focus of the FCC's preemption efforts here—i.e., territorial restrictions and "level playing field" rules—go directly to a state's control of its political subdivisions and, by extension, how it governs its citizens.

Moreover, the Court in *Nixon* appeared to reject specifically the FCC's argument that it was not preempting state laws that prohibit municipal broadband outright but only those laws which deter deployment after authority was provided. To illustrate the point, the Court offered the following hypothetical:

> [C]onsider the result if a State that previously authorized municipalities to operate a number of utilities including telecommunications changed its law by narrowing the range of authorization. Assume that a State once authorized municipalities to furnish water, electric, and communications services, but sometime after the passage of §253 narrowed the authorization so as to leave municipalities authorized to enter only the water business."[261]

In this circumstance, the Court noted that the:

> [R]epealing statute would have a prohibitory effect on the prior ability to deliver telecommunications service and would be subject to preemption. But that would mean that a State that once chose to provide broad municipal authority could not reverse course. A State next door, however, starting with a legal system devoid of any authorization for municipal utility operation, would at the least be free to change its own course by authorizing its municipalities to venture forth. *The result, in other words, would be the federal creation of a one-way ratchet. A State or municipality could give the power, but it could not take it away later.*[262]

In the Court's view, such as result made little legal sense and would interfere with the relationship between states and their political subdivisions:

259. *Id.* at ¶ 156.
260. *Id.* (citations omitted).
261. *Nixon*, 541 U.S. at 136.
262. *Id.* at 136–37 (emphasis added).

> Private counterparts could come and go from the market at will, for after any federal preemption they would have a free choice to compete or not to compete in telecommunications; governmental providers could never leave (or, at least, could not leave by a forthright choice to change policy), for the law expressing the government's decision to get out would be preempted.[263]

Nixon also comes up in the agency's overall interpretation of Section 706. At bottom, it is important to recognize the simple fact that nowhere in Section 706 does any derivation of the word "preemption" appear—only the word "forbearance"—and there is a big legal difference between the two concepts.[264] To wit, Black's Law Dictionary defines the concept of forbearance simply as "refraining from action." In contrast, Black's defines preemption as the "doctrine adopted by the U.S. Supreme Court holding that certain matters are of such a national, as opposed to local character that federal laws preempt or take precedence over state laws." Given the Constitutional implications of preemption, therefore, there is a much higher legal standard to meet if an agency of the federal government would like to preempt a state law. Indeed, as the Supreme Court observed in *Wyeth v. Levine,* there are:

> [T]wo cornerstones of our pre-emption jurisprudence. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' ... we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[265]

So, given that Congress deliberately chose to exclude the term "preemption" from Section 706(a), it is difficult to see how the FCC's use of Section 706 to preempt state laws would reflect a "clear and manifest purpose of Congress."

In its *Order*, the FCC side-stepped this point by arguing that "Congress need not 'explicitly delegate' the authority to preempt"[266] because "Congress delegated the authority [to the FCC] to act in this sphere."[267] According to the FCC,

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263. *Id.* at 137.

264. 47 U.S.C. § 1302.

265. Wyeth v. Levine*,* 555 U.S. 555, 565 (2009) (citations omitted); *see also* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government," it must make its intention to do so 'unmistakably clear in the language of the statute.'") (citations omitted).

266. *2015 Preemption Order, supra* note 6, at ¶ 145.

267. *Id.* at ¶ 142.

> Our preemption authority falls within the "measures to promote competition in the local telecommunications market" and "other regulating methods" of section 706(a) that Congress directed the [FCC] to use to remove barriers to infrastructure investment. It likewise falls within the available "action[s] to accelerate deployment" we may take in order to "remove barriers to infrastructure investment" and to "promote competition" described in section 706(b). As Congress would have been aware in passing the 1996 Act, the [FCC] has in the past used preemption as a regulatory tool where state regulation conflicts with federal communications policy. Given this history against which Congress legislated, the best reading of section 706 is therefore that Congress understood preemption to be among the regulatory tools that the [FCC] might use to act under section 706.[268]

The FCC's logic was a bit of a stretch for two fundamental reasons.

First, the FCC's logic rested upon the notion that Section 706 provides an independent source of preemption authority. A simple reading of the caselaw reveals that it did not. According to the clear language of the D.C. Circuit's holding in *Verizon,* "[A]ny regulatory action authorized by Section 706(a) [must] fall within the [FCC]'s subject matter jurisdiction over such communications—*a limitation whose importance this court has recognized in delineating the reach of the [FCC]'s ancillary jurisdiction.*"[269] According to the D.C. Circuit's holding in *Comcast v. FCC*, this means that *any use of Section 706 must be tied directly to a specific delegation of authority in "Title II, Title III, or Title VI…*"[270] So what does this language mean in practice? It means if the FCC wants to preempt under its Section 706 mandate, then it needs to look exclusively at Section 253. Section 706 does not provide an independent source of authority.

This reading of Section 706 is nothing new to the courts. In fact, the D.C. Circuit's ruling in *Ad Hoc Telecommunications Users Committee v. FCC*—a case the FCC cited with approval several times in its *2015 Preemption Order*—is directly on point.[271] In *Ad Hoc,* the court was asked to rule on the FCC's decision to use its Section 10 authority to forbear from dominant carrier price regulation for special access services. To support its decision to forbear, the FCC also argued that its actions would further Section 706's goals of promoting broadband deployment. After review, the court held that the "general and generous phrasing of § 706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to settle

268. *Id.* at ¶ 144.

269. *Verizon*, 740 F.3d at 639–40 (emphasis added). It is interesting to note that when the Commission cited this exact passage from *Verizon* in its *Order,* the agency specifically omitted the italicized language above. *See 2015 Preemption Order, supra* note 6, at ¶ 138.

270. Comcast v. FCC*,* 600 F.3d 642, 654 (D.C. Cir. 2010) (emphasis added).

271. Ad Hoc Telecoms. Users Comm. v. FCC, 572 F. 3d 903, 907 (D.C. Cir. 2009).

on the best regulatory or deregulatory approach to broadband—a statutory realty that assumes great importance when parties impose courts to overrule FCC decision on this topic."[272] However, the court made it crystal clear that the FCC's forbearance authority did not lie in Section 706 itself, but exclusively in Section 10. As the court stated bluntly, "*As contemplated by § 706 . . . [f]orbearance decisions are governed by the Communications Act's § 10*…."[273]

Given the court's ruling in *Ad Hoc*, the FCC's argument that Section 706 provides the agency with independent preemption authority falls apart. Section 706's *explicit* forbearance authority is governed by Section 10, which means that Section 706's *implicit* preemption authority (to the extent it exists) is governed by Section 253. And, if Section 706's preemption authority is, in fact, grounded in Section 253, then *Nixon* is directly on point and the FCC's actions were unconstitutional.

The FCC's argument that it need not have an express indication of Congressional intent to preempt using Section 706 was also belied by the plain language of *Nixon*. As the Court observed, while the FCC has ample authority to preempt state laws and regulations that create barriers to entry for *private* entities, the Court in *Nixon* specifically found that "neither statutory structure nor legislative history [of Telecommunications Act of 1996] points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms."[274] Thus, reasoned the Court, the "want of any 'unmistakably clear' statement to that effect is fatal" to any argument that Congress intended the FCC to have any authority to preempt state laws which restrict municipal broadband.[275]

3. Sixth Circuit Review

As to be expected, the FCC's *2015 Preemption Order* was appealed to the Sixth Circuit in *Tennessee v. Federal Communications Commission* and it did not go well for the Agency.[276] As the Sixth Circuit observed, the FCC's *2015 Preemption Order* "essentially serves to re-allocate decision-making power between the states and their municipalities."[277] To do so, the court held that this "preemption by the FCC of the allocation of power between a state and its subdivisions requires at least a clear statement in the authorizing federal legislation."[278] As Section 706 lacked such a clear statement, the Sixth Circuit reversed.

According to the Sixth Circuit,

272. *Id.* at 906–07.
273. *Id.* at 907.
274. *Nixon,* 541 U.S. at 141.
275. *Id.*
276 Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016).
277. *Id.* at 600.
278. *Id.*

> What the FCC seeks to accomplish through preemption is to decide *who*—the state or its political subdivisions—gets to make these choices. The FCC wants to pick the decision-maker for the discretionary issues of expansion, rate setting, and timeliness of rollout of services. It wants to provide the EPB and the City of Wilson with these options notwithstanding Tennessee's and North Carolina's statutes that have already made these choices.[279]

However, recognized the court, "[a]ny attempt by the federal government to reorder the decision-making structure of a state and its municipalities trenches on the core sovereignty of that state."[280] In the absence of a clear statement in Section 706 that Congress wanted to disrupt that relationship, therefore, the court ruled that the FCC had no authority to preempt the two state laws.[281]

The court also did not bite on the FCC's other two related arguments that (a) its ruling applied to circumstances where a state has already permitted a political subdivision to enter the market as a broadband provider and, ergo, (b) the FCC's authority trumps a state's authority due to the Commerce Clause. First, similar to the Supreme Court's reasoning in *Nixon*, the court recognized that the Agency's argument could produce an "anomalous" result due to the fact that a state could "flatly prohibit municipalities from engaging in telecommunications altogether, but they cannot do it in limited steps or with conditions based on the governmental nature of the municipalities."[282] In the court's view, such an outcome would be highly "intrusive on state-municipal relations…."[283] The court then tersely disposed of the FCC's Supremacy Clause argument: "[T]he statutes at issue here implicate core attributes of state sovereignty *and* regulate interstate communications services…. These effects are not mutually exclusive."[284]

Finally, the court went out of its way to note that its holding in *Tennessee* was limited. First, like the Supreme Court in *Nixon*, the court made clear that it did not question the purported public benefits that the FCC identified in permitting municipalities to expand Gigabit Internet coverage.[285] The court also made clear that it would not address the following legal issues debated by the parties, including (1) whether Section 706 provides the FCC any preemptive power at all; (2) whether Congress, if it is clear enough, could give the FCC the power to preempt as it did in this case; (3) whether, if the FCC had such power, its exercise of it was arbitrary or capricious in this case; and (4) whether and to what extent the clear statement rule would apply to FCC preemption if a State required its municipality to act contrary to otherwise valid FCC regulations.[286]

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279. *Id.* at 610.
280. *Id.* at 611.
281. *Id.* at 613.
282. *Id.* at 611.
283. *Id.*
284. *Id.* at 611–12 (emphasis in original).
285. *Id.* at 613.
286. *Id.* at 613–14.

4. Postscript: *Mozilla v. FCC*

In October 2019, the D.C. Circuit released its much-anticipated ruling in *Mozilla v. FCC*[287] which upheld, in large part, the FCC's *2018 Restoring Internet Freedom Order*.[288] Among a multitude of disputes at bar, one major issue on appeal was the Agency's decision to view once again Section 706—the primary legal authority relied upon by the previous FCC in the *2015 Preemption Order*—as hortatory rather than as an affirmative source of authority. Consistent with its 2014 ruling in *Verizon v. FCC*,[289] the court found that because the language of Section 706 was ambiguous, the FCC's interpretation to view Section 706 once again as hortatory was reasonable under step two of *Chevron.*[290]

But as one FCC can do, a subsequent FCC can un-do, let's assume *arguendo* that the first action a Democratic-controlled FCC takes upon regaining office is to re-instate Section 706 as an independent grant of authority.[291] Would it matter to the preceding preemption analysis? Probably not.

Both *Nixon* (which involved Section 253) and *Tennessee* (which involved Section 706) make clear that state preemption of municipal broadband laws is not an issue of agency interpretation under *Chevron* but a matter of Constitutional principle. (Indeed, even if we assume *Chevron* applies, we would not be able to move past step one because neither Section 253 nor Section 706 contains a clear statement by Congress.[292]) As the Supreme Court noted, absent a clear statement, "that is the end of the matter."[293] But the promise of future federal legislation that delineates a "clear statement" should not give hope to municipal broadband advocates. Although the Sixth Circuit in *Tennessee* declined to rule on the matter, as noted in the discussion of *Nixon supra*, the Supreme Court appeared to indicate that *no* Congressional attempt to intervene into the relationship between a state and its political subdivisions would pass Constitutional muster.[294]

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287. Mozilla Corp. v. FCC*,* 940 F.3d 1 (D.C. Cir. 2019), *reh'g en banc denied* 2020 U.S. App. LEXIS 3726 (D.C. Cir., Feb. 6, 2020). Interestingly, the D.C. Circuit's ruling in *Mozilla* also involved significant questions about whether the FCC can preempt state laws that seek to regulate the Internet. *See generally*, Lawrence J. Spiwak, *The Preemption Predicament Over Broadband Internet Access Services,* 21 FEDERALIST SOC'Y REV. 32 (2020), https://fedsoc.org/commentary/publications/the-preemption-predicament-over-broadband-internet-access-services [https://perma.cc/A64K-LVVB].

288. Restoring Internet Freedom, *Declaratory Ruling, Report And Order, And Order*, 33 FCC Rcd. 311 (2018).

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

290. *Mozilla*, 940 F.3d at 46 (citing *Chevron USA v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984)).

291. For a full exploration of the bounds, and ultimate abuse, of this authority, *see* Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?, supra* note 243; Lawrence J. Spiwak, *USTelecom and its Aftermath, supra* note 245.

292. *See, e.g.*, *Tennessee,* 832 F.3d at 612 ("[the] intent of Congress is clear in this case: § 706 does not authorize the preemption attempted by the FCC.").

293. *See Chevron,* 467 U.S. at 842–43.

294. *See Nixon*, 541 U.S. at 141.

5. Summary

Promoting the rapid deployment of broadband to all Americans, as Section 706 commands, is certainly a worthy social goal. And, in some select cases, municipal broadband may even make a positive contribution towards achieving this goal. Yet, regardless of whatever one may feel about the pros and cons of municipal broadband, it is *completely irrelevant* to the Constitutional issue raised by the FCC's *2015 Preemption Order—the federal government simply may not intervene into the relationship between the states and their respective municipal subdivisions*. As Justice Sandra Day O'Connor wrote for the majority in *Gregory v. Ashcroft*, if our federalist system "is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty."[295]

B. Municipal Broadband and the Antitrust Laws

Private entry does not occur when it is unprofitable, which means that expected revenues after entry are insufficient to cover expected costs. Yet, as discussed *supra*, municipal systems enter when "no one else will" implying asymmetric subsidies are involved. The evidence affirms the logic.

If sparse revenues are the result of the municipal system offering high prices and low quality, thereby obtaining low market share, then the municipal system won't last long and it will have accomplished nothing. Instead, advocates for municipal entry claim that municipal systems offer lower prices and higher quality in pursuit of the positive externalities associated with broadband. Whatever the goal, these systems take market share from the private incumbents.[296] As detailed above, eventually this additional entry will drive some, if not all, private incumbents from the market, or at least substantially reduce their presence and investments and reduce their returns. It is in this sequence of events where the problem with subsidized entry becomes apparent. If a subsidy is required for entry and sustained operations, then by implication average price is below average incremental cost.[297] Subsidized entry, therefore, may lead to predatory pricing (prices below incremental cost). While increased availability and adoption are noble goals, strangely enough it is this drive to increase output (and thus the externality benefits) that makes municipal entry more likely to be predatory.

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295. *Gregory,* 501 U.S. at 459.

296. St. John, *supra* note 35; Karami, *supra* note 54.

297. In regard to the entry decision, "below costs" implies that the total revenues of the entrant are below the total cost, since all costs are incremental. In the presence of legitimate spillovers, total costs are the incremental cost of adding the broadband network to whatever resources are already in use.

The word "predatory" typically invokes antitrust law.[298] Cities are likely to believe they are immune from antitrust law, both because of their status as "government" and because they are merely serving the interest of the public and not pursuing profit. Interestingly, in 1978, the United States Supreme Court in the case of *City of Lafayette, Louisiana v. Louisiana Power and Light* rejected this public interest argument when it held that municipalities are not immune from the antitrust laws under the "state action" doctrine of *Parker v. Brown* when they compete directly for customers with the private sector.[299] There, municipalities argued that the antitrust laws are intended to protect the public from abuses of private power and not from utilities "that exist to serve the public weal."[300] The Court rejected this argument, finding that the municipalities' argument that "their goal is not private profit but public service" to be only "partly correct." As the Court explained:

> Every business enterprise, public or private, operates its business in furtherance of its own goals. In the case of a municipally owned utility, that goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders. The allegations of the counterclaim, which for present purposes we accept as true, aptly illustrate the impact which local governments, acting as providers of services, may have on other individuals and business enterprises with which they interrelate as purchasers, suppliers, and sometimes, as here, as competitors.[301]

While the Court noted that municipal systems "may, and do, participate in and affect the economic life of this Nation in a great number and variety of ways," the Court held that:

298. W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 272, 285 (1995) ("pricing at a level calculated to exclude from the market an equally or more efficient competitor . . . . Areeda and Turner propose [] a price below reasonably anticipated average variable cost should be conclusively presumed unlawful.").

299. *City of Lafayette*, 435 U.S. 389.

300. *Id.* at 403.

301. *Id.*

> When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender. If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.[302]

So while a city may view its actions to be to the "benefit of its citizens," doing so does not imply the city is excused from antitrust law or incapable of anticompetitive conduct that may lead to a "serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets." "Parochial interests" do not nullify "anticompetitive effects."

Furthermore, externalities are, by definition, external, which means they are not monetized by the seller. Choosing prices, quality, or other factors without consideration of their financial implications is certain to reduce profit margins. A profit-maximizing firm chooses its prices to maximize the spread between revenues and incremental (or marginal) cost. Any other strategy will lead to a lower spread between the two. Thus, the argument that a city may pursue objectives other than profit only strengthens the case for predatory entry, since subsidies must rise to account for the larger losses caused by the deviation from profit maximization.

Whether or not the inherent predatory nature of municipal entry in a market already served by others is actionable on antitrust grounds is an interesting question. For the most part, economic and legal experts frown upon predatory pricing claims, though some have been successful.[303] In the normal thinking, predatory pricing is not profitable unless the firm can raise price after its rivals exit. Doing so, however, may draw an entrant back in, thereby making the predatory strategy unprofitable. Such an argument depends on profit maximization and municipal systems often claim not to be profit-maximizers. Thus, predation in the context of municipal entry is uncharted territory from a theoretical (both legal and economic) perspective. A lack of a profit motive makes existing caselaw and economic theories about predation mostly uninformative.

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302. *Id.* at 408.

303. For a thorough review of predatory pricing in antitrust, *see* Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, U.S. DEP'T OF JUST. (2006), http://www.justice.gov/sites/default/files/atr/legacy/2006/10/30/218778.pdf [https://perma.cc/J4C6-A7U4].

C. Municipal Entry as A Due Process Problem

Over the last decade, there has been much debate over whether local governments should get into the broadband business by building their own networks. While most generally don't view municipal broadband as controversial in rural high-cost areas where it is too expensive for the private sector to enter, it is a very different story when municipalities seek to overbuild in established metropolitan areas that are already served by multiple private sector providers. As detailed above, these government-owned networks typically require massive injections of federal, state, and local tax dollars for their construction and operation. Some city governments have taken to raising taxes, shifting funds between other government services like a city electric utility, or just dipping straight into the city's coffers to cover seemingly perpetual financial shortfalls.[304]

Motivations for the private sector's distaste for such systems are plain enough. Taxpayer subsidies permit the GONs to charge below-cost rates—a type of predatory pricing that is both sanctioned and financed by the government. Competing under such conditions is difficult, at best, for unsubsidized private firms. Municipal entry could very well be a poison pill for private sector investment. Indeed, even the threat of municipal entry makes investors skittish about committing billions of their own money to build Internet networks for fear of competing with uneconomic pricing by a self-subsidized government network. As the FCC recognized in its *2010 National Broadband Plan*, ''Municipal broadband has risks. Municipally financed service may discourage investment by private companies."[305]

Making matters worse, as the private sector attempts to compete against City Hall for market share, local governments operating GONs control the many key inputs of production essential for private sector broadband deployment. For example, if a private firm wants to provide multichannel video programming over its network, then it needs local government approval in the form of a cable franchise in which the local government sets the rate terms and conditions of this franchise approval.[306] If a private communications firm wants to put up a cell tower, once again it needs local government approval.[307] Want to use municipal duct works? Same thing. And, in many cases where the municipal broadband provider is also the local municipal electric utility monopoly, if a private firm needs to attach a wire to a utility pole, guess who it has to deal with? Municipalities are known to

304. *See* discussion *supra*, at Section V.

305. *National Broadband Plan, supra* note 2.

306. *See generally*, T. Randolph Beard et al., *Infrastructure Investment and Franchise Fee Abuse: A Theoretical Analysis*, PHX. CTR. (Apr. 2019), https://www.phoenix-center.org/PolicyBulletin/PCPB45Final.pdf [https://perma.cc/E9PL-9Q8U].

307. As the FCC has documented, this cell tower siting process can be arduous, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, *Declaratory Ruling And Third Report And Order,* 33 FCC Rcd 9088, para. 25–28 (2018).

charge highly inflated rates for pole access.[308] Finally, but certainly not least, the government has the power to tax, again affecting private sector entry costs. The conflicts of interest abound.[309]

Which brings us, oddly enough, to railroads.

A 2016 decision by the D.C. Circuit Court of Appeals in *Association of American Railroads v. U.S. Department of Transportation* addresses the fundamental fairness of the private sector being forced to compete against City Hall.[310] In this case, the plaintiffs argued that the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) violated the Due Process Clause of the Fifth Amendment because it permitted Amtrak effectively to regulate the rates, terms and conditions of key inputs of production required by its competitors. The court agreed.

In the court's view, the "power to self-interestedly regulate the business of a competitor is … anathema to 'the very nature of things,' or rather, to the very nature of governmental function."[311] As such, Amtrak's self-interest constitutes "an intolerable and unconstitutional interference with personal liberty and private property" and is *"*clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment."[312] More to the point, the court found that "government's increasing reliance on public-private partnerships portends an even more ill-fitting accommodation between the exercise of regulatory power and concerns about fairness and

308. Letter from Steven F. Morris, Vice President & Deputy Gen. Counsel, The Internet & Television Association, to Marlene H. Dortch, Sec'y, Fed. Commc'ns Comm'n (July 22, 2019), https://www.ncta.com/sites/default/files/2019-07/NCTA%20Muni%20and%20Coop%20Poles%20Connolly%20Article%20Ex%20Parte%20Filing%207-22-19.pdf [https://perma.cc/7LK2-LEQH]; T. Randolph Beard et al., *The Pricing of Pole Attachments: Implications and Recommendations*, 9 REV. OF NETWORK ECON. (2010), https://www.degruyter.com/view/journals/rne/9/3/article-rne.2010.9.3.1192.xml [https://perma.cc/SEQ6-4RYE].

309. It should be noted that on several occasions, the Federal Communications Commission has had to step in to deal with recalcitrant municipalities to speed up the approval process for private sector deployment. Fortunately, the courts have tended to side with the FCC in this regard. *See, e.g.*, Petition for Declaratory Ruling to Clarify Provisions of Section 3329(c)(7)(b) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Declaratory Ruling*, 24 FCC Rcd 13994, para. 4 (2009), *aff'd sub nom. City of Arlington v. FCC*, 668 F.3d 229, 262 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013); *see also* Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting; 2012 Biennial Review of Telecommunications Regulations, *Report And Order*, 29 FCC Rcd 12865, para. 1 (2014); Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order And Further Notice Of Proposed Rulemaking*, 22 FCC Rcd 5101, para. 1 (2007); *aff'd sub nom. Alliance for Cmty. Media v. FCC,* 529 F.3d 763, 785 (6th Cir. 2008), *cert. denied,* 557 U.S. 904 (2009).

310. Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 821 F.3d 19, 31 (D.C. Cir. 2016).

311. *Id.* at 29.

312. *Id.* (citing *Carter v. Carter Coal Co.*, 298 U.S 238 (1936)).

accountability."[313] Thus, concluded the court, "[w]herever Amtrak may fall along the spectrum between public accountability and private self-interest, the ability—if it exists—to co-opt the state's coercive power to impose a disadvantageous regulatory regime on its market competitors would be problematic."[314]

Defendants argued in response that because Amtrak is a government entity, it was not advancing its own private interests because it instead fulfils a variety of "public interest" obligations. The D.C. Circuit would have none of it. As the court observed, concluding that Amtrak is not an autonomous private enterprise "is not the same as concluding it is not economically self-interested."[315] According to the court,

> [M]any corporations are obligated to compromise profit-seeking ambitions pursuant to statutory goals aimed at public goods. Corporations must, for instance, comply with the Americans with Disabilities Act, the Clean Air Act, and the Affordable Care Act, even though doing so may not otherwise have been the most economically prudent choice. Compliance with these statutory directives does not somehow negate economic self-interest.[316]

Viewing the totality of the circumstances, the D.C. Circuit concluded that PRIIA violated the Due Process Clause of the Fifth Amendment because Amtrak's "economic self-interest as it concerns other market participants is undeniable"[317] and, as such, PRIIA improperly allowed Amtrak effectively to regulate the rates terms and conditions of key inputs of production of its competitors.

Proponents of municipal broadband will likely seek to distinguish *American Railroads* on the ground that Amtrak is affirmatively charged under its statutory charter with making a profit, while municipal broadband systems are generally organized as not-for-profit entities.[318] Thus, so the argument will likely go, as municipal networks are not interested in profit but rather the local good, GONs cannot be "self-interested entities" and *American Railroads* does

313. *Id.* at 31.
314. *Id.*
315. *Id.* at 32.
316. *Id.*
317. *Id.*
318. *See, e.g.*, *id.*, where the D.C. Circuit observed:

Amtrak's self-interest is readily apparent when viewed, by contrast, alongside more traditional governmental entities that are decidedly not self-interested. The government of the United States is not a business that aims to increase its bottom line to achieve maximum profitability. Unlike for-profit corporations, government strives—at least in theory—for an equilibrium of revenues and expenditures, where the revenue obtained is no more and no less than the operating costs of the services provided.

not apply.[319] According to established caselaw, however, that argument doesn't hold water.

GONs are in the business of obtaining market share, and they are typically successful in obtaining market shares in the 40-60% range. Municipalities are clearly "competing" with private firms to capture customers. In fact, advocates for municipal broadband point to "increased competition" as a justification for GONs. Whether the GONs are officially not-for-profit entities, it is abundantly clear that they are not, as *American Railroads* held, "presumptively disinterested" participants in the broadband market.[320] Also, as GONs wrestle with private providers for market share, municipal networks' "economic self-interest as it concerns other market participants is undeniable."[321] Without dispute, local governments have the "power to regulate the business … of a competitor," a coercive authority the D.C. Circuit in *American Railroads* found to be "'an intolerable and unconstitutional interference with personal liberty and private property' and transgresses "the very nature of' government function."[322]

As noted above, the Supreme Court rejected this public interest defense both in *City of Lafayette, Louisiana v. Louisiana Power and Light* and in *Nixon*. For example, in *City of Lafayette,* the Court deemed the argument that the goal of municipal entry "is not private profit but public service" as "partly correct." To highlight once again, the Court found that when municipalities act "… as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender."[323] So while a city may view its actions to be to be benefit of its citizens, doing so does not imply the city is incapable of or excused from anticompetitive conduct that may lead to a "serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets." As the Court in *City of Lafayette* observed, "parochial interests" do not nullify "anticompetitive effects."[324] The Supreme Court was blunter in *Nixon*.[325] As the Court found:

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319. *See, e.g.*, Tom Wheeler, *Removing Barriers to Competitive Community Broadband,* FED. COMMS. COMMISSION (June 10, 2014), https://www.fcc.gov/news-events/blog/2014/06/10/removing-barriers-competitive-community-broadband [https://perma.cc/DR54-KYLW] ("Commercial broadband providers can pick and choose who to serve based on whether there is an economic case for it. On the other hand, [a municipal broadband network] … has a duty to ensure that *all* of its citizens have affordable broadband Internet access.").

320. *Am. R.Rs.*, 821 F3d at 29 (citing *Carter*, 298 U.S 238 (1936)).

321. *Id.* at 32.

322. *Id.* at 34.

323. *City of Lafayette*, 435 U.S. at 408.

324. *Id.*

325. *Nixon*, 541 U.S. at 134.

> [W]hen a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated. Legal limits on what may be done by the government itself (including its subdivisions) will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command.[326]

Given this precedent, it would be hard to argue that municipal networks are not "self-interested entitles."

Accordingly, the argument against municipal broadband is about more than mere unfairness of competing against City Hall; it's worse. The argument is that it is inherently unfair to compete against City Hall when the government can use its sovereign power to regulate rates, terms and conditions over key inputs of production required for private sector entry. With the D.C. Circuit's ruling in *American Railroads,* a court has formally affirmed that due process of law is violated when a self-interested entity is entrusted with the power to regulate the business of a competitor—even when that self-interested entity is the government. Whether a private broadband provider will choose to bring a case against municipal operators based on this legal theory remains to be seen. Given the cases outlined herein, if one does, we think there is a good probability of success.

X. CONCLUSION

At the outset of this Article, we posited that the economic essence of the municipal broadband debate can be boiled down to a simple question: *why is the municipality the only one willing to build the network*? The frequent answer is generally "*because no one else will*." But as we walked through the law and economics of the problem, we realized that there is a more fundamental question at play: even if "no one else will," *should* a municipality step into the void and construct its own broadband network? The answer ultimately lies in the relationship among local officials, their respective constituents, and state legislative masters. This Article aims to establish the legal and economic parameters of such discussions.

At the core of the issue is the uneconomic nature of municipal broadband. The construction of these systems normally requires massive subsidies from federal, state, and local governments. When a municipal broadband network is an offshoot of the local electric utility, as they often are, captive electric ratepayers are routinely required to cross-subsidize the communications network. Nonetheless, despite the subsidies, many if not most municipal systems are financially unviable; they will eventually go bust and the unrecovered costs are left to electric ratepayers, local constituents, and even federal taxpayers. These observations are not intended as disparagement; they are simply a statement of the empirical facts. Local

326. *See id.*

governments contemplating building a broadband network should do so with eyes wide open to the financial history of such ventures.

Being unsound financially, municipal broadband cannot promote competition. Given the massive amount of direct- and cross-subsidization enjoyed by GONs, municipal broadband is better characterized as predatory entry and anticompetitive. As a result, state laws overseeing municipal broadband have a sound economic policy foundation, especially those that limit cross subsidies. Considering the caselaw, federal preemption of these state laws seems improbable. Also, the uneconomic nature of municipal broadband invokes legitimate antitrust and due process concerns, though so far, no challenges to municipal broadband relied on either of these theories.

So while ensuring that advanced telecommunications capability is "deployed to all Americans in a reasonable and timely fashion" is certainly a worthy and aspirational social goal,[327] it is important to remember that the operative word here is "*reasonable.*"[328] Unfortunately, as we see it, the debate over municipal broadband has become more emotional than rational. We hope this Article helps tips the scale back toward more reasoned policymaking.

327. Section 706(b), 47 U.S.C. § 1302.

328. *Cf.* George S. Ford & Lawrence J. Spiwak, *Justifying the Ends: Section 706 and the Regulation of Broadband, supra* note 81.

The Score Is 4-0: FCC Media Ownership Policy, Prometheus Radio Project, and Judicial Review

Christopher Terry[*]
Stephen Schmitz[†]
Eliezer (Lee) Joseph Silberberg[‡]

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[*] Christopher Terry received his Ph.D. from UW-Madison in 2012. He spent 15 years in broadcast radio, and his research includes policy, regulatory and legal analysis of media ownership, media content and political advertising. He has published articles in a variety of journals and has been a frequent conference presenter. Terry served for six years as a lecturer at the University of Wisconsin-Milwaukee before becoming an assistant professor of Media Law at the University of Minnesota's Hubbard School of Journalism and Mass Communication. His research has earned top paper awards from the Communication and Law Division of the National Communication Association (NCA), the Law and Policy Division of the International Communication Association (ICA), and has received financial support from both the Industry Research Forum of AEJMC and the Center for Information Policy Research.

[†] Stephen Schmitz is a class of 2022 J.D. candidate at the University of Minnesota Law School. He received a B.S. in Political Science and Economics at the University of Oregon in 2019. His studies have focused on media, criminal law, privacy, and administrative law.

[‡] Eliezer (Lee) Joseph Silberberg is a class of 2022 J.D. candidate at the University of Minnesota Law School. He received a B.A. in Philosophy from Rhodes College in 2017. His studies currently focus on Constitutional Law and Administrative Law.

I. INTRODUCTION

Media ownership continues to be an important democratic issue mired in a complicated policy limbo.[1] The relationship between the control of media outlets, the sources of information, and the range of viewpoint diversity available to citizens has been at the center of a continuing legal impasse between the FCC and the courts. Even in the Internet age, access to local news and information is an important element in maximizing political participation, and so broadcasting retains a central role in the media use of everyday Americans.[2]

The FCC implemented a media ownership policy to balance the economic goal of competition, the democratic societal values associated with viewpoint diversity, and the operational objectives of broadcast stations licensed to serve a local community.[3] The regulatory matrix of competition, localism, and diversity has been the pillar of media ownership policy since the agency's initial adoption of the conceptual relationship between ownership and diversity in the rulemaking proceeding that implemented the newspaper-broadcast cross ownership ban in 1975.[4]

While contemporary media ownership policy was not created by the adoption of a single economic theory, the central conceptual premise of media ownership policy is simple: ownership and diversity are directly related. Yet this simple premise has been elusive for the agency to support empirically.[5] Most significantly, the FCC's inability to demonstrate a clear relationship between the variables, and to functionally apply the relationship to the larger policy in a way that promotes ownership by women, minorities, and other underrepresented groups. This led to a series of paralyzing remands when the Third Circuit Court of Appeals reviewed FCC decisions on media ownership.[6] These remands involve the agency's rush to implement new ownership limits after passage of the Telecommunications Act of 1996 coupled with the functional abandonment of its localism and diversity objectives. These remands are the product of a running series of defeats for the FCC in cases

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1. Christopher Terry, *Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act*, 71 FED. COMM. L.J. 328, 328–29 (2019) (discussing the possibility of localism as a remedy for market failure).

2. *Id*. at 330.

3. *Id.*

4. *Id.* at 334. *See generally* Amendment of Sections 73.34, 73.240, And 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, Fm, And Television Broadcast Stations, *Second Report and Order*, 50 F.C.C. 2d 1046 (1975).

5. Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC's Incubator Program*, 24 COMM. L. & POL'Y 403, 407 (2019) (stating that empirical evidence supporting or refuting FCC regulatory premises has been inconsistent).

6. *See* Prometheus Radio Project v. FCC (*Prometheus IV*), 939 F.3d 567, 572 (3d Cir. 2019) *reh'g en banc denied,* (3d Cir. Nov. 20, 2019) (expressing the Third Circuit's clear exasperation with the two-decade saga that has been Prometheus, Judge Ambro begins the case with, "[h]ere we are again"); *see also* Prometheus Radio Project v. FCC (*Prometheus I*), 373 F.3d 372, 383 (3d Cir. 2004).

brought by lead plaintiff and citizen petitioner Prometheus Radio Project.[7] After judicial setbacks in 2004, 2011, 2016, and 2019, the FCC continues to find itself in a legal quagmire with limited policy options moving forward.[8]

This Article traces the implementation of FCC media ownership policy since the passage of the Telecommunications Act of 1996[9] through the FCC's continuing legal battle with the Prometheus Radio Project. The paper discusses the FCC's various policy proposals, the agency's 1998,[10] 2000,[11] and 2002[12] Biennial Reviews, its Quadrennial Reviews undertaken in 2006,[13] 2010,[14] 2014[15] and the ongoing review launched at the end of 2018.[16] Then, in context of this background, this Article concludes by proposing a new approach to media ownership and minority ownership policy based on the FCC's ongoing statutory mandate to regulate broadcast ownership.

This Article suggests that the FCC just do what it is told: develop and implement a minority ownership policy that puts broadcast stations in the hands of locally based owners who themselves are women and minorities. Furthermore, when faced with the precedent from *Adarand*, the FCC should recognize that because of spectrum scarcity, it is not subject to the same level of scrutiny that would dictate a content neutral approach in application. In short, the FCC should focus on just two aspects of the media ownership equation—localism and diversity. Empirical evidence strongly suggests this

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7. *Id.* at 388–89.

8. *Id.* at 381; Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431, 437 (3d Cir. 2011); Prometheus Radio Project v. FCC (*Prometheus III*), 824 F.3d 33, 37 (3d Cir. 2016)

9. 47 U.S.C. § 533 (2018); Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat 56 (1996) [hereinafter Telecommunications Act].

10. 1998 Biennial Regulatory Review – Review of the Commission Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Biennial Review Report*, 15 FCC Rcd. 11058, 162 (2000) [hereinafter *1998 Biennial Review*].

11. The 2000 Biennial Regulatory Review, *Report*, 16 FCC Rcd. 1207 (2001) [hereinafter 2000 Biennial Review].

12. 2002 Biennial Regulatory Review – Review of the Commission Broadcast Ownership Rules and Other Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd. 13620 (2003) [hereinafter 2002 Biennial Review].

13. 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Further Notice of Proposed Rule Making*, 21 FCC Rcd. 8834 (2006) [hereinafter 2006 Quadrennial Regulatory Review].

14. 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Inquiry*, 25 FCC Rcd. 6086 (2010) [hereinafter 2010 Quadrennial Regulatory Review].

15. 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Second Report and Order*, 31 FCC Rcd. 9864 (2016) [hereinafter 2014 Quadrennial Review].

16. 2018 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking*, 32 FCC Rcd. 12111 (2018).

will lead to the competition that the FCC seeks. That is, unless the FCC intends to lose in court ***again***.

II. THE BEGINNING – TELECOMMUNICATIONS ACT OF 1996

On February 8th, 1996, President Bill Clinton signed the Telecommunications Act into law.[17] Congress designed the omnibus bill to update, but not replace, major elements of the Communications Act of 1934.[18] Among the changes within the Telecommunications Act were provisions that resulted in significant structural changes to the legal, policy, and social dynamics of media ownership.

Largely overlooked in historical discussion is the reality that in the Telecommunications Act, Congress had, for the first time, directly substituted its own judgment on media ownership for the regulatory expertise of the FCC.[19] The statutory delegation of the Telecommunications Act mandated specific ownership limits for radio and television.[20] No longer would the FCC interpret a delegation and assess policy alternatives through the rulemaking process in its role as the expert agency in charge of assigning stations to qualified owners. This change in media licensing policy largely reduced the FCC to the status of a regulatory errand boy whose primary duty is to approve mergers and transfer station operation licenses.[21]

Just as this do-as-we-are-told type approach to media regulation significantly changed the FCC's traditional public-trustee decision making previously employed for assessing ownership and license allocation, Congress also moved away from the FCC's traditional administrative process. This was brought about by a new statutory requirement to conduct a review of the agency's media ownership rules every two years.[22] This review required existing rules to survive an agency review process with an evidence standard roughly equivalent to FCC rulemaking. On top of that, Congress also set some media ownership policies itself. Section 202(b)(1) of the Telecommunications Act set new ownership limitations.

17. Telecommunications Act § 202.
18. Communications Act of 1934, Pub. L. 73-416, 48 Stat. 1064 (to be codified at 47 U.S.C. § 151).
19. Telecommunications Act § 202.
20. *Id*.
21. *Id.*
22. *See id.* § (h).

> In a radio market with 45 or more commercial radio stations, a single party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM); in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.[23]

When Congress mandated these rules to the FCC, the process of rulemaking for media ownership also changed. In order to quickly comply, the FCC solicited no comments, and collected no evidence on the state of the media industry.

> We are revising these rules without providing prior public notice and an opportunity for comment because the rules being modified are mandated by the applicable provisions of the Telecom Act. We find that notice and comment procedures are unnecessary, and that this action therefore falls within the "good cause" exception of the Administrative Procedure Act ("APA"). The rule changes adopted in this Order do not involve discretionary action on the part of the [FCC]. Rather, they simply implement provisions of the Telecom Act that direct the [FCC] to revise its rules according to specific terms set forth in the legislation.[24]

In the wake of this decision, the FCC approved a massive, rapid wave of station transfers and mergers that consolidated ownership, and between 1996 and 2010, the looser ownership limits resulted in significant changes to the media landscape and rapid consolidation of ownership within the industry.[25]

Congress's alteration of the traditional rulemaking process resulted in rapid changes to the production and distribution models for media content. Furthermore, embedded within the Telecommunications Act was Section 202(h), an obscure but important mandate that requires the agency to remove

23. Telecommunications Act § 202(b)(1); *see also* 47 C.F.R. § 73.3555 (1996).

24. Implementation of Section 202(a) and 202(b) of the Telecommunications Act of 1996, *Order*, 11 FCC Rcd. 12371, para. 5 (1996).

25. 2010 Quadrennial Regulatory Review, *supra* note 14, at para. 4.

or modify rules that are no longer necessary to promote competition or no longer in the public interest.[26] This mandate, which alters the traditional administrative process[27] specified that:

> The [FCC] shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The [FCC] shall repeal or modify any regulation it determines to be no longer in the public interest.[28]

In a rush to implement the ownership changes mandated by the Telecommunications Act, the FCC failed to fully assess the state of media ownership before starting a process of rapid consolidation.[29] Lacking the baseline comparator data on the status of media ownership policy, and saddled with the ongoing review requirements of Section 202(h), it is unsurprising that a shortage of evidence demonstrating positive outcomes for media ownership policy bedevils the FCC. The relevant history shows this problem tormenting the agency time and time again.

III. FIRST REVIEW – THE FCC'S 1998 BIENNIAL REVIEW

The FCC launched the first of the mandated biennial reviews for media ownership rules under Section 202(h) on March 12, 1998.[30] The review examined seven ownership policies using the guidelines set by Section 202(h).[31] Of the seven, the FCC examined four rules unmodified by the Telecommunications Act, including the UHF television discount,[32]

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26. Telecommunications Act § 202(h).

27. *See* Andrew Jay Schwartzman et al., *Section 202(h) of the Telecommunications Act of 1996: Beware of the Intended Consequences*, 58 FED. COMM. L. J. 581, 583-84 (2006) (providing an explanation of how 202(h) perverts the usual administrative process).

28. *Id*.

29. *See generally* Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership) 47 C.F.R. Section 73.3555, *Order*, 11 FCC Rcd. 12368, para. 5–6 (1996) (discussing the implementation of sections 202(a) and 202(b)(l) of the Telecommunications Act of 1996).

30. The FCC already began the process of reviewing two ownership rules. The first, the television duopoly rule prevented a party from owning, operating, or controlling two or more broadcast television stations with overlapping "Grade B" signal contours, essentially preventing the ownership of more than one television station in a market. Additionally, the FCC launched a review of the "one-to-a-market" rule, which prohibited the common ownership of a television and a radio station in the same market. 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Inquiry*, 13 FCC Rcd. 11276, paras. 1, 9 (1998) [hereinafter *1998 Notice of Inquiry*].

31. *See id.* at paras. 8–54.

32. *Id.* at paras. 25–27. The UHF television discount rule attributes 50% of television households in a local television market to the audience reach of a UHF television station for purposes of calculating whether a television station owner complies with the 35% national audience reach cap. 47 C.F.R. 73.3555(e)(2)(i) (1998).

newspaper-broadcast cross-ownership rule,[33] cable television cross-ownership rule,[34] and experimental broadcast station multiple ownership rules.[35] Additionally, the review also examined three rules that the FCC modified per directives of the Telecommunications Act, namely the national television ownership rule,[36] local radio ownership rules,[37] and dual network rule.[38]

The FCC launched the 1998 Biennial Review while adjudicating many proposed mergers and license transfers. During review of its media ownership rules, but before approving changes to those rules, the FCC granted a series of conditional waivers to various owners.[39] By continuing to grant waivers,

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33. *1998 Notice of Inquiry, supra* note 30, at paras. 28–42. The newspaper-broadcast cross-ownership rule prohibits common ownership of a broadcast station and daily newspaper in the same market; 47 C.F.R. 73.3555(d) (1996). The rule was passed by the FCC in 1975. Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, *Second Report and Order*, 50 FCC Rcd. 1046 (1975).

34. *Id.* at paras. 43–52. The cable-television cross-ownership rule effectively prohibited the common ownership of a broadcast television station and cable system in the same market. 47 C.F.R. 76.501(a) (1998).

35. The experimental broadcast station multiple ownership rule limited the number of experimental broadcast stations that can be licensed to or controlled by a person. *1998 Notice of Inquiry, supra* note 30*,* at paras. 53–54.

36. The Telecommunications Act revised the national television ownership rule to eliminate a numerical limit on the number of television stations a party could own nationally and increase the national audience reach cap of television station ownership from 25% to 35% of television households nationally. *See* Telecommunications Act § 202(c)(1)(B).

37. The Telecommunications Act revised the local radio ownership rules to allow an organization ownership of up to 8 commercial radio stations in a market depending on the number of commercial radio stations in the market. These rules allow for combinations of up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM), in markets with 45 or more commercial radio stations; combinations of up to 7 commercial radio stations, not more than 4 of which are in the same service, in markets with between 30 and 44 commercial radio stations; combinations of up to 6 commercial radio stations, not more than 4 of which are in the same service, in markets with between 15 and 29 commercial radio stations; combinations of up to 5 commercial radio stations, not more than 3 of which are in the same service, if no party controls more than 50% of the stations in the radio market, in radio markets with 14 or fewer commercial radio stations. Telecommunications Act § 202(b).

38. The dual network rule permitted an entity to maintain two or more broadcast networks unless such dual or multiple networks are composed of (1) two or more of the four major networks (ABC, CBS, Fox, NBC), or (2) any of the four major networks and one of the two emerging networks (WBTN, UPN). 47 C.F.R. 73.658(g) (1996); *see also 1998 Notice of Inquiry*, *supra* note 30 at para. 24, n.28.

39. For example, QueenB's request for waiver in DA 97-1067 at 14: "Because the present case also proposes a commonly owned television station, we must next determine whether to waive our one-to-a-market rule. In considering the current request for a permanent waiver we will follow the policy established in recent one-to-a-market waiver cases where the radio component to a proposed combination exceeds those permitted prior to the adoption of the Telecommunications Act of 1996. . . . In such cases, the [FCC] declined to grant permanent waivers of the one-to-a-market rule, and instead granted temporary waivers conditioned on the outcome of related issues raised in the television ownership rulemaking proceeding. . . . Similarly, we conclude that a permanent, unconditional waiver would not be appropriate here. QueenB has, however, demonstrated sufficient grounds for us to grant a temporary waiver conditioned on the outcome of the rulemaking proceeding." Concrete River Associates. L.P., *Memorandum and Order*, 12 FCC Rcd. 6614, para. 14 (1997) (assigning a license to QueenB Radio).

even conditionally, the FCC openly encouraged further ownership consolidation to occur at a rate faster than the agency could empirically assess the results of its freshly approved mergers.

The 1998 Biennial Review concluded 17 months later, in which the FCC declared it could not meaningfully assess the effects of ownership consolidation since 1996, primarily because it had not yet completed the initial wave of mergers.[40] The FCC amended the television duopoly rule to permit common ownership of television stations in two specific scenarios related to media market measurements. Second, the FCC relaxed the radio/television cross-ownership ("one-to-a-market") rule in order to approve more of such combinations. This was a substantial change that could permit a party to own as many as one TV station and seven radio stations under certain circumstances.[41]

IV. MOVING ALONG – THE FCC'S 2000 BIENNIAL REVIEW

After concluding the first biennial review in August of 1999, the FCC chose to use the required 2000 Biennial Review to build a framework to "form the basis for further action."[42] The FCC hoped to build a working framework for future reviews under Section 202(h), most notably for the review scheduled to begin in 2002.

> We will continue to take a proactive approach to reviewing, modifying, and repealing our rules, and believe that the 2002 regulatory review will benefit from and build upon prior biennial reviews. As competition increases, technology evolves, and laws change, it will be critical for us to modify and eliminate our rules, and improve our processes, to reflect these changes. Accordingly, we direct staff to continue its ongoing efforts to review [FCC] rules and suggest appropriate modifications and improvements.[43]

The FCC's 2000 Staff Report represented the majority of the work completed during the 2000 Biennial Review process. Engaged in a top to bottom review of existing FCC regulations, staff applied a five-part test to

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40. *See 1998 Biennial Review*, *supra* note 10, at para. 4 ("It is currently too soon to tell what effect his will have consolidation, competition, and diversity.").

41. *Id.* at para. 65; *see generally* Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Report and Order*, 14 FCC Rcd. 12903, paras. 8–11 (1999) for the FCC's explanation of how the use of "failed station" waivers allow augmented ownership past the outlined six station limit [hereinafter *1999 Report and Order*].

42. 2000 Biennial Review, *supra* note 11, at para. 13. While the review was of existing regulations agency wide, media ownership rules were reviewed by the Media Bureau staff during the 2000 proceeding. *See* Biennial Regulatory Review 2000 Staff Report, 15 FCC Rcd. 21142, para. 43 (2000) [hereinafter *2000 Staff Report*].

43. 2000 Biennial Review, *supra* note 11, at para. 84.

each rule in their analysis to decide between a recommendation of either modification or elimination of a rule.

> Staff's review considered (1) the purpose of the rule; (2) the advantages of the rule; (3) the disadvantages of the rule; (4) what impact competitive developments have had on the rule; and (5) whether to recommend modification or revocation of the rule. This analysis allowed the staff to make reasoned determinations about whether a rule should be changed or eliminated either because of competitive developments, or for other reasons.[44]

The FCC designed its 2000 Staff Report to provide recommendations, but importantly, it did not have the power of a rulemaking proceeding. In terms of media ownership, the 2000 Staff Report applied this five part test to eight separate rules, including the local radio ownership rule, local television ownership rule, radio television cross-ownership rule, daily newspaper-broadcast cross-ownership rule, national television multiple ownership rule, dual network rule, experimental broadcast station multiple ownership rule, and cable television broadcast station cross-ownership rule.[45] The 2000 Staff Report also opined on the FCC's plans to launch a rulemaking proceeding on the local radio ownership rule designed to more clearly define radio markets, and to stabilize the counting methodology used to determine ownership of radio stations.[46] The Mass Media Bureau stated it would take no action on the local television ownership rule and the radio television cross-ownership rule, preferring to wait and examine the effects generated by the recent changes to the rules.[47]

In terms of the newspaper-broadcast cross-ownership prohibition, the 2000 Staff Report identified that the rule remained in the public interest and furthered the important goal of viewpoint diversity, but at the same time the report also noted that the FCC had an on-going rulemaking inquiry launched in 1996 about the continued need for the rule.[48] Similar rulemaking inquiries were announced for the dual network[49] and cable television cross-ownership rules.[50]

As a result of the agency-wide review commenced in 2000, the FCC proposed retaining, but modifying, three of its media ownership rules while eliminating a fourth. The FCC then launched rulemaking inquiries to amend

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44. Part two of the analysis includes consideration of how adroitly, precisely, and cost-effectively the rule addresses the problem at issue. Part three includes consideration of whether the rule is over- or under-inclusive in its scope, and whether compliance imposes unnecessary costs. *2000 Staff Report*, *supra* note 42, at 21111–12, nn.10–11, para. 12; *see also* 16 FCC Rcd. at 1235, para. 82, for a further inclusion of part two of the aforementioned analysis.

45. *2000 Staff Report*, *supra* note 42, at para. 116.

46. *Id*. at para. 120.

47. *Id*.

48. *Id.* at para. 122.

49. *Id.* at para. 127.

50. *Id*. at para. 129.

the dual network rule,[51] the definition of local radio markets,[52] and the newspaper-broadcast cross-ownership rule.[53] The agency also proposed to eliminate its restriction on multiple ownership of experimental broadcast stations.[54] Ultimately, each of these individual proceedings would become elements of the next required review under Section 202(h), the 2002 Biennial Review.

V. FIRST OVERHAUL ATTEMPT – FCC'S 2002 BIENNIAL REVIEW

The story of the Prometheus Radio Project's 4-0 record in the Third Circuit begins with the FCC's review of the existing media ownership rules in the 2002 Biennial Review.[55] From the outset of the 2002 Biennial Review, the FCC mulled reconsidering its longstanding thinking about the premise of media ownership policy:

> The regulatory structure best suited to promote the public interest is not static. Thus, the [FCC]'s media ownership rules must be reassessed on an ongoing basis to ensure that they are grounded in the current realities of the media marketplace. It is only through this reevaluation that the [FCC] can be assured that its media ownership rules actually advance, rather than undermine, our policy goals. In this regard, we recognize that the marketplace has changed dramatically over the last few decades, with both greater competition and diversity, and increasing consolidation.[56]

Focusing the initial process on the biennial reviews of existing media ownership rules conducted in 1998 and 2000 (specifically the national television multiple ownership rule, the local television multiple ownership rule, and the radio-television cross-ownership rule), the FCC had two objectives that dominated the early phase of the 2002 Biennial Review proceeding. First was the Section 202(h) mandate to engage in the review, part of which incorporated the ongoing rulemaking proceedings launched after the 2000 Biennial Review.[57] A second mandate involved answering a

51. *Id.* at para. 127.
52. *Id.* at paras. 118–19.
53. *Id.* at paras. 122–24.
54. *Id.* at para. 128.
55. 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Proposed Rule Making*, 17 FCC Rcd. 18505, para. 6 (2002) [hereinafter *2002 Notice of Proposed Rulemaking*].
56. *Id.* at para. 4.
57. *Id.* at para. 3.

remand from the D.C. Circuit Court of Appeals in *Fox Television v. FCC*[58] over the national television ownership rule.[59]

The *Fox Television* remand was significant in two ways. First, the D.C. Circuit stated that the FCC failed to provide evidence and rational reasoning for the its decision to retain the ownership cap set at 35% of national audience, a decision contained in both the 1998 and 2000 proceedings.[60] In a section of the decision, the court chastised the FCC for failing to provide factual evidence, and ruled that, "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules."[61] However, the panel did not rule on the meaning of Section 202(h) of the Telecommunications Act "when it instructs the [FCC] first to determine whether a rule is 'necessary in the public interest' but then to 'repeal or modify' the rule if it is simply 'no longer in the public interest.'"[62]

The requirement for factual evidence led the FCC to publicly request that commenters buttress their comments with empirical evidence.[63] Also, The FCC decided to fund a series of studies on media ownership as part of its Media Ownership Working Group (MOWG).[64] In reviewing the four rules, the FCC tested each with an eye on promoting its policy goals of competition, localism, and diversity.[65] Notably, the Notice of Proposed Rulemaking (NPRM) for the 2002 Biennial Review states that the FCC's interest was furthering of "one or more of the three public interest goals."[66] This marked a change to the FCC's discussion of its three goal (Competition-Localism-Diversity) strategy, where in the past, its policy promoted all three objectives simultaneously.[67]

Also of note in the NPRM was the FCC's flexible adoption and application of the standards from a decision earlier in the year in *Sinclair v. FCC*.[68] In *Sinclair*, the D.C. Circuit noted that ownership limits encourage diversity in the ownership of broadcast stations, which can in turn encourage a diversity of viewpoints in material presented over the airwaves.[69] The court

58. Fox Television v. FCC, 280 F.3d. 1027, 1039 (D.C. Cir. 2002), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) [hereinafter *Fox Television*].

59. 2002 Biennial Review*, supra* note 12, para. 6, n.8 (2002).

60. *Fox Television*, 280 F.3d. at 1042.

61. *Id*. at 1048.

62. *Notice of Proposed Rulemaking* 2002, *supra* note 55, at para. 18; *see also Fox Television*, 280 F.3d. at 1034 (quoting 47 U.S.C. § 161).

63. *Notice of Proposed Rulemaking* 2002, *supra* note 55, at para. 27.

64. *Id.*

65. *Id.* at paras. 29–30.

66. *Id.* at para. 29.

67. *See* Matter of Broadcast Television National Ownership Rules; Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order*, 15 FCC Rcd. 20764–65 (1999) in which Commissioner Ness, quoting a letter by Senators Hollings and Dorgan to Chairman Kennard, stated that it was imperative that the, '[FCC] remain mindful of the careful balancing. . . . the robust diversity of voices, localism, and competition in the broadcast industry that was evident at the time of enactment.' I believe we have done that."'

68. *See* Sinclair v. FCC, 284 F.3d 148, 162 (D.C. Cir. 2002); *Notice of Proposed Rulemaking 2002*, *supra* note 55, at 18510.

69. The *Sinclair* court elaborates on American courts' general presumption against judicial review of FCC regulatory line-drawing. That court applied this presumption to the "voice-count test" that the FCC proposed to promote diversity. *Sinclair*, 284 F.3d 148.

added that promoting ownership diversity as a means to achieving viewpoint diversity serves a legitimate government interest, and has, in the past, survived rational basis review.[70] When launching the 2002 Biennial Review, the FCC stretched the finding in *Sinclair* by stating, "The interests that government may promote through content neutral rules also include competition – both the promotion of competition and the prevention of anti-competitive practices and results."[71]

The FCC, in a section of the 2002 Biennial Review NPRM, discussed four possible proxy methodologies for assessing diversity: viewpoint diversity, source diversity, program diversity, and outlet diversity.[72] Viewpoint diversity is a content-based measurement and policy.[73] While both source diversity and program diversity examine content indirectly, viewpoint diversity requires a direct analysis of the content itself.[74] More importantly, viewpoint diversity, "has been the touchstone of the [FCC]'s ownership rules and policies. We remain fully committed to preserving citizens' access to a diversity of viewpoints through the media."[75]

Yet, when dealing with viewpoint diversity as a measurement, the FCC expressed concerns that regulations involving judgments about content would be inherently subjective, and thus problematic under the First Amendment.[76] The FCC admitted that it questioned whether viewpoint diversity, a longstanding policy objective, should retain the central, "touchstone" position in policy implementation for media ownership rules. The FCC sought comment on whether viewpoint diversity should be a primary goal, and whether source diversity or program diversity, as simple counting methodologies, could be employed as proxies in place of viewpoint diversity.

> Viewpoint diversity has been a central policy objective of the [FCC]'s ownership rules. We seek comment on whether viewpoint diversity should continue to be a primary goal of the [FCC]'s decision-making. The [FCC] has not viewed source and outlet diversity as policy goals in and of themselves, but as proxies for viewpoint diversity. Should the [FCC] continue to use source and outlet diversity as proxies to protect and advance viewpoint diversity?[77]

Put another way, the FCC's stated objective in the 2002 Biennial Review was to redefine the diversity goals of media ownership policy by

70. *Notice of Proposed Rulemaking* 2002, *supra* note 55, at para. 30; *see Sinclair*, 284 F.3d at 159–60 ("The [FCC] had acted rationally, despite the inconclusiveness of the rulemaking record, in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoint.") (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 570 (1990)).

71. *Notice of Proposed Rulemaking* 2002, *supra* note 55, at para. 30.

72. *Id.* at paras. 35–41.

73. *See id.* at para. 35.

74. *See id.* at paras. 37, 38.

75. *Id.* at para. 35.

76. *Id.* at para. 20.

77. *Id.* at para. 41.

using the competition objective as a proxy for localism and diversity. Relying on a raw count of media outlets, including newspapers, broadcasters, cable, and the Internet,[78] the agency shifted media ownership policy away from the viewpoint diversity objective by creating an ownership environment that would "advance diversity without regulatory requirements."[79] To this end, the FCC sought empirical evidence from interested parties on the topics of media usage and possible media substitution.

> In considering these questions, we are particularly interested in the actual experience of the media industry. Has consolidation in local markets led to less or greater diversity? Commenters are encouraged to submit empirical data and analysis demonstrating both the change (either decrease or increase) in diversity levels and the causal link, as opposed to mere correlation, between those changes and greater consolidation in local markets. Evidence comparing the levels of diversity in local communities with different levels of media concentration would be especially useful.[80]

As further indication of relegating viewpoint diversity to a secondary concern, the FCC also addressed the effects of ownership consolidation on the advertising market. After noting its status "as the steward of the Communications Act," the [FCC] went on to clarify their belief that its role is "charged with evaluating the potential benefits and harms to the viewing and listening public, not to advertisers." However, after asserting this belief, the FCC then requested comments on whether its authority under the Communications Act justified basing media ownership limits on the advertising market.[81] Additionally, the FCC requested commenters to submit empirical evidence dealing with effects on consolidation on the advertising market.[82]

On July 2, 2003, the FCC released an Order in the 2002 Biennial Review proceeding.[83] Concluding the 2002 Biennial Review,[84] this Order would set the stage for judicial review by the Third Circuit Court of Appeals in a challenge brought by Prometheus Radio Project. The Order modified the local television multiple ownership rule and now permitted a single party to own up to two television stations in markets with 17 or fewer television stations and up to three television stations in markets with 18 or more stations.[85] This order also added a "top four" provision to the local television ownership rule that prevents a party from acquiring a television station if a

78. *Id.* at para. 42.
79. *Id.*
80. *Id.* at para. 43.
81. *Id.* at para. 59.
82. *Id.*
83. 2002 Biennial Review, *supra* note 12, at 13620.
84. *Id.* at para. 1.
85. *Id.* at para. 186.

proposed merger would cause the party to own two of the top four rated television stations in a market.[86]

The FCC's 2002 Biennial Review Order retained existing limits on local radio ownership as defined by the Telecommunication Act, but it made two significant changes to its method for calculating the size of a radio market.[87] First, the Order adopted market definitions for radio as defined by Arbitron,[88] which at the time was the entity that provided radio stations with ratings data.[89] Additionally, the Order now included local non-commercial stations when calculating the total number of stations in each market, a decision that functionally allowed for additional ownership consolidation at the local level.[90] The Order also retained the dual network rule,[91] which prohibited a merger between any two of the top four broadcast television networks, but the agency revised the national television ownership rule to permit a single party to own television stations reaching 45% (rather than 35%) of the national audience.[92] With respect to bigger overhauls, the Order replaced two other existing media ownership rules: the newspaper-broadcast cross-ownership and the radio-television cross-ownership rule. The FCC replaced both with the Diversity Index,[93] a modified version of the Herfindahl-Hirschman Index (HHI) – an antitrust tool traditionally applied by the Department of Justice and the FTC for analyzing impact of mergers on market consolidation.[94]

A market's HHI score is the sum of market shares squared; thus a highly competitive market will have a lower HHI score than a concentrated one. The DOJ and FTC at the time rated markets with HHI scores above 1800 as

86. *Id.* at para. 1, n.6.
87. *Id.* at paras. 273–86.
88. *Id.* at para. 275; *see id.* at paras. 276–81 for a deeper explanation of how the FCC came to their decision.
89. Previously, the FCC used a signal contour overlap methodology to define ownership parameters, a process which continued until the FCC adopted Arbitron Market definitions in 2003. In FCC 96-90, the FCC affirmed the signal contour policy, "define the relevant radio market as the area encompassed by the principal community contours (i.e., predicted or measured 5 mV/m for AM stations and predicted 3.16 mV/m for FM stations) 3 of the mutually overlapping stations proposing to have common ownership. (2) The number of stations in the market will continue to be determined based on the principal community contours of all commercial stations whose principal community contours overlap or intersect the principal community contours of the commonly-owned and mutually overlapping stations. (3) The stations that will be included within the market will continue to be: operating commercial full-power stations, including daytimers and foreign stations." Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership) 47 C.F.R. Section 73.3555, *Order,* 11 FCC Rcd. 12368, para. 4 (1996).
90. *Id.* at para. 280.
91. *Id.* at para. 600.
92. *Id.* at paras. 499–500.
93. *Id.* at para. 390.
94. *Id.* at para. 394.

"highly concentrated," and if a proposed merger would exceed this limit, the agencies deem the merger as harmful to the competition in that market.[95]

The central theory of the FCC's Diversity Index was the use of the market share-squared formula found in the HHI to identify mergers that resulted highly concentrated markets. The Diversity Index marked a substantial change in both procedure and policy and, mathematically, generated some questionable but legal merger arrangements.[96] Compounding the FCC's struggles in deploying this new methodology, however, were gaps in traditional rulemaking procedures by the agency. None of the new limits, rule modifications, existence of the Diversity Index, or any rationale for any of the changes were made public ahead of the release of the Order implementing these changes on June 3, 2003.[97]

VI. FIRST LOSS – PROMETHEUS RADIO PROJECT V. FCC

Groups of both "citizen petitioners"[98] and "deregulatory petitioners"[99] challenged the FCC's 2003 Order on media ownership in multiple federal circuit courts, and the Judicial Panel on Multidistrict Litigation consolidated

95. *Id.* at para. 79; *see 1998 Biennial Review*, *supra* note 10, at para. 47 (stating that commenters also remarked that a market with an HHI rating of 1800 was considered to be, "substantially concentrated"); *see also Prometheus I*, 373 F.3d at 418 for a brief discussion by the Third Circuit about diversity indexing change within the FCC.

96. Most notably is the example involving a college television station and the New York Times. *Prometheus I*, 373 F.3d at 408 n.39.

97. *Prometheus II*, 652 F.3d at 451 (holding that the FCC 2006 Quadrennial Review provided too little information to the public about what the FCC intended to do, that it did not sufficiently explain what the FCC considered as options, and that it did not provide sufficient time for public comment); Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC's Incubator Program*, 24 COMM. L. & POL'Y 403, 416 (2019).

98. In the *Prometheus* ruling, the court assigned the various petitioners to two groups. The first was referred to as the "Citizen Petitioners." "Prometheus Radio Project, Media Alliance, National Council of the Churches of Christ in the United States, Fairness and Accuracy in Reporting, Center for Digital Democracy, Consumer Union and Consumer Federation of America, Minority Media and Telecommunications Council (representing numerous trade, consumer, professional, and civic organizations concerned with telecommunications policy as it relates to racial minorities and women), and Office of Communication of the United Church of Christ ("UCC") (intervenor). The Network Affiliated Stations Alliance, representing the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the ABC Television Affiliates, and Capitol Broadcasting Company, Inc. (intervenor) also raised anti-deregulatory challenges to the national television ownership rule." *Prometheus I*, 373 F.3d at 381 n.1.

99. See *id*. at 381 n.2, stating that the "Deregulatory Petitioners," included: "Clear Channel Communications, Inc.; Emmis Communications Corporation; Fox Entertainment Group, Inc.; Fox Television Stations, Inc.; Media General Inc.; National Association of Broadcasters; National Broadcasting Company, Inc.; Paxson Communications Corporation; Sinclair Broadcast Group; Telemundo Communications Group, Inc.; Tribune Company; Viacom Inc.; Belo Corporation (intervenor); Gannett Corporation (intervenor); Morris Communications Company (intervenor); Millcreek Broadcasting LLC (intervenor); Nassau Broadcasting Holdings (intervenor); Nassau Broadcasting II, LLC (intervenor); Newspaper Association of America (intervenor); and Univision Communications, Inc. (intervenor).".

the petitions.[100] Unlike the *Sinclair* and *Fox* cases which the D.C. Circuit Court of Appeals, the traditional venue for administrative agencies, the panel sent the case to the Third Circuit Court of Appeals, consolidating the challenges under lead plaintiff, Prometheus Radio Project. After a preliminary hearing, the Third Circuit stayed implementation of the FCC's rules pending review, and denied a petition filed jointly by members of the deregulatory petitioners and the FCC to return the case to the D.C. Circuit.[101]

The Third Circuit heard eight hours of oral argument, and on June 24, 2004, it released a 2-1 decision, written by Judge Thomas L. Ambro, which stayed and remanded most of the FCC's 2003 Order.[102] Among the primary reasons for remand was the FCC's arbitrary and capricious decision-making process and the lack of supporting evidence for its decisions in the record.

> [W]e have identified several provisions in which the [FCC] falls short of its obligation to justify its decisions to retain, repeal, or modify its media ownership regulations with reasoned analysis. The [FCC]'s derivation of new Cross-Media Limits, and its modification of the numerical limits on both television and radio station ownership in local markets, all have the same essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets. We thus remand for the [FCC] to justify or modify its approach to setting numerical limits.[103]

In terms of radio, the majority upheld the FCC's decision to change market definitions to the geographical market definitions provided by Arbitron[104] and the FCC's decision to include non-commercial stations when assessing the total number of stations in each market.[105] The majority also ruled that the agency's decision to retain the existing limits, essentially the limits within the Telecommunications Act, was unsupported and arbitrary and

100. *Id*. at 382.

101. *Id*. at 389.

102. *Prometheus I*, 373 F.3d at 435*;* For example, the 2002 Biennial Review, *supra* note 12, para. 327 describes the cross-ownership rulemaking by the FCC — with foregoing explanation — with which the Third Circuit found fault.

103. *Id.*

104. The majority rejected the contention of the citizen petitioners that using Arbitron's market designations was a delegation of governmental power to a non-government agency. The ruling indicated that Arbitron will only provide a methodology for measuring market concentration, and cited the, "established specific safeguards to deter potential manipulation, including a two-year buffer period before any party can receive the benefit of either a change in Arbitron Metro market boundaries or the addition of more radio stations to the market." *Prometheus I*, 373 F.3d at 425 (citing 2002 Biennial Review*, supra* note 12, para. 278, n.584).

105. *Prometheus I*, 373 F.3d at 426.

capricious.[106] While generally supportive of the agency decision to use numeric limits in place of a case by case analysis, the majority declared the decision to retain the existing limits lacked reasoned analysis of the information within the docket, citing both the 34% in reduction in owners identified by the FCC study and the docket comments, both of which provided examples of consolidated radio groups eliminating local news production.[107]

The court also felt unpersuaded by the FCC's use of the economic literature, specifically game theory, which led the FCC to conclude that five equal sized competitors represented a sufficiently competitive market: The [FCC]'s numerical limits cannot rationally be derived from a "five equal-sized competitor" premise. We thus remand for the [FCC] to develop numerical limits that are supported by a rational analysis.[108]

The majority took a hard look at Congress's delegation in the Telecommunications Act and the requirements of Section 202(h), ruling that the delegation required the FCC to monitor the effects of competition and make adjustment to its regulations. Judge Ambro noted that the text of Section 202(h) omits the word "necessary" in its repeal or modify instruction.[109] This was significant as it set the stage for the review of the rules using a traditional view of the phrase, "necessary in the public interest."

> So, in interpreting the [FCC]'s obligation under § 202(h) to review its broadcast media ownership rules to determine whether they are "necessary in the public interest," we adopt what the [FCC] termed "the plain public interest" standard under which "necessary" means "convenient," "useful," or "helpful," not "essential" or "indispensable."[110]

The majority was not ignorant to the intent and context in which Congress enacted the mandate of Section 202(h), and while Judge Ambro's decision described Section 202(h) as deregulatory in nature, the ruling rejected the suggestion of the earlier *Fox* and *Sinclai*r decisions that the deregulatory nature of the provision acted as a "one-way ratchet."

106. The remand on this point is notable among the others because the majority does not suggest that ownership consolidation has gone, or is capable of going, too far, as was the underlying case against the cross-media limits and the Diversity Index. In fact, after the complicated discussion of the cross-media limits, the ruling is very simple. In the 1998 and 2000 reviews, the FCC decided that the existing limits were in the public interest. In 2002 the agency did not provide evidence to support this conclusion, and thus the ruling remands the local radio ownership rule to the agency for additional evidence and rationale. *Id.* at 430–35.

107. *Id*.

108. *Id*. at 434.

109. *Id*. at 393.

110. *Id.* at 394.

> We do not accept that the "repeal or modify in the public interest" instruction must therefore operate only as a one-way ratchet, i.e., the [FCC] can use the review process only to eliminate then-extant regulations. For starters, this ignores both "modify" and the requirement that the [FCC] act "in the public interest." What if the [FCC] reasonably determines that the public interest calls for a more stringent regulation? Did Congress strip it of the power to implement that determination? The obvious answer is no, and it will continue to be so absent clear congressional direction otherwise.[111]

The majority interpreted Section 202(h) as a requirement to periodically justify existing regulations, which absent the review provision, the FCC would not have an obligation to complete.[112] Additionally, when the FCC engages in the review of its rules, it must determine if rules remain useful to the public interest. Rules deemed no longer useful must be repealed or modified.[113] But after reviewing a rule, regardless of what the FCC determined to be the proper action, whether "retain, repeal, or modify (whether to make more or less stringent)—it must do so in the public interest and support its decision with a reasoned analysis."[114]

Judge Ambro then invalidated the FCC's new cross-ownership limits and Diversity Index methodology for failing hard look review.[115] While the ruling noted that the FCC's decision to replace cross-ownership rules with the new limits was constitutional and allowable in context of Section 202(h)'s mandate, its procedure was its ultimate flaw, as the FCC failed to demonstrate a reasoned analysis.[116]

Ambro's opinion also explored the FCC's empirical support for the underlying conceptual relationship between viewpoint diversity and ownership. In terms of newspaper-broadcast cross-ownership, the FCC's Order relied heavily on the Spavins Media Ownership Working Group study.[117] Spavin's data indicated that newspaper-owned television stations provide almost 50% more local news and public affairs programming than other stations. The FCC relied on this data, coupled with other empirical findings from a Project of Excellence in Journalism study, which stated that

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111. *Id*. at 394–95.

112. *Id*. at 395 ("§ 202(h) extends this requirement to the [FCC]'s decision to retain its existing regulations. This interpretation avoids a crabbed reading of the statute under which we would have to infer, without express language, that Congress intended to curtail the [FCC]'s rulemaking authority and to contravene 'traditional administrative law principles.'").

113. *Id*.

114. *Id.* at 435.

115. *Id.* at 435; *see also* Motor Vehicle Mfr's Ass'n v. State Farm, 463 U.S. 29 (1983) (establishing the "Hard Look Doctrine" later applied by the *Sinclair* court).

116. *Id.* at 418.

117. *Id.* at 398 ("The [FCC] principally relied on the findings of its MOWG study that newspaper-owned television stations provide almost 50% more local news and public affairs programming than other stations, an average of 21.9 hours per week.") (citing Thomas C. Spavins et al., *The Measurement of Local Television News and Public Affairs Programs* 3 (FCC Media Bureau Staff Research Paper 2002-7) (2002)).

newspaper-owned stations "were more likely to do stories focusing on important community issues and to provide a wide mix of opinions, and they were less likely to do celebrity and human-interest features."[118]

After this finding by Spavin, the FCC began the process of repealing the newspaper-broadcast cross-ownership ban, offering two rationales to do so. First, a blanket ban was no longer necessary to ensure diversity, a contention the FCC supported by citing the conclusion of the Pritchard MOWG study, "Commonly-owned newspapers and broadcast stations do not necessarily speak with a single, monolithic voice."[119] The FCC's second rationale was that other media sources at the local level, including cable and the Internet, made up for the loss of viewpoints when newspapers and broadcasts became commonly owned.[120]

The majority was entirely skeptical of the FCC's rationale, citing the external criticism of the Pritchard MOWG study methodology, including the narrow scope of the data and lack of control group, but given the inconclusive evidence in the docket about viewpoint diversity's relation to ownership, the majority ruled that FCC acted reasonably when concluding it lacked evidence of a uniform bias to justify upholding the provision implementing the ban on newspaper-broadcast cross-ownership.[121]

Likewise, the *Prometheus I* court upheld the FCC's finding that cable and Internet news sources could supplement the diversity of viewpoints available in local markets, a conclusion drawn from the Waldfogel 2002 MOWG study on media substitutability.[122] Despite this, the majority ruled that the agency had not provided a reasonable rationale for its decision, stating that the FCC's evidence demonstrated that Internet and cable counted as sources for local news, but they did not replace or outrank newspapers or broadcast stations for local content. Basically, the Third Circuit believed that cable and Internet sources can count as local news, but not to the extent of replacing legacy media.

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118. *Id.*

119. *Id.* at 399.

120. *Id.* at 400.

121. The initial finding by the FCC could be described as evidentiary slight-of-hand. Relying on the discredited Pritchard 2002 MOWG Study, the FCC used the findings of the study to cast doubt on the uniformity of viewpoint by a single owner. Then by applying the evidence standard of Section 202(h), the agency said that because of the confusion over the validity of Pritchard's data, it lacked evidence to uphold the ban on newspaper broadcast cross-ownership. In simpler terms, the FCC relied on questionable data in order to fail to provide evidence necessary to uphold a regulation it wanted to repeal, but lacked evidence to justify repeal, so that the rule could be repealed. *See generally* David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign* (FCC Media Ownership Working Grp.) (2002).

122. Although the majority questioned the weight assigned to these Internet contributions to diversity by the Diversity Index. *Prometheus I*, 373 F.3d at 408.

> The [FCC]'s finding that a blanket prohibition on newspaper/broadcast cross-ownership is no longer in the public interest does not compel the conclusion that no regulation is necessary . . . As described above, the [FCC] found evidence to undermine the premise that ownership always influences viewpoint, but it did not find the opposite to be true. And while the [FCC] found that other media sources contributed to viewpoint diversity in local markets, it could not have found that the Internet and cable were complete substitutes for the viewpoints provided by newspapers and broadcast stations.[123]

The Third Circuit was also extremely skeptical of the FCC's new approach to regulating media ownership using the Diversity Index. The court concluded that the FCC gave the Internet too much weight in the Diversity Index.[124] Judge Ambro's opinion also suggested that the FCC's assumption of equal market shares was inconsistent with the intended approach of the Diversity Index.[125] This inconsistency generated a set of unrealistic assumptions about the relative contributions of media outlets to viewpoint diversity within local markets. The assigning of equal shares within a media form did not "jibe" with the FCC's decision to assign relative weights to each type of media, which in turn, created a problematic rationale for the use of the HHI formula at the heart of the Diversity Index.[126] The purpose of the Diversity Index was to facilitate a measurement of the actual loss of diversity caused by additional consolidation, a process designed to assess the changes to a market based on the "diversity importance" of the merging parties.

Judge Ambro's decision also demonstrated the *Prometheus I* court's skepticism of the FCC's assignment of equal shares to media outlets that did not carry local news, stating that the result generated "an almost certainly . . . understated view of concentration."[127] Finally the majority criticized the FCC's commitment to making "the most conservative assumption possible" when estimating the effect of a merger on the availability of viewpoint diversity.[128]

The court supported the FCC's decision to discount cable's contribution to viewpoint diversity, but ruled that the same rationale which applied to cable should also apply to the Internet, stating the "decision to count the Internet as a source of viewpoint diversity, while discounting cable, was not rational.[129] The FCC properly excluded cable because of serious

123. *Id.* at 400.
124. *Id*.
125. *Id*.
126. *Id*. at 408.
127. *Id*.
128. *Id*.
129. *Id*. at 405.

doubts as to the extent that cable provided independent local news—the FCC's recognized indicator of viewpoint diversity in local markets."[130]

Local news production, which the FCC functionally applied as a quantitative assessment of its localism objective, factored heavily into the majority questioning the weight assigned to the Internet. While the FCC used data from MOWG study, specifically the finding that 18.8% of the survey respondents listed the Internet as a source of local news, the survey design did not generate data indicating which websites users visited for news.[131] As such, the majority was skeptical that sites producing local news were not websites tied to existing media outlets.

> There is a critical distinction between websites that are independent sources of local news and websites of local newspapers and broadcast stations that merely republish the information already being reported by the newspaper or broadcast station counterpart. The latter do not present an "independent" viewpoint and thus should not be considered as contributing diversity to local markets.[132]

On the local and independent production point, the majority slammed the FCC's decision, stating the record lacked basic evidence to support the agency's premise of independent news websites producing local news.[133] Additionally, the websites the FCC highlighted as potential local news contributors provided news national in scope.

> The [FCC] does not cite, nor does the record contain, persuasive evidence that there is a significant presence of independent local news sites on the Internet. According to the record, most sources of local news on the Internet are the websites for newspapers and broadcast television stations . . . (62% of Internet users get local news from newspaper websites, 39% visit television station websites). And the examples the [FCC] does cite—the Drudge Report and Salon.com—have a national, not local, news focus.[134]

The majority's view of the Diversity Index also criticized the FCC's inclusion of the important contributions of the Internet as a local news source at the time. In the 2003 Order,[135] the FCC purported that the Internet was a "virtual universe of information sources."[136] This "universe" of diversity was

130. *Id.* at 405 (citing 2002 Biennial Review, *supra* note 12, para. 394) ("News and public affairs programming is the clearest example of programming that can provide viewpoint diversity . . . . [and] the appropriate geographic market for viewpoint diversity is local.").

131. Nielsen Media Research, *Consumer Survey on Media Usage* 1 (FCC Media Ownership Work Grp., Research Paper 2002-8) (2002).

132. *Prometheus I*, 373 F.3d at 405–06.

133. *Id*. at 406.

134. *Id*.

135. *Id.*

136. *Id*.

the FCC's rationale for its decision to include the Internet in its local diversity measurements, with the FCC arguing that the immense diversity of the Internet should automatically qualify the web as a source of viewpoint diversity.[137] The majority disagreed, stating, "[T]o accept this rationale we would have to distort the [FCC]'s own premise that local news is an indicator of viewpoint diversity."[138] In fact, the majority found that the FCC's evidence undermined the very argument the FCC put forward.

> The [FCC] attempts to justify different treatment for cable and the Internet by suggesting that local cable news channels are only available in select markets, while the Internet is available everywhere. Not only is this distinction demonstrably false (as even the [FCC] acknowledged that almost 30% of Americans do not have Internet access), it is irrelevant. That the Internet is more available than local cable news channels does not mean that it is providing independent local news. On remand the [FCC] must either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable.[139]

On other points, the majority also criticized the FCC's lack of evidence, such as its suggestion that stations will increase the amount of news they provide upon merger, a contention entirely unsupported by data in the record.[140] Notably, the majority showed skepticism for the FCC's reluctance to assess actual media content and evaluate media usage as empirical measurements of viewpoint diversity. In the process of discounting even the constitutional and data collection problems the FCC used to justify this decision, the majority pointed right at the data cited by the agency to support its change to the Diversity Index. In MOWG 8, the FCC had ability to collect actual usage data by media type, where it avoided making a content distinguishing judgement by asking a survey question about where people went for local news.[141] Likewise critical of the data collection issue, the majority opinion suggests that not only are the FCC's objections to the collection of this type of data "vague and unexplained; there is no suggestion that obtaining actual-use data for outlets within a media type would be prohibitively more onerous than obtaining the same data for the media types themselves."[142] These shortcomings on the development of empirical evidence resulted in a remand of the relevant sections of the order to the FCC.

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137. *Id.*
138. *Id*. at 406.
139. *Id*. at 407.
140. *Id*. at 409 ("The [FCC] needs to undergird its predictive judgment that stations can freely change the level of their news content with some evidence for that judgment to survive arbitrary and capricious review.").
141. *Id.*
142. *Id*.

> Because the [FCC]'s reasons for eschewing actual-use data in assigning market shares to outlets within a media type and assuming equal market shares are unrealistic and inconsistent with the [FCC]'s overall approach to the Diversity Index and its proffered rationale, we remand for the [FCC]'s additional consideration of this aspect of the Order.[143]

Judge Scirica dissented from the majority's opinion in *Prometheus I*, primarily over the traditional administrative law premise that the court should provide the FCC more deference on implementation of the Diversity Index and proposed changes to the rules.[144] Despite this argument, the majority was quite deferential, stating that the agency was "entitled to deference in deciding where to draw the line between acceptable and unacceptable increases in markets' Diversity Index scores."[145] The majority's stated problem was agency consistency.[146] The FCC's proposal for cross-ownership limits, by their design, allowed combinations where the increases for Diversity Index scores were higher than scores for some prohibited combinations.[147] As before, the FCC's action on cross-media limits was "without doubt" arbitrary and capricious.[148]

The majority also addressed the FCC's procedural approach during the 2002 Biennial Review, arguing that remand of the FCC's cross-ownership limits was an appropriate method to resolve lingering issues about public notification of the changes. While the FCC provided notice of a new ownership assessment metric, it did not notify the public of the Diversity Index itself.[149] The FCC countered, claiming that it formulated the Diversity Index in response to comments, so it had no reason to seek additional comment on the Diversity Index.[150] The majority found this argument unpersuasive, even suggesting the FCC had acted with prejudice, by noting

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143. *Id*.

144. *Id*. at 435 (Scirica, C.J., dissenting in part, concurring in part).

145. *Id*. at 410.

146. *See id*. at 411.

147. *Id.* ("Consider the mid-sized markets (four to eight stations), where the [FCC] found that a combination of a newspaper, a television station, and half the radio stations allowed under the local radio rule would increase the average Diversity Index scores in those markets by 408 (four stations), 393 (five), 340 (six), 247 (seven), and 314 (eight) points respectively. These permitted increases seem to belong on the other side of the [FCC]'s line. They are considerably higher than the Diversity Index score increases resulting from other combinations that the [FCC] permitted, such as the newspaper and television combination, 242 (four stations), 223 (five), 200 (six), 121 (seven), and 152 (eight). They are even higher than those resulting from the combination of a newspaper and television duopoly—376 (five stations), 357 (six), 242 (seven), and 308 (eight)—which the [FCC] did not permit.").

148. *Id.* ("The [FCC]'s failure to provide any explanation for this glaring inconsistency is without doubt arbitrary and capricious, and so provides further basis for remand of the Cross-Media Limits.").

149. *Id.* at 411–12 (referencing requirements pursuant to the Administrative Procedures Act (APA) §553(b)(3)); *See generally* Administrative Procedures Act, 5 U.S.C. § 553(b)(3) (1946).

150. *Id*. at 412, n.42 (rejecting the FCC's argument that the Diversity Index was "simply an analytical tool" for measuring diversity).

that if the agency sought comment on the Diversity Index, some of its methodological flaws might have been discovered ahead of time.

> As the Diversity Index's numerous flaws make apparent, the [FCC]'s decision to withhold it from public scrutiny was not without prejudice. As the [FCC] reconsiders its Cross-Media Limits on remand, it is advisable that any new "metric" for measuring diversity and competition in a market be made subject to public notice and comment before it is incorporated into a final rule.[151]

Prometheus I also had a secondary effect. In January 2004, Congress inserted itself into the process during the Third Circuit's stay of the media ownership rule changes, passing an amendment to Section 202(c) of the Telecommunications Act which raised the national television ownership (audience) cap to 39%.[152] Congress also made two other changes. First, Congress replaced the FCC's biennial review obligation under Section 202(h) with mandatory quadrennial reviews. Second, Congress "insulated" the national television ownership limit's 39% audience cap from review under Section 202(h).[153]

VII. ROUND TWO BEGINS – THE 2006 QUADRENNIAL REVIEW

After the Third Circuit issued its remand in 2004, the FCC took minimal action on media ownership policy beyond adjudicating merger actions. A new FCC chairman, Kevin Martin, took charge in March 2005, and the agency set aside media ownership issues pending the first quadrennial review scheduled for 2006.[154]

After more than two years of inaction, on June 21, 2006, the FCC began its first quadrennial review under the amended Section 202(h) of the Telecommunications Act.[155] At the beginning of the 2006 Quadrennial Review, the FCC suggested it designed the proceeding to respond to procedural issues from the *Prometheus I* remand, and it took early steps to resolve the matters, including public access to proceedings, during this review.[156] To this end, the FCC scheduled a series of six public hearings and

151. *Id*.

152. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat 3.

153. *Id*.

154. *Biography of Kevin J. Martin*, FCC, https://www.fcc.gov/biography-kevin-j-martin [https://perma.cc/VB7X-FEQK] (last visited Feb. 21, 2020). *See also* Press Statement, Kevin J. Martin, Chairman, Fed. Commc'ns Commission, (Dec. 18, 2007), https://transition.fcc.gov/kjm121807-ownership.pdf.

155. 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 21 FCC Rcd. 8834, paras. 1, 7–8, n.10 (2006) [hereinafter *2006 Further Notice of Proposed Rulemaking*].

156. *See id.*

extended the comment period on the initial 2006 Quadrennial Review NPRM to 120 days.[157] The FCC also announced that it would make available up to $200,000 in funding to develop a series of new evidentiary studies exploring how people obtained news and information, competition within types of media and across media platforms, marketplace changes since the 2002 Biennial Review, localism, minority participation and independent and diverse programming in today's media environment, and the impact of ownership on production of children's and family-friendly programming.[158] To limit concerns about the transparency of the process, the FCC also provided access to information about the proceeding and a range of empirical studies on a special website.[159]

Unfortunately, the agency did not publicly release all the information weighing on its decision making. A Senate hearing unearthed an unreleased FCC report from 2003 that empirically demonstrated local ownership of television stations added significant content to local television news broadcasts.[160] Shortly after this study released, news reports also surfaced that then-FCC Chairman Michael Powell ordered all copies of the draft study destroyed—Chairman Powell denied (and continues to deny) those allegations.[161]

Five days later, a second unreleased FCC study became public.[162] The study, titled "Review of the Radio Industry," criticized the FCC's implementation of media ownership policy, perhaps even more fiercely than the television localism study.[163] After examining the effects of consolidation on the radio industry between 1996 and March 2003, the report reached five major conclusions, all of which would have caused problems for the FCC if its 2002 Biennial Review docket included the empirical data. First, despite a nearly 6% increase in the number of radio stations overall, the number of owners decreased by 35% thanks almost entirely to mergers between existing owners.[164] Second, the largest group owner in 1996 had fewer than 65 radio

157. The topic of public hearings was of specific importance to the FCC Commissioners, with Chairman Martin and Commissioners Copps, Adelstein, Tate, and McDowell all stating that increased surveying of the general public was pertinent to FCC regulation going forward. 2006 Quadrennial Regulatory Review, *supra* note 13, at 8859–8860, 8861–63, 8865–66, 8868–69.

158. *Id.* at 8859.

159. *Id.*; *but see id.* at 8863 for a rejoinder by Commissioner Copps, stating that the transparency of process agreed upon in the 2006 Quadrennial Review was inadequate, "I am deeply disappointed that this Notice does not contain a specific, up-front commitment to share proposed media concentration rules with the American people in advance of a final vote."

160. *Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News*, FCC 1-2 (2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267448A1.pdf [https://perma.cc/WQR9-CURG].

161. David Folkenflik, *FCC Study of TV Ownership Comes to Light*, NPR: MEDIA (Sept. 15, 2006), https://www.npr.org/templates/story/story.php?storyId=6082952 [https://perma.cc/CY6J-BUQP].

162. *See id.*; *see also Review of the Radio Industry*, (FCC Media Bureau Staff Research Paper Series), https://docs.fcc.gov/public/attachments/DOC-267479A1.pdf (last visited Aug. 28, 2020) [hereinafter The Media Bureau Staff Research Paper Series].

163. *The Media Bureau Staff Research Paper Series*, *supra* note 162.

164. *Id.* at 2.

stations, which meant that the consolidation of ownership was even more significant than the 35% overall reduction in owners suggested.[165] In just seven years, the top two companies, Clear Channel Communications and Cumulus Broadcasting, acquired more than 1,200 and just over 250 stations respectively.[166] Third, at the local level, the report marked a downward trend in the number of owners in Arbitron markets.[167] Fourth, in terms of advertising competition, the data demonstrated that the top firm in each market controlled on average 46% of advertising revenues and that the top two firms controlled on average 76% of advertising revenues.[168] The report concluded that this concentrated control at least partially caused an 87% increase in advertising rates even as station ratings fell.[169] Finally, in terms of consolidation's effect on format diversity, the study suggested that while the numbers of formats remained largely steady overall, there was actually a slight reduction in the number of formats offered in the larger markets.[170]

Facing the requirements of the Third Circuit's remand and revelations from the uncovering of lost evidence, when the FCC acted to conclude its 2006 Quadrennial Review in late 2007, its proposals were best described as modest. The FCC proposed revising only one ownership rule, allowing a newspaper to own one television station or one radio station—a partial repeal of the 1975 prohibition on newspaper-broadcast cross-ownership, but only in the top 20 media markets.[171]

Meanwhile, in a parallel rulemaking proceeding, the FCC also released a new minority ownership policy.[172] Using established Small Business Administration (SBA) financial standards, the policy created a class of license applicants called "eligible entities."[173]

The eligible entity policy represented a significant change from previous FCC minority ownership initiatives that provided direct enhancements and incentives to minorities.[174] In fact, the eligible entity proposal was not a direct minority ownership policy, but a broader and comprehensive policy for diversity, which the agency proposed could eventually include women and minorities as eligible entities.[175] To become an "eligible entity," an applicant had to meet SBA standards as defined by

165. *Id.* at 2–3.
166. *Id.* at 3.
167. *Id.* at 3–4.
168. *Id.*
169. *Id.* at 19.
170. *Id.* at 6–7.
171. *Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule*, FCC 2 (2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf [https://perma.cc/3PEX-582T]; *see also* 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order on Reconsideration*, 23 FCC Rcd. 2010, para. 13 (2007).
172. Promoting Diversification of Ownership in the Broadcasting Services, *Report and Order and Third Further Notice of Proposed Rule Making*, 23 FCC Rcd. 5922 (2008) [hereinafter *2008 Order*].
173. *Id.* at paras. 6–7.
174. *See id.*
175. *See id.* at para. 4.

total annual sales of an organization or its parent company.[176] For radio, the qualifying limit was $6.5 million, and for television, the limit was $13 million.[177] In addition, an eligible entity had to hold:

> 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.[178]

A legal battle over jurisdiction delayed judicial review of the Order resulting from the 2006 Quadrennial Review. Although the Third Circuit claimed jurisdiction over the FCC's response to the remand issued in *Prometheus I*, both the FCC and members of the deregulatory petitioners attempted to move judicial review to the D.C. Circuit. The petitions failed, the Third Circuits consolidated the cases, and oral arguments occurred in front of the panel on February 11, 2011.

VIII. LOSS NUMBER TWO – *PROMETHEUS II*

Returning to the Third Circuit resulted in another significant legal setback for the FCC. Judge Ambro issued another remand, this time of the FCC's 2007 decisions on media ownership, citing the agency's continuing series of procedural and evidence problems.[179] The panel also incorporated the FCC's eligible entry proposal into the review along with the largely unresolved remand from *Prometheus I*.[180] Suggesting that the agency had "in

176. *Id.* at para. 6.

177. *Id.* at para. 6.

178. *2008 Order*, *supra* note 172, para. 6.

179. "[T]he [FCC] failed to meet the notice and comment requirements of the Administrative Procedure Act. We also remand those provisions of the Diversity Order that rely on the revenue-based 'eligible entity' definition, and the FCC's decision to defer consideration of other proposed definitions (such as for a socially and economically disadvantaged business, so that it may adequately justify or modify its approach to advancing broadcast ownership by minorities and women." *Prometheus II*, 652 F.3d at 437.

180. The Third Circuit overturned the FCC's 2003 Order in *Prometheus I*. *See Prometheus I*, 373 F.3d at 435.

large part punted" on the minority ownership issue,[181] the second decision on remand mandated that the FCC address minority ownership before the completion of the then in-progress 2010 Quadrennial Review.

> The eligible entity definition adopted in the Diversity Order lacks a sufficient analytical connection to the primary issue that Order intended to address. The [FCC] has offered no data attempting to show a connection between the definition chosen and the goal of the measures adopted—increasing ownership of minorities and women. As such, the eligible entity definition adopted is arbitrary and capricious, and we remand those portions of the Diversity Order that rely on it. We conclude once more that the FCC did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions and remand for it to do so before it completes its 2010 Quadrennial Review.[182]

The ruling also signaled that the FCC strained the majority's patience on procedural matters and with its continuing failure to develop a rational media ownership policy decision. The panel provided the FCC with the administrative law version of the "there's no crying in baseball" speech and instructed the agency to resolve lingering evidence problems.

> Stating that the task is difficult in light of *Adarand* does not constitute considering proposals using an SDB definition. The FCC's own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider the proposals presented over many years. If the [FCC] requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor.[183]

Despite this blow, the Third Circuit agreed with the agency on a few points in the 2008 Order.[184] Rejecting an argument proposed by CBS and Clear Channel that media ownership rules were unconstitutional attempts by the FCC to regulate content,[185] the majority also agreed with the FCC and

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181. "Despite our prior remand requiring the [FCC] to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the [FCC] has in large part punted yet again on this important issue. While the measures adopted that take a strong stance against discrimination are no doubt positive, the [FCC] has not shown that they will enhance significantly minority and female ownership, which was a stated goal of this rulemaking proceeding. This is troubling, as the [FCC] relied on the Diversity Order to justify side-stepping, for the most part, that goal in its 2008 Order." *Prometheus II*, 652 F.3d at 471–72.

182. *Id.*

183. *Id.* at 484, n.42.

184. *Id.* at 458.

185. *Id.* at 465.

reaffirmed the belief that the media ownership rules served a substantial government interest in promoting diversity.

> We agree with the FCC that the rules do not violate the First Amendment because they are rationally related to substantial government interests in promoting competition and protecting viewpoint diversity. In NCCB, the Court said that limiting common ownership was a reasonable means of promoting these interests. Therefore, as we did in *Prometheus I*, we hold that the [FCC's] continued regulation of the common ownership of newspapers and broadcasters does not violate the First Amendment rights of either.[186]

Despite the FCC's relatively modest approach taken on media ownership in 2006 Quadrennial Review, the Third Circuit found that the FCC's rationale, ultimate policy decision, and lack of evidence to support its decisions, demonstrated that the FCC failed to create an adequate method of addressing diversity ownership.[187]

IX. SINKING MORALE – THE 2010 AND 2014 QUADRENNIAL REVIEWS

Following its second loss in court and facing another remand that now applied to a majority of its media ownership policies, the FCC nominally continued the ongoing 2010 Quadrennial Review required under Section 202(h).[188] After *Prometheus II*, the FCC's 2010 Quadrennial Review bogged down and became an extended process before expanding to incorporate the Third Circuit's latest remand on minority ownership policy. As time passed, the FCC demonstrated minimal public commitment to conducting the review process or proposing new minority ownership policies.[189] Ultimately, the agency ran out the four-year clock on the 2010 Quadrennial Review without releasing another decision.[190] As time to complete the proceeding expired, the

186. *Id.* at 464-65; Citing Nat'l Citizens Comm. for Broad. v. FCC, 436 U.S. 775, 797 (1978) in which J. Marshall stated that diversity and its effects are elusive concepts, and held that the FCC was entitled to rely on the judgment that commonly held station-newspaper combinations would be unlikely to provide "true diversity."

187. *Id.* at 469 (citing Commissioner Copps' part concurrence part dissent, commenting that, "We should have started by getting an accurate count of minority and female ownership—the one that the Congressional Research Service and the Government Accountability Office both just found that we didn't have. . . . [W]e don't even know how many minority and female owners there are. . . ." *2008 Order*, *supra* note 172, at 5983).

188. 2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant of Section 202 of the Telecommunications Act of 1996, *Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd. 4371, para. 1 (2014) [hereinafter 2014 Quadrennial Review NPRM].

189. *Prometheus II*, 652 F.3d at 465.

190. See 2014 Quadrennial Review NPRM, *supra* note 188, para. 74 & nn. 185–86 in which the FCC explains it disagreed with the Third Circuit's holdings that the agency's rulemaking procedures and outcomes on media ownership were insufficient.

agency continued the 2010 Quadrennial Review as well as a formal response to the remands issued by the Third Circuit in 2004 and 2011 by extending the ongoing process into the launch of the 2014 Quadrennial Review.

Launch of the 2014 Quadrennial Review proceeding further highlighted the FCC's limited actions on media ownership policy.[191] In the following year, the agency failed to release a new proposal and released no new empirical research evaluating the outcomes of media ownership policy. Following the extended period of inaction by the agency, the deregulatory petitioners, the citizen petitioners, and the FCC returned to the Third Circuit in April 2016.[192]

X. YET ANOTHER LOSS – *PROMETHEUS III*

During a hostile oral argument, the judges on the panel pressed the FCC for a straight answer as to when the agency would conclude the open proceedings and take some type of formal action.[193] Although the FCC was reluctant to commit to a timeline for final agency action, agency lawyers informed the court that a draft of new rules would be circulated among FCC commissioners before the end of June 2016.[194]

In response, the Third Circuit panel in *Prometheus III* mandated agency action to conclude the open 2010 and 2014 proceedings and deliver a new proposal for a functional minority ownership policy before the end of the calendar year.[195] The court argued that the FCC's delay "keeps five broadcast ownership rules in limbo."[196] As an example, the court stated that the 1975 ban on local cross-ownership of daily newspapers and broadcast stations remained in effect even though the FCC had determined more than a decade earlier that the ban was no longer in the public interest.[197] This delay also resulted in "significant expense to parties that would be able, under some of the less restrictive options being considered by the [FCC], to engage in profitable combinations."[198] The court also observed that the FCC's delay "hamper[ed] judicial review because there is no final agency action to challenge."[199]

The FCC's ongoing failure to develop—and support with empirical evidence—a policy plan to increase ownership of stations by women and minorities tested the Third Circuit's patience.

191. 2014 Quadrennial Review NPRM, *supra* note 188, at paras. 1, 3.
192. *Prometheus III*, 824 F.3d at 37.
193. *See id*. at 51.
194. *See id.* at 53–54.
195. See *id*. at 52.
196. *Id*. at 51.
197. *See id.*
198. *Id.* at 51–52.
199. *Id*. at 52.

> The FCC presents two arguments for why we should not order relief. Both fail. The first is that it is not yet in violation of *Prometheus II* because we instructed it to address the eligible entity definition during the 2010 Quadrennial Review, which is still ongoing. This contention improperly attempts to use one delay (the Quadrennial Review) to excuse another (the eligible entity definition). By this logic, the [FCC] could delay another decade or more without running afoul of our remand. Simply put, it cannot evade our remand merely by keeping the 2010 review open indefinitely.[200]

Judge Ambro's opinion in *Prometheus III* reiterated the point from *Prometheus II* that the FCC's inability to resolve the impasse over media ownership policy might eventually lead the court to declare the entire structural regulation approach arbitrary and capricious.

> Equally troubling is that nearly a decade has passed since the [FCC] last completed a review of its broadcast ownership rules. . . . Several broadcast owners have petitioned us to wipe all the rules off the books in response to this delay—creating, in effect, complete deregulation in the industry. This is the administrative law equivalent of burning down the house to roast the pig, and we decline to order it. However, we note that this remedy, while extreme, might be justified in the future if the [FCC] does not act quickly to carry out its legislative mandate.[201]

After cataloguing what it saw as the shortcomings in the FCC's most recent actions, the Third Circuit seemed resigned to continue with more litigation over the FCC's broadcast ownership rules. The last paragraph of the opinion noted:

> This is our third go-round with the [FCC]'s broadcast ownership rules and diversity initiatives. Rarely does a trilogy benefit from a sequel. To that end, we are hopeful that our decision here brings this saga to its conclusion. However, we are also mindful of the likelihood of further litigation.[202]

XI. THE FCC GIVES IT ANOTHER GO

In response, in August 2016, the FCC released an Order that concluded the open 2010 and 2014 Quadrennial Reviews while serving as a response to the *Prometheus I* and *Prometheus II* remands. Although the FCC recognized that high speed Internet and other technological innovations unregulated by the FCC have changed how many Americans consume media, it stressed that

200. *Id.* at 49.
201. *Id.* at 37.
202. *Id.* at 60.

localism—and the newspapers, television stations, and radio stations that provide local content—remain indispensable. Specifically, the FCC stated:

> Traditional media outlets . . . are still of vital importance to their local communities and essential to achieving the [FCC's] goals of competition, localism, and viewpoint diversity. This is particularly true with respect to local news and public interest programming, with traditional media outlets continuing to serve as the primary sources on which consumers rely.[203]

Most notably, after six years of inaction, the FCC decided to maintain existing media ownership rules and also offered a full recycle of the eligible entity minority ownership program that the Third Circuit ruled on in *Prometheus II*.[204] "[T]he public interest is best served by retaining our existing rules, with some minor modifications."[205]

> [W]e find that retaining the existing rule nevertheless promotes opportunities for diverse ownership in local radio ownership. The competition-based rule indirectly advances our diversity goal by helping to ensure the presence of independently owned broadcast radio stations in the local market, thereby increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants.[206]

Significantly, the FCC's decision to make no changes to existing rules brought the agency into conflict with the mandates of Section 202(h), as the agency lacked any direct evidence to sustain the existing rules.[207] Instead, the FCC relied only on competition as a proxy indicator to justify the rules, saying that the other two key elements of media ownership policy, localism and viewpoint diversity, no longer mattered in assessing the state of the media environment.

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203. 2014 Quadrennial Review NPRM, *supra* note 191, para. 1.

204. *Id.* at para. 4.

205. Comments Invited on Section 214 Application(S) to Discontinue Domestic Non-Dominant Carrier Telecommunications Services, *Public Notice*, 31 FCC Rcd 9864, para. 3 (2016).

206. *Id.* at para. 125.

207. *See id.*

> In the *Order*, the [FCC] finds that the current Local Radio Ownership Rule remains necessary in the public interest and should be retained with a limited modification. The [FCC] finds that the rule is necessary to promote competition. The radio ownership limits also promote viewpoint diversity by ensuring a sufficient number of independent radio voices and by preserving a market structure that facilitates and encourages new entry into the local media market. Similarly, [the FCC] find[s] that a competitive local radio market helps to promote localism, as a competitive marketplace will lead to the selection of programming that is responsive to the needs and interests of the local community. However, the Order does not rely on viewpoint diversity or localism as a justification for retaining the rule. The [FCC] finds also that the Local Radio Ownership Rule is consistent with the goal of promoting minority and female ownership of broadcast radio stations. The [FCC] ultimately concludes that these benefits outweigh any burdens that may result from the decision to retain the rule without modification.[208]

Likewise, in the face of a clear direction by the court in the remand in *Prometheus II* in 2011 and the decision in *Prometheus III* in 2016 to develop a functional minority ownership policy, the FCC chose to essentially recycle the eligible entity program proposed in 2007. Even with significant empirical evidence available that supported the conclusion that ownership by minorities or women expands the diversity of available content, the FCC chose to try again with a policy that the Third Circuit already deemed unworkable.

> [W]e disagree with arguments that the *Prometheus II* decision requires that we adopt a race- or gender-conscious eligible entity standard in this quadrennial review proceeding or that we continue this proceeding until the [FCC] has completed whatever studies or analyses that will enable it to take race- or gender-conscious action in the future consistent with current standards of constitutional law.[209]

The FCC's action, or lack thereof, risked antagonizing the court. In *Prometheus II,* the Third Circuit clearly ordered the FCC to address the standards and develop a policy for minority ownership:

208. *Id.* at para. 8.
209. *Id.* at para. 313.

> The eligible entity definition adopted in the Diversity Order lacks a sufficient analytical connection to the primary issue that Order intended to address. The [FCC] has offered no data attempting to show a connection between the definition chosen and the goal of the measures adopted—increasing ownership of minorities and women. As such, the eligible entity definition adopted is arbitrary and capricious, and we remand those portions of the Diversity Order that rely on it. We conclude once more that the FCC did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions and remand for it to do so before it completes its 2010 Quadrennial Review.[210]

But instead of following the Third Circuit's command, the FCC argued that the available data did not support changing media ownership rules, choosing instead to selectively interpret and apply the available data.

> In addition, we do not believe that Media Ownership Study 7, which considers the relationship between ownership structure and the provision of radio programming targeted to African American and Hispanic audiences, supports the contention that tightening the local radio ownership limits would promote minority and female ownership. While the data suggest that there is a positive relationship between minority ownership of radio stations and the total amount of minority-targeted radio programming available in a market, the potential impact of tightening the ownership limits on minority ownership was not part of the study design, nor something that can be reasonably inferred from the data.[211]

Legal challenges for non-action quickly followed the FCC's decision, but in November 2017, before those challenges reached oral argument, FCC leadership changed as a result of the 2016 presidential election. Now under new leadership of Chairman Ajit Pai, an appointee of President Donald Trump,[212] the FCC released a new media ownership policy as an Order on Reconsideration of the August 2016 Order.[213] The Order on Reconsideration included an elimination of the newspaper-broadcast cross-ownership rule[214] and the radio-television cross-ownership rule.[215] It also eliminated the eight-

210. *Prometheus II*, 652 F.3d at 471.

211. 2014 Quadrennial Review NPRM, *supra* note 188, para. 127.

212. 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCC Rcd. 9802, 9888 (2017) [hereinafter *2014 Quadrennial Review Reconsideration Order*] (statement of Chairman Ajit Pai).

213. *Id.* at para. 1.

214. *See id.* at para. 2; *see also id.* at para. 15 (stating that the FCC no longer believed that the newspaper-broadcast cross-ownership rule promoted "viewpoint diversity, localism, or competition" and therefore, "does not serve the public interest").

215. *Id.*

voices test in the local television ownership rule, replacing it with a case-by-case adjudication of mergers that ran afoul of the top four station prohibition.[216] The changes also included an elimination of the attribution rule for television Joint Service Agreements (JSAs).[217] Unlike the Second Report and Order from August 2016, the Order on Reconsideration neither included a revision to the local radio ownership rule nor directly addressed the Third Circuit's mandate to develop a viable minority ownership policy.[218]

While consolidated cases challenging the original 2016 Order and 2017 Order on Reconsideration pended in *Prometheus IV*, the FCC released its initial proposal for a new minority ownership policy, called the "incubator program"[219] as part of a concentrated effort to break the legal impasse over media ownership policy.[220] The incubator proposal paved avenues for additional ownership consolidation, including opportunities to exceed the local limits set by Congress in the Telecommunications Act for companies willing to incubate a startup through assistance and foster new entrant broadcasters.[221] Under the incubator program, existing operators will provide financial, operational, and technical guidance to new or diverse entities.[222] The Order implementing the new incubator program released in August 2018 just ahead of the Third Circuit's order to respond to the challenges to the 2016 and 2017 decisions.[223] The incubator program focused on developing new ownership entities in broadcast radio.[224] The FCC argued that radio required fewer staff, less technical experience, and a far smaller financial commitment than broadcast television.[225]

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216. *See id.* at para. 66; *see also id*. para. 76 (elaborating on other reasons for the elimination of the eight-voices test).

217. *See id*. at 9846, para. 96; *see also id.* at 9849, paras. 102–3 (in which the FCC further discusses its reasoning in eliminating the attribution rule for television JSAs).

218. *See id.* at para. 7, in which the FCC notes the existence of the *Prometheus Radio Project* line of cases, but does not mention the majority's remand on a functional minority ownership rule. Instead the FCC merely notes that the case involves, "Various diversity-related decisions, certain media ownership rules and the decision not to attribute SSAs."

219. *Id.* at para. 126.

220. *Id.* at para.127; *see also* Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, *Report and Order*, 33 FCC Rcd. 7911, para. 1 (2018) [hereinafter *2018 Incubator Policy*] (in which the FCC describes the Incubator Program as method to foster new and diverse voices into the broadcast industry).

221. *2014 Quadrennial Review Reconsideration Order*, *supra* note 212, at para. 127.

222. *See id.*

223. *See Prometheus IV*, 939 F.3d 567 (3d Cir. 2019).

224. *2018 Incubator Policy*, *supra* note 20, at para. 6.

225. *Id*. at para. 7.

> The program we implement today will apply in the radio market, as radio has traditionally been the more accessible entry point for new entrants and small businesses seeking to enter the broadcasting industry, and a waiver of the local radio rules provides an appropriate reward for incubation. Owning and operating a radio station requires a lower capital investment and less technical expertise than owning and operating a television station, and it also requires less overhead to operate. In addition, we believe that the [FCC]'s existing ownership limitations on local radio markets provide a sufficient incentive for incumbent broadcasters to participate in an incubator program with the promise of obtaining a waiver to acquire an additional station in a market.[226]

To be eligible for the incubator program, a startup entity must meet two criteria. The first prong of eligibility ties to an update of the FCC's entrant bidding credit standard.[227] To meet this new standard, the incubating entity must not have owned or have an attributable interest in more than three full service AM or FM radio stations and may not have any attributable interest in any broadcast television stations. The second requirement for the new initiative was that an incubated entity must meet the criteria established for the Eligible Entity designation proposed by the FCC in 2007.[228] This is the previously used designation remanded in *Prometheus II* and *Prometheus III*. Despite these remands, the FCC chose to use the designation yet again, this time for incubated entities.[229]

XII. HERE WE GO AGAIN: THE FOURTH, MOST RECENT, BUT PERHAPS NOT FINAL LOSS – *PROMETHEUS IV*

The consolidated challenges to the 2016, 2017, and 2018 Orders on media ownership returned to the Third Circuit for oral arguments in June 2019. As before, the panel appeared skeptical of the FCC's decision making to the point that one of the attorneys representing a group of the deregulatory petitioners used her available time to argue for limiting the scope of a potential remand.[230]

On September 23, 2019, in the fourth and final 2-1 decision written by Judge Ambro, the Third Circuit handed down the fourth *Prometheus Radio Project* decision which, in practical terms, undermined the FCC's decision

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226. *Id.*

227. *Id.* at para. 19; *2008 Order*, *supra* note 172, at 5925.

228. *Id.*

229. *2018 Incubator Policy*, *supra* note 20, at para. 19.

230. Oral Argument at 16:45, 37:19, 1:05:25, Prometheus Radio Project v. FCC (*Prometheus IV*), 939 F.3d 576, 589 (3d Cir. 2018) http://www2.ca3.uscourts.gov/oralargument/audio/15-3863HowardStirkHoldigsLLCetalvFederalCommunicationCommissionetal.mp3.

making from 2011 to 2019.[231] The scope of the panel's review included the 2016 Report and Order, the 2017 Order on Reconsideration, and the 2018 incubator program.

> Here we are again. After our last encounter with the periodic review by the [FCC] of its broadcast ownership rules and diversity initiatives, the [FCC] has taken a series of actions that, cumulatively, have substantially changed its approach to regulation of broadcast media ownership. First, it issued an order that retained almost all of its existing rules in their current form, effectively abandoning its long-running efforts to change those rules going back to the first round of this litigation. Then it changed course, granting petitions for rehearing and repealing or otherwise scaling back most of those same rules. It also created a new "incubator" program designed to help new entrants into the broadcast industry. The [FCC], in short, has been busy.[232]

While the Third Circuit suggested the agency had been busy in comparison to the years of inaction during the 2010 and 2014 Quadrennial Reviews, the panel ruled that yet again the FCC failed to resolve the two core issues it botched in the prior cases: providing empirical evidence to support a rational policy decision and proposing a policy that would increase ownership by women and minorities.

> We do . . . agree with the last group of petitioners, who argue that the [FCC] did not adequately consider the effect its sweeping rule changes will have on ownership of broadcast media by women and racial minorities. Although it did ostensibly comply with our prior requirement to consider this issue on remand, its analysis is so insubstantial that we cannot say it provides a reliable foundation for the [FCC's] conclusions. Accordingly, we vacate and remand the bulk of its actions in this area over the last three years.[233]

The FCC showed no embarrassment to admit that the failure to respond to the court's earlier mandates was intentional. The panel suggested that FCC did not even attempt to argue that it followed the Third Circuit's instructions.[234] Judge Ambro's decision matched the tone of oral argument,

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231. *Prometheus IV*, 939 F.3d at 589 ("We do conclude… that the [FCC] has not shown yet that it adequately considered the effect its actions since *Prometheus III* will have on diversity in broadcast media ownership. We therefore vacate and remand the Reconsideration and Incubator Orders in their entirety, as well as the "eligible entity" definition from the 2016 Report & Order").

232. *Id*. at 572–73.

233. *Id.* at 573.

234. *Id.* at 585 ("Problems abound with the FCC's analysis. Most glaring is that, although we instructed it to consider the effect of any rule changes on female as well as minority ownership, the [FCC] cited no evidence whatsoever regarding gender diversity. It does not contest this.").

pointing out that by any rational analysis the FCC's effort to support its choices was inadequate and could not even pass a more deferential review.

> The only 'consideration' the FCC gave to the question of how its rules would affect female ownership was the conclusion there would be no effect. That was not sufficient, and this alone is enough to justify remand. . . . Even just focusing on the evidence with regard to ownership by racial minorities, however, the FCC's analysis is so insubstantial that it would receive a failing grade in any introductory statistics class.[235]

Judge Ambro's decision proposed the need for the FCC to recognize that the outcomes of ownership policy are not natural effects, but rather the results of choices made by the agency. Recognizing this will likely not be the last review of media ownership policy, Judge Ambro states that in future reviews, the FCC will have to show its work and even determine whether other choices or approaches might be better.

> And even if we only look at the total number of minority-owned stations, the FCC did not actually make any estimate of the effect of deregulation in the 1990s. Instead it noted only that, whatever this effect was, deregulation was not enough to prevent an overall increase during the following decade. The [FCC] made no attempt to assess the counterfactual scenario: how many minority-owned stations there would have been in 2009 had there been no deregulation.[236]

In the judgement, the Third Circuit vacated and remanded the 2017 Reconsideration Order and the incubator program to the FCC and vacated and remanded the definition of "eligible entities" in the 2016 Report and Order.[237] The Third Circuit, yet again, retained jurisdiction over the remanded issues and all other petitions for review.[238]

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235. *Id.* at 585–86.

236. *Id.* at 586.

237. *Id.* at 587–88.

238. *Id.* ("Accordingly, we vacate the Reconsideration Order and the Incubator Order in their entirety, as well as the 'eligible entity' definition from the 2016 Report & Order. On remand the [FCC] must ascertain on record evidence the likely effect of any rule changes it proposes and whatever 'eligible entity' definition it adopts on ownership by women and minorities, whether through new empirical research or an in-depth theoretical analysis. If it finds that a proposed rule change would likely have an adverse effect on ownership diversity but nonetheless believes that rule in the public interest all things considered, it must say so and explain its reasoning. If it finds that its proposed definition for eligible entities will not meaningfully advance ownership diversity, it must explain why it could not adopt an alternate definition that would do so. Once again we do not prejudge the outcome of any of this, but the [FCC] must provide a substantial basis and justification for its actions whatever it ultimately decides.").

XIII. HERE WE ARE AGAIN, AGAIN – WHERE WE ARE

The day after the decision released, the FCC also released an Order approving a merger of TV stations under one of the ownership deregulations vacated in *Prometheus IV*.[239] Then the FCC and the National Association of Broadcasters (NAB) each requested a rehearing and en banc review on November 7, 2019. The FCC's filing argued that the Third Circuit had for fifteen years functionally replaced the FCC's authority on media ownership policy.

> Through its several remands, the panel has effectively replaced the [FCC]'s broad-ranging public interest analysis (which is focused by statute on competition but historically has included considerations of localism and diversity) with a narrow inquiry into the effect of the FCC's rules on female and minority ownership.[240]

As it had done in oral argument in June 2019, the FCC conflated the standards for evidence between the Administrative Procedure Act and Section 202(h) of the Telecommunications Act, stating that there was no standard requiring the agency to produce evidence of the type the panel demands on remand.[241] Further, the FCC claimed that the evidence on minority ownership that the Third Circuit demanded was impossible to produce, and as such, the panel had set the agency up to fail.

> Faced with daunting instructions on remand—to collect decades-old data that may not exist, to conduct analyses that are not defined, and to consider unspecified alternatives, all to satisfy legal standards that are unmoored from the 1996 Act or the APA—the [FCC] has been set up for failure.[242]

Less than two weeks later, on November 20, 2019, Judge Ambro authored a decision denying a review by the full panel. The full panel review sought by the FCC and the NAB would not occur.

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239. *Consent to Assign Certain Licenses from Red River Broadcast Co., LLC to Gray Television Licensee, LCC*, *Memorandum Opinion and Order*, 34 FCC Rcd. 8590 (2019).

240. Petition of Federal Communications Commission and United States of America for Rehearing en banc at 7-8, Prometheus Radio Project v. FCC, 939 F.3d 567 (3d Cir. 2019) (en banc) (No. 17-1107, 17-1108, 17-1109, 17-1110, 17-1111, 18-1092, 18-1669, 18-1670, 18-1671, 18-2943,18-3335).

241. *Id.* at 2.

242. *Id.* at 3.

> The petitions for rehearing filed by Respondents and Intervenors in support of Respondents in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service not having voted for rehearing, the petitions for rehearing by the panel and the Court *en banc* are denied.[243]

On November 29, 2019, the panel issued a mandate formally implementing the remand. On December 20, 2019, the FCC's Media Bureau responded to the mandate with an order which concluded the 2014 Quadrennial Review, the 2010 Quadrennial Review, and the incubator program.[244] The Media Bureau's Order reimplemented the long-standing newspaper-broadcast cross-ownership ban, radio-television cross-ownership rule, local television ownership rule, local radio ownership rule, and television JSA attribution rules.[245] The FCC marked the 2017 Order on Reconsideration and the incubator program as repealed.[246] Finally, the 2016 Order's reinstatement of the eligible entity designation was also repealed in line with the Third Circuit's remand in *Prometheus IV*.[247] In summary, the FCC has once again returned media ownership policy to the status quo embraced by the agency in the August 2016 Second Report and Order, functionally leaving most media ownership rules where they have been since the decision in *Prometheus I* in 2004, and arguably since the implementation of the Telecommunications Act.

XIV. A NEW, OLD APPROACH

At the center of the FCC's struggle is the continuing reliance on a largely unsupported conceptual relationship between ownership and diversity. While the FCC certainly has employed economic mechanisms to promote competition, the agency has used ownership as a proxy for the policy

243. Prometheus Radio Project v. FCC, 939 F.3d 567 (3d Cir. 2019), *reh'g en banc denied* (3d Cir. Nov. 20 2019).

244. 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to 1996; 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership In the Broadcasting Services; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets; Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, *Order*, 34 FCC Rcd. 12360, paras. 1–3 (2019).

245. *See id.*

246. *See id.*

247. *Id.*

goal of diversity.[248] This approach to policy implementation is problematic and has been a significant obstacle to rational policy design since the passage of the local newspaper-broadcast cross-ownership ban in 1975.

Notably, there is limited empirical data that supports the idea that either internal or external competition is increasing content diversity among the larger ownership structures the agency pursues. Even in proposing the minority ownership proposals, including the 2007 eligible entity definition and the 2018 incubator program, the FCC attempted to shoehorn in some additional ownership diversity without any consideration for what the agency is actually tasked with, namely creating content diversity. Data repeatedly supports the idea that smaller ownership structures, especially those that include stations owned by women or minorities, are the most likely to provide diverse content.[249] While this is a technical point of this discussion, it is an important one.

As Congress removed the FCC's decision-making role as the expert agency, the FCC responded by quickly implementing the new ownership limits mandated by the Telecommunications Act.[250] This decision by the FCC started a chain of problems for the agency that lingers today, since the agency started the media ownership review process with a limited understanding of the current media environment, but despite this limited understanding, allowed six years and the 1998 and 2000 Biennial Reviews to pass without critically assessing the outcomes of its policies.[251] By the time the agency took stock of the changes to the media environment during the 2002 Biennial Review, the FCC could not support the changes it implemented, going so far as to hide empirical evidence about those changes and forcing the agency to develop the Diversity Index in hopes that the index would allow further changes.[252] Unfortunately for the FCC, by the time it proposed the Diversity Index, citizens had seen the outcomes of media ownership policy and sought judicial review. Once media ownership policy reached the Third Circuit, the game was over for the FCC, and the agency has been losing ever since.

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248. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 794–95 (1978) (stating that, '"the [FCC] has long given 'primary significance' to 'diversification of control of the media of mass communications,' and has denied licenses to newspaper owners on the basis of this policy… so as to promote diversification of the mass media as a whole"').

249. *See* Carolyn M. Byerly, *Gender-and-Race-Conscious Research Toward Egalitarian Broadcast Ownership Regulation*, FED. COMM. CMM'N, (Jan. 27, 2010), https://transition.fcc.gov/ownership/workshop-012710/byerly.pdf [https://perma.cc/2DYC-XB5B](stating that previous findings of empirical studies indicate that diverse ownership of broadcasting stations leads to audiences which feel the material better fits their community's interests and needs); *see also* Sandra Fulton, *We Still Need Diversity and Minority Ownership in our Media*, ACLU, (Jan. 19, 2012, 2:05 PM), https://www.aclu.org/blog/free-speech/internet-speech/we-still-need-diversity-and-minority-ownership-our-media [https://perma.cc/A94N-X8ZW] for an extension of the arguments past not only minority communities made in the above cited remarks, but also concerning women. *See generally* Christopher Terry, *Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act*, 71 FED. COMM. L.J. 328, 328–29 (2019).

250. *Id*. at para. 1.

251. *1998 Biennial Review*, *supra* note 10, at. 1–13.

252. *See generally* 2002 Biennial Review, *supra* note 12, at paras. 391–400.

Following the decision in *Prometheus IV*, the FCC finds itself with media ownership regulation largely as it has existed since the Telecommunications Act. Although the FCC made minor tweaks to the rules since 1996, the reality is that the regulations in place were the ones adjusted by Congress, at least in the case of the national television ownership rule. This impasse, largely the result of the FCC's unwillingness to develop empirical evidence of the outcomes of media ownership policy, should be resolved as the agency concludes the 2018 Quadrennial Review.[253]

The evidence created by an honest policy evaluation of media ownership policy since 1996 is likely to cast two decades of the FCC's actions in a bad light. That reality cannot be avoided, and the four losses in court to the Prometheus Radio Project have already laid bare the agency's shortcomings. The policy, as implemented, has significant conceptual problems, and absent a new delegation from Congress, the FCC will need to adopt major changes in its approach to implementing media ownership policy to break the impasse. The Third Circuit panel is clear that a functional policy promoting ownership by women and minorities is a requirement for breaking the deadlock,[254] yet the FCC remains reluctant to test perceived equal protection clause issues from the Supreme Court's *Adarand* precedent with a policy proposal that directly promotes ownership by women and minorities.

The FCC actively chooses to make the situation more complicated than it already is. The FCC's 2017 data on minority ownership suggest the need for radical changes.[255] Both women and minorities are drastically underrepresented in terms of media control. Women are 51% of our population, but only held a majority of the voting interests in 73 of 1,368 full power commercial television stations (5.3%); 19 of 330 Class A television stations (5.8%); 76 of 1,025 low power television stations (7.4%); 316 of 3,407 commercial AM radio stations (9.3%); and 390 of 5,399 commercial FM radio stations (7.2%).[256] Beyond gender, breakdowns along racial and ethnic lines demonstrate low levels of control and media ownership. Racial minorities collectively or individually held a majority of the voting interests in only 26 of 1,368 full power commercial television stations (1.9%); 8 of 330 Class A television stations (2.4%); 21 of 1,025 low power television stations (2.0%); 202 of 3,407 commercial AM radio stations (5.9%); and 159 of 5,399 commercial FM radio stations (2.9%), for a miniscule total of 416 of 11,529 (3.6%) of all commercial broadcast stations.[257]

Trivial control and ownership of media properties by women and minorities result from the FCC's implementation of the ownership limits contained in the Telecommunications Act as well as the repeated failure of the agency to develop a functional minority ownership policy that can

253. See *Prometheus IV*, 939 F.3d at 574, in which J. Ambro, speaking for the majority, stated, "Thrice before we have passed on the [FCC's] performance of its duties under § 202(h), or the lack thereof."

254. *See id.* at 587.

255. *See* FCC, No. DA 20-161, FOURTH REPORT ON OWNERSHIP OF BROAD. STATIONS, (2020).

256. *See id.* at 4-5.

257. *See id.* at 5.

withstand judicial review. Problematically, empirical evidence seems to suggest that smaller media organizations in the control of minority owners are more likely to create content that directly targets minorities.[258] By allowing the media ownership environment to degrade, the FCC is choosing to limit the political participation of these groups, one of which represents more than half of the U.S. population. Developing a minority ownership policy that directly targets the strict scrutiny standard applied to race and gender based decisionmaking by the *Adarand* precedent may be challenging, but the FCC has decided it is easier to keep losing in court than to even try.[259]

In *Prometheus I*, Judge Ambro's decision suggested to the FCC a way forward on media ownership policy by focusing on broadcast regulation, rather than trying to account for and accommodate other forms of media the agency lacks jurisdiction to regulate.[260] If one applies this logic to the issue of minority ownership, then there is likely a straightforward path for the FCC to follow that is also largely supported by Supreme Court precedent. Broadcasting is an anomaly in judicial review of state action, in that the spectrum scarcity doctrine justifies a lower standard of review.[261] In *NBC v. United States*, the Supreme Court said the FCC was more than a traffic officer and that it had an obligation to determine the nature of the traffic on the airwaves.[262] Likewise, in *Red Lion v. FCC*, the Court said unanimously that the FCC did not infringe the First Amendment by keeping open the airwaves through regulation and that the rights of the listeners were paramount.[263]

Following this policy design to its logical conclusion is a straightforward exercise. Develop and implement a minority ownership policy that puts broadcast stations in the hands of locally based owners who themselves are women and minorities. When faced with the *Adarand* dilemma, rely on the precedent that broadcasting, because of spectrum scarcity, is not subject to scrutiny that dictates a content neutral approach in

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258. Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC's Incubator Program*, 24 COMM. L. & POL'Y 403, 407 (2019).

259. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). A fuller discussion of *Adarand* warrants a separate article, but for the purposes of this Article, the Supreme Court's application of strict scrutiny to race-based government decisions intended to benefit racial minorities is the primary stated explanation for why the FCC has, so far, refused to assess or develop an ownership policy that promotes control of broadcast outlets by women and minorities.

260. *Prometheus I,* 373 F.3d at 435.

261. Red Lion Broad. v. FCC, 395 U.S. 367 (1969). The decision in *Red Lion* represents a high-water mark for the idealistic role of broadcast regulation in ensuring citizen access to diverse and antagonistic viewpoints. Broadcasting represents the easiest medium for universal access to information, providing opportunities for political maximization while requiring minimal equipment or infrastructure through an established service that can effectively provide targeted content to underrepresented groups, including minorities. While there is a risk to the higher societal values embedded in *Red Lion* if those values are tested against the Strict Scrutiny standard in *Adarand*, the reality is that the FCC's own data, released in 1995, indicates the current approach to media ownership has failed. *See generally* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

262. Nat'l Broad. Co. v. U.S., 319 U.S. 190, 215–16 (1943).

263. *Red Lion Broad.*, 395 U.S. at 375 (holding that the "fairness doctrine" as applied to the RTNDA "enhance[d] rather than abridg[ed]" First Amendment liberties).

application.[264] By focusing on just two aspects of the media ownership equation—localism and diversity—competition will increase as new entrants are created. There is substantial empirical evidence available that would justify this approach, and unless the FCC intends to lose in court again, this path provides an answer that the Third Circuit already signaled it would approve.[265]

Localism and diversity were core values of the broadcast regulation scheme prior to the deregulation of the 1980s, but the FCC largely abandoned them in favor of an economic approach to regulation. Now, almost 25 years after the Telecommunications Act, we see its effects clearly. The rights of the "listener" are not being served by ownership regulations that have reduced the diversity of viewpoints. It is time to move on before the slaughter rule gets invoked in time for a potential *Prometheus V*.

264. *Prometheus II*, 652 F.3d at 483.
265. *Prometheus I,* 373 F.3d at 435.

The Repeal of Net Neutrality: Does it Violate Title II of the Civil Rights Act of 1964?

Katrina Jackson*

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*J.D., May 2021, The George University Law School. Notes Editor, Federal Communications Law Journal, Vol. 73. B.A. International Affairs, The George Washington University - Elliot School of International Affairs, 2017. I would like to thank the hard working members of the Federal Communications Law Journal for their continued support and dedication in the publication process. A special thanks to Professor Michael Bedder, Journal Adjunct, for his guidance and scholarship. And additionally, I would like to thank my parents, my sister, and my friends for their love, support, and encouragement.

I. INTRODUCTION

On the evening of December 1, 1955, police forcibly removed a young woman from a local bus in Montgomery, Alabama, and arrested her when she refused to give up her seat for a White passenger.[1] At the time, Alabama law required African Americans to sit in the back of busses and relinquish their seats to White passengers if a bus became full.[2] Alabama's discriminatory state law denied Rosa Parks the *full and equal enjoyment* of Montgomery's local bus system.[3] Two years later, on September 4, 1957, law enforcement prohibited nine Black students from attending an all-White public high school in Little Rock, Arkansas.[4] Upon entering the school, Arkansas' National Guard blocked the nine Black students from entering the school, pursuant to Governor Orval Faubus' orders.[5] Arkansas' unwillingness to desegregate its public school system denied the Little Rock Nine the *full and equal enjoyment* of the state's public educational system.[6] Following this incident, on February 1, 1960, a diner denied four Black college students service at a local lunch counter in Greensboro, North Carolina.[7] The diner's lunch counter policy only permitted White customers to dine.[8] But fighting for equality, the young Black college students refused to leave despite the lunch counter's policy.[9] Stemming from intolerance and bigotry, North Carolina's diner denied the Greensboro Four the *full and equal enjoyment* of service at their local diner.[10] During the 1950s and early 1960s, discriminatory laws and practices continually denied the *full and equal enjoyment* of many public establishments to African Americans.[11] However, such discriminatory practices fueled the Civil Rights Movement, a movement that fought to ensure equality for African-Americans.[12]

On July 2, 1964, President Lyndon B. Johnson signed the Civil Rights Act of 1964 ("Civil Rights Act") into law, which aimed to eliminate discriminatory practices in places of public accommodation, such as hotels, restaurants, and local bus systems.[13] The Civil Rights Act protected an

1. *Today in History-December 1: Rosa Parks Arrested*, LIBR. OF CONG., https://www.loc.gov/item/today-in-history/december-01/ [https://perma.cc/ZP9C-CPBJ].
2. *Id.*
3. *See id.*; The Civil Rights Act, 42 U.S.C. § 2000(a) (1964).
4. *Civil Rights Movement*, HISTORY (Oct. 27, 2009), https://www.history.com/topics/black-history/civil-rights-movement#section_3 [https://perma.cc/4XDT-NPVS].
5. *Id.*
6. *See id.*; 42 U.S.C. § 2000(a).
7. *Civil Rights Movement*, *supra* note 4.
8. *See id.*
9. *Id.*
10. 42 U.S.C. § 2000(a); *Civil Rights Movement*, *supra* note 4.
11. *Civil Rights Movement*, *supra* note 4.
12. *Id.*
13. *Id.*

individual's right to fully and equally enjoy places of public establishments regardless of one's race or ethnicity.[14]

While discriminatory practices in places of public accommodation during the 1950s and 60s prompted the Civil Rights Act, there are similar issues today. [15] As America continues to progress socially, economically, and politically, places of public accommodation should not be confined to physical walls. In today's society, the Internet should be classified as a place of public accommodation. The Internet is an integral part of all of our lives and it will continue to revolutionize society for the better.[16] Thus, the law should guarantee all persons a right to fully and equally enjoy the Internet and its vast economic benefits.

Moreover, the Internet is one of the most common tools Americans use to receive information.[17] Due to rapid developments in social media and the sharing of digital news, 50% of all Internet users report that they receive breaking news via social media applications and Internet web browsers.[18] Over the years, Americans have become accustomed to freely receiving and imparting information and ideas via the Internet.[19] But this free exchange of material and knowledge is in jeopardy because, on October 1, 2019, the United States Circuit Court of Appeals for the District of Columbia ("D.C. Circuit") upheld the FCC's repeal of net neutrality.[20]

Net neutrality incorporates the idea that one's ability to access the Internet freely and equally is a human right.[21] Net neutrality is the principle that Internet service providers (ISPs), such as Comcast Xfinity, Verizon Fios, or AT&T, must treat all Internet content and Internet data equally, regardless of the source.[22] However, the D.C. Circuit affirmed the FCC's repeal of net neutrality.[23] ISPs may now engage in discriminatory practices including

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14. 109 CONG. REC. 22,839 (Dec. 30, 1963).

15. *Id.*

16. *See generally* Janna Anderson & Lee Rainie, *Stories from Experts About the Impact of Digital Life*, PEW RSCH. CTR. (July 3, 2018), https://www.pewresearch.org/internet/2018/07/03/stories-from-experts-about-the-impact-of-digital-life/ [https://perma.cc/2GN8-89VS]; *See generally* Kathleen Stansberry et al., *Experts Optimistic About the Next 50 Years of Digital Life*, PEW RSCH. CTR. (Oct. 28, 2019), https://www.pewresearch.org/internet/2019/10/28/experts-optimistic-about-the-next-50-years-of-digital-life/ [https://perma.cc/EX9J-CF96].

17. *See generally* Kristen Bialik & Katerina Eva Matsa, *Key trends in social and digital news media*, PEW. RSCH. CTR. (Oct. 4, 2017), https://www.pewresearch.org/fact-tank/2017/10/04/key-trends-in-social-and-digital-news-media/ [https://perma.cc/VQR6-VSQE].

18. *See generally* Nicole Martin, *How Social Media Has Changed How We Consume News*, FORBES (Nov. 30, 2018), https://www.forbes.com/sites/nicolemartin1/2018/11/30/how-social-media-has-changed-how-we-consume-news/#59a691573c3c) [https://perma.cc/EYR2-28HK].

19. *Id*.

20. *See* Mozilla Corporation v. FCC, 940 F.3d 1, 18 (D.C. Cir. 2019).

21. *Why Net Neutrality Should Be Considered a Human Right*, CITIZENS FOR GLOB. SOLS. (Aug. 3, 2017), https://globalsolutions.org/why-net-neutrality-should-be-considered-a-human-right/ [https://perma.cc/8WK7-LES2].

22. *Net Neutrality*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/net%20neutrality (last visited Nov. 11, 2020).

23. *Mozilla*, 940 F.3d at 18.

blocking, throttling, and paid prioritization.[24] Such discriminatory practices could result in an Internet that separates users by socioeconomic status or race.[25]

For example, individuals or private companies willing to pay ISPs at a higher rate may receive a faster, favored service, whereas individuals unwilling or unable to pay ISPs a competitive market price may find it much harder to compete and may receive slower Internet access.[26] Moreover, ISPs may begin to offer "bundled" Internet packages, similar to the market of television packages.[27] ISPs, like other private companies, are motivated by profits.[28] ISPs now have the market power as gatekeepers to impose "both technical and economic harms as part of a business negotiation, or favor their own higher-level services."[29] Not only can ISPs prevent a consumer's right to access lawful content, ISPs can degrade and slow down a consumer's network service.[30] The repeal of net neutrality and such harms associated with it could lead to a cable packaged Internet, jeopardizing the order of an open Internet. And because the Internet touches every facet of American lives, it should remain equally accessible to all.

The benefits of an open Internet are undisputed, including steady development in commerce, innovation, information, and free flowing speech.[31] But cable packaged Internet substantially harms such necessary benefits, which could severely and disproportionally impact African Americans and Hispanics.[32] African Americans and Hispanics, in comparison to Whites, rely substantially more on an open Internet to stay abreast of local and global news and are least likely to be able to afford an Internet package that offers a diverse set of unblocked, readily available content.[33] To prevent such a distorted outcome, the idea of Internet openness must be protected.

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24. *Id.* at 63.

25. *Id.*; *see* Keith Collins, *Net Neutrality Has Officially Been Repealed. Here's How That Could Affect You.*, N.Y. TIMES (June 11, 2018), https://www.nytimes.com/2018/06/11/technology/net-neutrality-repeal.html [https://perma.cc/3EQM-SFCT]; Michael J. Coren, *Without net neutrality in Portugal, mobile Internet is bundled like a cable package*, QUARTZ (Oct. 30, 2017), https://qz.com/1114690/why-is-net-neutrality-important-look-to-portugal-and-spain-to-understand/ [https://perma.cc/7SSU-JXK2].

26. *See* Collins, *supra* note 25.

27. *Id.*

28. *See generally* Tom Wheeler, Chairman, Fed. Commc'n Comm'n, Remarks at the Aspen Institute, *A Time to Look Forward: Protecting What Americans Now Enjoy* (Jan. 13, 2017), https://www.fcc.gov/document/remarks-chairman-wheeler-aspen-institute-washington-dc.

29. Protection and Promoting the Open Internet, *Report & Order on Remand, Declaratory Rule, and Order*, 30 FCC Rcd. 5601, 5629, para. 80, n.128 (2015) [hereinafter *2015 Order*].

30. *See id.* at 5892, para. 6.

31. See *id*. at 5603, para. 1.

32. Collins, *supra* note 25; Coren, *supra* note 25.

33. *Local News in the Digital Age*, PEW RSCH. CTR. (Mar. 5, 2015), https://www.journalism.org/2015/03/05/race-and-ethnicity-in-the-local-news-ecosystem/ [https://perma.cc/Z86U-BNUM]; Rakesh Kochhar & Anthony Cilluffo, *How wealth inequality has changed in the U.S. since the Great Recession, by race, ethnicity, and income*, PEW RSCH. CTR. (Nov. 1, 2017), https://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/ [https://perma.cc/5CGQ-EREC].

Similar to the way Rosa Parks, the Little Rock Nine, and the Greensboro Four were found to be entitled to *full and equal enjoyment* of the various places of public accommodations, African Americans, Hispanics, and more generally people of color should be entitled to the *full and equal enjoyment* of the Internet.

This Note will establish that the repeal of net neutrality will have disparate effects on people of color because ISPs can engage in blocking, throttling, and paid prioritization of an individual's Internet access, resulting in unlawful disparate impact prohibited by Title II of Civil Rights Act of 1964. Part II will establish the legal and factual background of the FCC and its net neutrality proceedings. Part III will illustrate how the FCC's repeal of net neutrality enables ISPs to engage in conduct that disparately impacts people of color. Part IV will explain what a place of public accommodation means under federal civil right law. Part V will establish why the Internet should be considered a place of public accommodation under Title II of the Civil Rights Act. And lastly, Part VI will demonstrate how Title II of the Civil Rights Act prohibits disparate impact resulting from the FCC's repeal of net neutrality.

II. BACKGROUND

A. Past Net Neutrality Principles

Net neutrality, a term first coined in 2003, has governed many of the FCC's policy positions and regulatory frameworks.[34] Even before the term's recognition, FCC Chairman William Kennard in 2000 identified the importance of an open Internet, stating: "Consumers—the people who actually drive a market—deserve and will demand an open platform. They are used to openness in the dial-up world, and they will not want to be denied it in the broadband environment."[35] Four years later, FCC Chairman Michael Powell established the "Four Internet Freedoms" ("The Freedoms"), which encouraged ISPs to follow and promote Internet openness.[36] The Freedoms included the freedom to access content, run applications, attach devices, and obtain service plan information.[37]

The Freedoms illustrate the FCC's long-standing efforts in encouraging ISPs to allow their customers to freely impart and receive information via the Internet. Moreover, in 2010, the FCC officially adopted an Open Internet Order ("2010 Order"), which incorporated principles of net neutrality.[38] In an effort to "preserve the Internet as an open platform for innovation, investment,

34. Tim Wu, *Network Neutrality, Broadband Discrimination* 2 J. TELECOMM. HIGH TECH. L. 141, 143–44 (2003)

35. William E. Kennard, Chairman, Fed. Commc'n Comm'n, Remarks before the Fed. Comm. Bar N. Cal. Ch., The Unregulation of the Internet: Laying a Competitive Course for the Future (July 20, 1999).

36. Michael K. Powell, Chairman, Fed. Commc'n Comm'n, Remarks at Silicon Flatirons Symp., Preserving Internet Freedom: Guiding Principles for the Industry (Feb. 8, 2004).

37. *Id.*

38. Preserving the Open Internet Broadband Industry Practices, *Action*, 25 FCC Rcd. 17905, 17906, para. 2 (2010) [hereinafter *2010 Order*].

job creation, economic growth, competition, and free expression," the FCC adopted three basic rules in the 2010 Order.[39] The rules required transparency by ISPs about their network practices and prohibited ISPs from blocking or unreasonably discriminating against lawful content in order to "empower and protect consumers and innovators while helping ensure that the Internet continues to flourish."[40]

The transparency rule required ISPs to disclose their network management practices and the conditions of all their services to their customers.[41] Secondly, the blocking ban prevented ISPs from preventing customers from viewing lawful websites.[42] And lastly, the FCC's no unreasonable discrimination rule prevented ISPs from unreasonably discriminating against lawful content, content an ISP would otherwise be obligated to transmit over the network.[43] Although the 2010 Order established restrictions on an ISP's behavior, ISPs still managed to circumvent and break such rules.[44] To further address the D.C. Circuit's expressed concerns in the 2010 Order, specifically that the FCC lacked authority to ban blocking and throttling without proper classification of broadband Internet under Title II of the Communications Act, the FCC promulgated the 2015 Open Internet Order ("2015 Order").[45]

The 2015 Order established three bright-line rules.[46] The FCC sought to develop these "clear, bright-line rules" to protect consumers from an ISP's discriminatory behavior.[47] The first bright-line rule issued was the *no blocking* rule.[48] The rule stated that, "[c]onsumers who subscribe to a retail broadband Internet access service must get what they have paid for—access to all (lawful) destinations on the Internet."[49] Verizon Fios and Comcast Xfinity are examples of retail broadband Internet access services, which the 2015 Order prohibited from blocking lawful content they did not wish to make available.[50] The rule of *no blocking* illustrated the FCC's long-standing commitment, as outlined above, to the protection of an individual's right to access any lawful content, application, or service.[51]

Furthermore, the 2015 Order prohibited an ISP from "impairing or degrading lawful Internet traffic on the basis of Internet content, application, [or] service," a practice known as "throttling."[52] In other words, the *no throttling* rule prevented an ISP from slowing down an individual's service—either in general or with respect to particular websites or services—whenever

39. *Id*. at 17.
40. *Id.*
41. *See id.* at 17937–88, para. 54–56.
42. *See id.* at 17907, para. 4.
43. *See id.* at 17944, para. 68.
44. *Infra* Part III – Section C will outline discriminatory conduct by various ISPs.
45. *See generally* Verizon v. F.C.C., 740 F.3d 623, 628 (D.C. Cir. 2014); *2015 Order*, *supra* note 29, at 5604, 5615 paras 7, 49.
46. *2015 Order*, *supra* note 29, at 5601.
47. *Id.* at 5607, para. 17.
48. *See id.*
49. *Id.*
50. *Id.* at 5607, para. 15.
51. *See id.*
52. *Id.* at 5646, para. 106.

the ISP saw fit.[53] The FCC explained that the *no throttling* rule prevented ISPs from circumventing the *no blocking* rule by effectively slowing down content, rendering it unusable but technically unblocked.[54] Working in tandem, the *no blocking* and *no throttling* rules ensured an ISP's equal treatment of all content and all customers who registered for a broadband service.

Lastly, the FCC established *no paid prioritization* as its third bright-line rule.[55] The agency explained that paid prioritization occurs "when a broadband provider accepts payment (monetary or otherwise) to manage its network in a way that benefits particular content, applications, or devices."[56] By prohibiting the implementation of paid prioritization, also known as "fast lanes," a broadband provider, under the 2015 Order, could not accept money in exchange for managing its network in a particular way.[57]

The 2015 Order, alongside past FCC's proceedings, demonstrate the FCC's commitment to protect America's most critical tool of information, the Internet. Moreover, under the 2015 Order, the FCC reclassified ISPs as "common carriers" providing a "telecommunications service" under Title II of the Communications Act of 1934.[58] Section C of this Note will further explain and outline these concepts, but it is important to recognize that this reclassification permitted the FCC to impose the three bright-line rules discussed above. Ultimately, the FCC wanted to establish rules that it could implement to ensure that an individual's Internet access was available without discriminatory practices. In finding that "broadband providers have the incentive and ability to discriminate in their handling of network traffic," the FCC felt compelled to develop rules that sufficiently protected against "broadband providers' incentives to disadvantage edge providers or classes of edge providers in ways that would harm Internet openness."[59] The 2015 Order represented a thoughtful approach in promoting technological advancement while protecting consumers from discriminatory practices.

B. Current Net Neutrality Rules

In 2017, the FCC promulgated the *Restoring Internet Freedom* order ("2017 Order"), which reversed the regulatory framework established by the 2015 Order and eliminated the three-bright line rules.[60] The 2017 Order highlighted the finding that the Internet thrived for decades before the

53. *See id.*
54. *See id*.
55. *Id.* at 5603, para. 4.
56. *Id.* at 5608, para. 18 ("Paid prioritization refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through the use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.").
57. *See id.* at 5607, para. 18.
58. *Id.* at 5610, para. 29.
59. *Id.* at 5659, para. 133.
60. Restoring Internet Freedom, *Action*, 33 FCC Rcd 311, 312–13, paras. 1–5 (2018) [hereinafter *2017 Order*].

establishment of the three bright-line rules, and thus removed them.[61] In the 2017 Order, the FCC announced that it found such rules to be especially restrictive for an industry as dynamic and developing as the communications industry.[62] Thus, any benefit the three bright-line rules had were outweighed by the rules' costs on innovation and investment.[63] Moreover, the 2017 Order declared the 2015 Order's findings that ISPs would engage in harmful behavior as unpersuasive and sparse.[64] To the contrary, the 2017 Order found that problematic and harmful ISP behavior was quite rare and "inconsequential, and pale in comparison to the significant costs the three bright-line rules imposed."[65] Instead, the 2017 Order claimed to favor and prioritize regulatory principles which would increase technological innovation and investments while producing higher rates of economic growth.[66]

Furthermore, the 2017 Order departs from the 2015 Order's classification of a broadband Internet access service ("BIAS") as a telecommunications service and reclassifies it as an information service.[67] However, the 2017 Order rejected the 2015 Order's classification because it found that "[w]ithin the communication industry . . . the most regulated sectors, such as basic telephone service, have experienced the least innovation," which the FCC believed could be damaging to the communications industry.[68] The 2017 Order significantly emphasized that "[t]he Internet as we know it developed and flourished under light-touch regulation."[69] Thus, the FCC felt justified to return to a regulatory framework already proven to work. The 2017 Order's reclassification adopts a market-based policy approach in order "to preserve the future of Internet freedom."[70] In conclusion, the 2017 Order asserted that a "light-touch information service framework will promote investment and innovation better than applying costly and restrictive laws. . . ."[71]

C. Title I versus Title II under the Communications Act of 1934

The Communications Act of 1934 ("Communications Act"), as amended by the Telecommunications Act of 1996 ("Telecommunications Act"), is divided into seven titles.[72] Under the Telecommunications Act, there are two possible classifications of a BIAS.[73] A BIAS can either be classified as an information service under Title I or a telecommunication service under

61. *See id.* at 317, 369, paras. 18, 100–02.
62. *See id.* at 368–69, paras. 99–102.
63. *Id.* at 313, para. 3.
64. *See id.* at 415–16, paras. 171–72.
65. *See id.* at 375, para. 109.
66. *See id.* at 318, para. 20.
67. *Id.* at 312, para. 2. These concepts will be identified and further discussed *infra* Subsection C.
68. *See id.* at 369, para. 100.
69. *Id.* at 375, para. 110.
70. *Id.* at 312, para. 2.
71. *Id.*
72. Communications Act of 1934, 47 U.S.C. § 151.
73. 47 U.S.C. § 153.

Title II of the Communications Act.[74] The difference between Title I and Title II is considerable, as each title "triggers an array of statutory restrictions and requirements."[75] But, before further explanation, this section will first provide necessary technical definitions.

BIAS is a "service that uses spectrum, wireless facilities, and wireless technologies to provide subscribers with high speed Internet access capabilities."[76] For example, companies like Verizon Wireless are considered BIAS because Verizon Wireless uses wireless technologies to provide customers with high speed Internet capabilities.[77] BIAS providers like Verizon Wireless can either be classified as a telecommunications service or an information service.[78]

A telecommunications service is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[79] A telecommunications service offers telecommunications, which is defined as "the transmission between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received."[80] And on the other hand, an information service is "the offering of a capability for generating, acquiring, sorting, transforming, processing, retrieving, utilizing, or making available information via telecommunications. . . ."[81] The "distinction between a telecommunications and an information service turns on the question of what service the provider, ISP, is offering."[82] Consequently, depending on which statutory classification—telecommunications service or an information service—the FCC finds the "offering" meets will determine subsequent regulatory restrictions and requirements.[83]

In the 2015 Order, the FCC classified BIAS as a telecommunications service.[84] In doing so, the FCC found that ISPs offering BIAS, like Comcast Xfinity and AT&T, are common carriers that provide a telecommunications service.[85] Following this classification, the FCC applied the sectional provisions found under Title II. Specifically, the FCC made use of Section

74. *See id.*

75. *Mozilla*, 940 F.3d at 17.

76. FCC Classifies Wireless Broadband Internet Access Services as an Information Service, WT Docket No. 07-53.

77. *Important Information About Verizon Wireless Broadband Internet Access Services*, VERIZON, https://www.verizonwireless.com/support/broadband-services/ (last visited Nov. 15, 2020) [https://perma.cc/EZT2-DWXE].

78. *See generally Mozilla*, 940 F.3d at 17.

79. 47 U.S.C. § 153(53).

80. *Id.* at (50).

81. *Id.* at (24).

82. *2017 Order*, *supra* note 60, at 704, para. 355.

83. *See id.*

84. *2015 Order*, *supra* note 29, at 5724, para. 283.

85. 47 U.S.C. § 153(11) (a common carrier is "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy."); *2015 Order*, *supra* note 29, at para. 355 ("[i]f the offering meets the statutory definition of telecommunications service, then the service is also necessarily a common carrier service.").

201–Services and Charges, Section 202–Discrimination and Preferences, and Section 208–Complaints to the Commission.[86] Such sectional provisions provided the FCC with the support and authority to adopt the *no blocking*, *no throttling*, and *no paid-prioritization* rules, in an effort to ensure an open Internet. However, motivated by different priorities and desired outcomes, such as an increase in investment and innovation, the FCC in the 2017 Order adopted a different regulatory framework. Under the 2017 Order, the FCC classified BIAS as an information service under Title I.[87] By reclassifying BIAS as an information service under Title I, the FCC removed the statutory restrictions under Title II, thereby removing ISPs from the sectional provisions outlined above.[88]

The difference in how the FCC classified BIAS in the 2015 Order and the 2017 Order is not an anomaly, but rather likely to occur again. Guided by different objectives, the 2015 and 2017 FCC administrations were able to classify BIAS in accordance with their stated goals.[89] Although the FCC is an independent agency, it is subject to politicization.[90] The FCC's five commissioners are appointed by the U.S. President and confirmed by the U.S. Senate, with the stipulation that only three out of the five commissioners can be from the same political party.[91] Furthermore, the President selects one commissioner to serve as the chairman, who acts as the chief executive officer of the commission.[92] Because each Presidential administration has different policy objectives, the FCC commissioners typically align with the Presidential administration and implement like orders.[93] In fact, past FCC chairmen have stepped down following a change in Presidential administrations.[94] Accordingly, with every change in Presidential administration comes a change in the FCC's policies and objectives, as seen by the reclassifications in the 2015 and 2017 Order.[95]

Nevertheless, the Internet, "a critical tool for America's citizens,"[96] should not be subject to the FCC's volatile changes. In accordance with Presidential administration policies and subsequent FCC orders, courts have upheld the FCC's classification of BIAS as either a telecommunication service or an information service, constantly altering how ISPs are required

86. *2015 Order*, *supra* note 29, at 5724, para. 283.
87. *2017 Order*, *supra* note 60, at 312, para. 2.
88. *See 2017 Order*, *supra* note 60, at 410, para. 166.
89. *Compare Mozilla*, 940 F.3d at 1, *with United States Telecom. Assoc'n*, 825 F.3d at 674.
90. *What We Do*, FCC, https://www.fcc.gov/about-fcc/what-we-do (last visited Nov. 15, 2020) [https://perma.cc/2PMU-69N4]; Brendan Sasso & The Nat'l J., *The Increasing Politicization of the FCC*, THE ATLANTIC (Feb. 26, 2015), https://www.theatlantic.com/politics/archive/2015/02/the-increasing-politicization-of-the-fcc/456579/ [https://perma.cc/D45X-8572].
91. *What We Do*, *supra* note 90.
92. *See id.*
93. Sasso, *supra* note 90.
94. Berkeley Lovelace Jr., *Net neutrality advocate Tom Wheeler stepping down as FCC Chairman*, CNBC (Dec. 15, 2016), https://www.cnbc.com/2016/12/15/fcc-chairman-tom-wheeler-says-he-plans-to-step-down-january-20.html [https://perma.cc/CKU8-4MN].
95. *Compare 2015 Order*, *supra* note 29, *with 2017 Order*, *supra* note 60.
96. *2015 Order*, *supra* note 29, at 5603, para. 1.

to treat a customer's Internet access.[97] Currently, ISPs are permitted to implement discriminatory practices and may slow down or block a customer's Internet access.[98] However, the Internet, which provides an individual access to information and services, should forever be protected from such discriminatory practices. Therefore, in an effort to prevent the likely and continual swing of the BIAS classification pendulum, the Internet should be defined as a place of public accommodation. As a place of public accommodation, the Internet would remain free of any discriminatory practices that would have disparate impacts on African Americans and Hispanics pursuant to Title II of the Civil Rights Act of 1964.

III. THE REPEAL OF NET NEUTRALITY AND ITS DISPROPORTIONATE IMPACTS

Part III will establish America's reliance on the Internet, specifically highlighting how Americans rely on the Internet to access the news. Next, Part III will show that people of color rely the most on the Internet when accessing the news and such findings will demonstrate that the repeal of net neutrality will likely have disparate impacts. Further, Part III will show that ISPs will likely engage in discriminatory behavior, which will establish the increasing likelihood that the repeal of net neutrality will have disparate impacts.

A. An Increase in Online News Consumption

Americans need the Internet to stay informed.[99] In 2017, over half of the U.S. population ages 18-29 and 30-49 accessed the news through online consumption.[100] With the tap of an app or the swipe of a finger, Americans can stay abreast of the latest issues. Consequently, traditional modes of accessing the news are becoming more uncommon, as only 18% of Americans rely on print newspapers.[101] Specifically, the growth and development in mobile technology has permitted Americans to access news with ease, such that among smartphone owners 78% percent reported using their mobile device to get the news when surveyed.[102] Moreover, social media has become

97. *Compare Mozilla*, 940 F.3d at 1, *with United States Telecom. Assoc'n*, 825 F.3d at 675.

98. *See 2017 Order*, *supra* note 60, at 450, para. 239.

99. *See generally* Kristen Purcell & Lee Rainie, *Americans Feel Better Informed Thanks to the Internet*, PEW RSCH. CTR. (Dec. 8, 2014), https://www.pewresearch.org/internet/2014/12/08/better-informed/ [https://perma.cc/E4UW-FJQA].

100. Jeffrey Gottfried & Elisa Shearer, *Americans' Online News Use Is Closing in On TV News Use,* PEW RES. CTR., (Sept. 7, 2017), https://www.pewresearch.org/fact-tank/2017/09/07/americans-online-news-use-vs-tv-news-use/ [https://perma.cc/M3CC-7ZS6].

101. *See id*.

102. *The Personal News Cycle: How Americans choose to get their news*, AM. PRESS INST. (Mar. 17, 2014), https://www.americanpressinstitute.org/publications/reports/survey-research/personal-news-cycle/ [https://perma.cc/Z7CV-4XNB].

a critical means that permits individuals to discover the news and stay informed.[103] As the Internet allows for news customization, individuals visit different platforms to stay informed on varying subjects.[104] The Internet is now essential to everyday life.[105]

Today, the Internet provides an array of services, most notably access to global and domestic information. The U.S. Supreme Court has articulated the significance of "free speech, press, or assembly to the country's welfare."[106] Furthermore, Article 19 of the Universal Declarations of Human Rights declares that, "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[107] Therefore, Americans have a right to report and receive information without interference or barriers. However, under the 2017 Order, ISPs may now engage in discriminatory practices including "blocking, throttling, and paid prioritization" of information.[108] ISPs may now offer "bundled" Internet packages, similar to the way cable television is marketed.[109] If the Internet becomes cable packaged, the primary method by which Americans stay informed could dramatically change, resulting in disproportionate effects on African Americans and Hispanics.

B. African Americans & Hispanics' Use of the Internet

Compared to White people, African Americans and Hispanics depend substantially more on the Internet to stay informed. Like most Americans, African Americans and Hispanics have come to rely on an array of technologies and devices to receive news.[110] But the types of technological devices on which consumers rely substantially differ among races. In 2019, roughly 82% of White people reported owning a desktop or a laptop computer, compared with 58% of Black people and 57% of Hispanics. Thus, African Americans and Hispanics rely more heavily on their phone for Internet access.[111] Moreover, roughly 25% of Hispanics and 23% of African Americans, compared to 12% of Whites, are "smartphone only" Internet users

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103. *See id*.

104. *News consumption patterns among African Americans and Hispanics*, AM. PRESS INST. (Sept. 16, 2014) https://www.americanpressinstitute.org/publications/reports/survey-research/news-consumption-patterns-african-americans-hispanics/ [https://perma.cc/FM78-534L].

105. Emily A. Vogels et al., *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, PEW RSCH. CTR. (Apr. 30, 2020), https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/ [https://perma.cc/D2N3-563B].

106. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

107. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948).

108. *See 2017 Order*, *supra* note 60, at 450, para. 239.

109. *See* Collins, *supra* note 26.

110. *See* American Press Institute, *supra* note 104.

111. *See* Monica Anderson, *Racial and ethnic differences in how people use mobile* technology, PEW RES. CTR., (April 30, 2015) https://www.pewresearch.org/fact-tank/2015/04/30/racial-and-ethnic-differences-in-how-people-use-mobile-technology/ [https://perma.cc/RY9K-HM9X].

and lack traditional home broadband service.[112] Thus, African Americans and Hispanics continue to adapt to mobile technology at higher rates than non-Hispanic Whites.[113] In fact, when surveyed, roughly 75% of African Americans and 64% of Hispanics who own a cell phone reported that they use their cellphone to get the news, compared to 53% of White people.[114] Access to a cellphone that connects to the Internet allows African Americans and Hispanics to stay readily informed.

Moreover, while the digital divide – the difference between those who have ready access to computers and the Internet compared to those who don't – steadily persists, mobile technology and social media consumption among African Americans and Hispanics are substantially connected.[115] "African Americans smartphone owners are two times more likely to say they used social media to access news in the last week."[116] Roughly, 74% of non-whites report receiving their news via social media applications and sites compared to 64% of White people.[117] And, as social media applications and developments continue to increase, these percentages, and the divide, will likely steadily increase.[118] Because open Internet practices have afforded African Americans and Hispanics an ability to rely on the Internet to stay informed, they are least likely to be able to socially and economically adapt to a new cable packaged Internet.

A cable packaged Internet would economically hurt African Americans and Hispanic Americans, who are less likely to afford news subscriptions, because statistically, African American families and Hispanic American families have less wealth.[119] In fact, African Americans and Hispanics are twice as likely to cancel and turn off their cellular service because of its cost.[120] Moreover, African Americans and Hispanics are less likely than Whites to purchase news subscriptions.[121] Only 16% of African Americans and 11% of Hispanics report paying for news subscriptions, compared to 31% of Whites who pay for new subscriptions.[122] ISPs, like any other company, are motivated by profits.[123] Thus, ISPs are likely to implement market priced Internet packages that will be profitable for them. The repeal of net neutrality, which now permits ISPs to engage in discriminatory practices, will further

112. *See, e.g.*, Andrew Perrin & Erica Turner, *Smartphones Help Blacks, Hispanics Bridge Some – But Not All – Digital Gaps With Whites*, PEW RES. CTR., (Aug. 20, 2019) https://www.pewresearch.org/fact-tank/2019/08/20/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/ [https://perma.cc/F8V9-UF78].

113. *See* American Press Institute, *supra* note 104.

114. *See id*.

115. *See* Monica Anderson & Madhumitha Kumar, *Digital Divide Persists Even As Lower-Income Americans Make Gains in Tech Adoption*, PEW RES. CTR. (May 7, 2019), https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/ [https://perma.cc/9YLV-SR88].

116. *See* American Press Institute *supra* note 104.

117. *The Personal News Cycle*, *supra* note 102.

118. *See* Bialik, *supra* note 17.

119. *Id.*; Kochhar & Cilluffo, *supra* note 33.

120. *See* Perrin, *supra* note 112.

121. *See* American Press Institute, *supra* note 104.

122. *Id.*

123. Wheeler, *supra* note 28.

exacerbate what limited resources and access African Americans and Hispanics have to the Internet. Further, the repeal of net neutrality opens the door for a cable packaged Internet. African Americans and Hispanics are likely to be disproportionately affected due to economic inequality and their greater reliance on the Internet. To avoid such disparate impacts, the Internet needs to be considered a place of public accommodation under Title II of the Civil Rights Act.

C. The Likelihood of a Cable Packaged Internet

While some may contest the likelihood that ISPs will engage in threatening behavior, history reveals otherwise. As stated by former FCC Chairman Wheeler, "it is human nature to do things that benefit oneself, regardless of who it harms."[124] ISPs now more than ever have the power, ability, and more importantly the incentive to engage in harmful tactics, including "blocking, throttling, and paid prioritization."[125] And, starting as early as 2005, ISPs have utilized the methods of blocking, throttling, and paid prioritization.[126]

In 2005, a North Carolina ISP and telco, Madison River, blocked the voice-over-Internet protocol ("VOIP") service Vonage.[127] Vonage is a company that provides phone service over the Internet and Madison River imposed a block on VOIP providers like Vonage from working on its network.[128] Fortunately, due to the policies in place at the time, the FCC was able to issue sanctions against Madison River to ensure that further general blocking and specifically blocking of VOIPs, like Vonage, would not occur.[129] However, due to the recent repeal of net neutrality, the FCC could not sanction this type of behavior today.[130]

Just two years later, in 2007, Comcast, one of the nation's largest ISPs, began "secretly" blocking peer-to-peer technologies.[131] Peer-to-peer technologies allow for file sharing between systems without a central server.[132] Yet, Comcast blocked its customers from exchanging files on BitTorrent, a peer-to-peer technology, without disclosure to customers.[133] Moreover, around the same time, from 2007 to 2009, the wireless provider AT&T forced Apple to block Skype and other similarly situated VOIP phone services on the iPhone.[134] Motivated by different reasons, Comcast and AT&T felt it necessary to block such services, and now more than ever ISPs

124. *2015 Order*, *supra* note 29, at 5629, para. 80 n.128.
125. *Id.*
126. Timothy Karr, *Net Neutrality Violations: A Brief Histor*y, FREE PRESS (Jan. 24, 2018), https://www.freepress.net/our-response/expert-analysis/explainers/net-neutrality-violations-brief-history [https://perma.cc/PLY8-TYPQ].
127. *Id.* at 2.
128. *See* Lawrence Lessig, *Voice-Over-IP's Unlikely Hero*, WIRED (May 1, 2020), https://www.wired.com/2005/05/voice-over-ips-unlikely-hero/ [https://perma.cc/SZC9-J3LJ].
129. Karr, *supra* note 126, at 2.
130. *See generally Mozilla*, 940 F.3d at 18–19.
131. Karr, *supra* note 126.
132. *Id.*
133. *Id.*
134. *Id.*

may be inclined to engage in similar behavior following the elimination of the three bright-line rules.

Furthermore, in 2012 "AT&T blocked Apple's FaceTime application from running on its mobile network unless customers paid extra for the Mobile Shared Data plan."[135] AT&T forced its customers to pay for extra services if they wanted to legally use Apple's FaceTime service.[136] Under the 2017 Order, ISPs can engage in similar practices and force their customers to pay for extra services if they wish to have access to faster Internet and other carrier features. In 2013, another major ISP, Verizon, threatened to implement practices of paid prioritization.[137] During oral arguments in *Verizon v. FCC*, Verizon's counsel openly stated that if the Court overruled the FCC's open Internet rules, Verizon would be exploring the possibility of favoring some preferred services, content, and or sites over others.[138] Unfortunately, history illustrates the potential but real harms the public faces if the FCC's net neutrality protections are not restored and discriminatory practices, including blocking, throttling, and paid prioritization are banned.

From 2011 to 2013, AT&T, Sprint, and Verizon, three major ISPs, blocked a commonly known application, Google Wallet, "because all three companies had an economic stake in developing a similar service, Isis."[139] Currently, under the 2017 Order, nothing stops ISPs from eliminating competition by forming like alliances and blocking developing social media applications or Internet browsers. Furthermore, throughout 2013 and 2014, individuals across the U.S. generally experienced slower Internet speeds when trying to connect to various websites and applications.[140] After thorough investigation, analysts discovered that ISPs, such as Time Warner Cable and Verizon, limited their customer's capacity at interconnection points—points at which two different operators connect.[141] By limiting the capacity at customers' interconnection points, Time Warner Cable and Verizon were able to throttle the delivery of content to various U.S. businesses and residential customers across the country. Unfortunately, numerous ISPs' past conduct, even when open Internet rules were in place, illustrate the increasing likelihood that ISPs will now more than ever engage in harmful behavior following the recent repeal of net neutrality.[142] The Internet must be defined as a place of public accommodation in order to prevent and protect the invaluableness of the Internet.

135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*

IV. PLACES OF PUBLIC ACCOMMODATION UNDER FEDERAL CIVIL RIGHTS LAWS

Although the FCC has repealed its net neutrality rules, civil rights law provides another possible avenue for prohibiting the ISP abuses discussed above. Part IV will discuss how the text and legislative history of Title II of the Civil Rights Act of 1964 have been interpreted to define places of public accommodation in terms of traditional facilities like hotels and restaurants. Next, Part IV will explain how the definition of places of public accommodation under a similar civil rights law—the Americans Disability Act of 1990 ("ADA")—expanded to include websites. Finally, Part IV will explain why the expanded definition of public accommodation developed in ADA litigation should also apply under Title II of the Civil Rights Act.

A. The Civil Rights Act of 1964

The Civil Rights Act of 1964 ("The Civil Rights Act") prohibits the practice of discrimination "on the ground of race, color, religion, or national origin."[143] Specifically, Title II—Injunctive Relief Against Discrimination in Places of Public Accommodation—provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation."[144] Section 2000(b) establishes that a facility that serves the public is a place of public accommodation "if its operations affect commerce, or if discrimination or segregation by it is supported by State action. . . ."[145] Lodges, restaurants, and theaters are facilities that have traditionally fallen within the meaning of a place of public accommodation; however, what qualifies as a place of public accommodation should invariably expand to correspond with the Civil Rights Act's purpose.[146]

The Civil Rights Act aspired to move the U.S. forward by "eliminating every trace of discrimination and oppression."[147] Consequently, the definition of places of public accommodation should be broadly interpreted and applied.[148] Specifically, Section 202 provides that "[a]ll persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion or national origin…"[149] Section 202 advances the understanding that the nature of the facility is immaterial because Title II of the Civil Rights Act prohibits any facility that services the public from implementing discriminatory practices.[150] In accordance with legislative history, the Internet should be considered a place of public accommodation within the meaning of a "public

143. 42 U.S.C. § 2000(a).
144. *Id.*
145. 42 U.S.C. § 2000(b).
146. *See id*.
147. 109 CONG. REC. 22,839 (1963).
148. *See id.*
149. 42 U.S.C. § 2000(a).
150. *Id.; See also* Robert R. Bebermeyer, *Public Accommodations and the Civil Rights Act of 1964*, 19 U. MIAMI L. REV. 456, 472 (1965).

accommodation" under Title II of the Civil Rights Act of 1964. The Internet, a global and commonly used apparatus, which serves the public, may soon suffer from ISPs' discriminatory behavior. Pursuant to the 2017 Order, ISPs may now engage in blocking, throttling, and paid prioritization of network content.[151] Although the statute's drafters certainly did not foresee the Internet, the Civil Rights Act sought to ensure and protect an individual's right to equally enjoy all facilities which serve the public.[152] The Internet should be a place of public accommodation that can be equally enjoyed by all.[153]

B. The Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") prohibits discrimination based on one's physical or mental disability.[154] Guided by the principles of the Civil Rights Act, the ADA sought to end discrimination against individuals with disabilities in all areas of life by creating an "equal opportunity law" for people with mental and physical disabilities.[155] Specifically, similar to Title II of the Civil Rights Act, Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodations.[156] The statute does not define places of public accommodation, but rather presents a list of twelve categories, containing over fifty examples of facilities.[157] Pursuant to 28 C.F.R. § 36.204, "A public accommodation shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control."[158] Ultimately, like Title II of the Civil Rights Act, Title III of the ADA sought to prevent discrimination in places of public accommodation and aimed to ensure that individuals with disabilities have the same rights and opportunities.[159]

However, under Title III of the ADA, a place of public accommodation has significantly expanded to encompass technological advances like websites and mobile apps.[160] Across jurisdictions, courts have begun

151. *See 2017 Order*, *supra* note 60, at 450, para. 239.

152. 109 CONG. REC. 22,839 (1963).

153. *Internet Is a Modern Necessity, But Some Americans Don't Even Have Broadband*, WASH. POST (Aug. 11, 2019, 5:31 pm EDT), https://www.washingtonpost.com/opinions/all-americans-should-be-able-to-use-the-internet-how-do-we-get-there/2019/08/11/7d98a4d2-bad6-11e9-b3b4-2bb69e8c4e39_story.html [https://perma.cc/4369-EHWB].

154. The Public Health and Welfare, 42 U.S.C. § 12101 (2006).

155. *Id.*; *see also Introduction to the ADA*, ADA, https://www.ada.gov/ada_intro.htm (last visited Nov. 15, 2020) [https://perma.cc/F5Y5-Z5P4].

156. *Id.*; 42 U.S.C. § 2000.

157. 42 U.S.C. § 12181(7).

158. 28 C.F.R. § 36.204 (2010).

159. 42 U.S.C. § 12101.

160. *See* Jason P. Brown & Robert T. Quackenboss, *The Muddy Waters of ADA Website Compliance May Become Less Murky in 2019*, HUNTON ANDREW KURTH (Jan. 3, 2019), https://www.huntonlaborblog.com/2019/01/articles/public-accommodations/muddy-waters-ada-website-compliance-may-become-less-murky-2019/ [https://perma.cc/A2T5-3NUJ].

broadening the definition of a place of public accommodation.[161] No longer are places of public accommodations restricted to the four walls of hotels, restaurants, and stadiums.[162] Now, courts seek to ensure that persons are protected from discriminatory treatment in all places and have assessed whether a website should be considered a place of public accommodation under Title III of the ADA.[163] Similarly, Title II of the Civil Rights Act should broaden the definition of a place of public accommodation to include not only a website but the Internet as well.

The Civil Rights Act should rely on recent judicial developments regarding whether a website is a place of public accommodation under Title III of the ADA to properly label the Internet as a place of public accommodation. When assessing the merits of a claim violation under the ADA or the Civil Rights Act, courts have turned to the respective title's counterpart application and interpretation.[164] For example, in *A.R. ex. rel. Root v. Dudek*, the court relied on Title VI's interpretation under the Civil Rights Act, which "proscribes discrimination on the basis of race, color, or national origin by state and local government entities receiving federal funds,"[165] to permit the U.S. to bring enforcement litigation under Title II of the ADA, Title VI's parallel.[166] Furthermore, the ADA and the Civil Rights Act have similar remedial schemes and statutory application and interpretation.[167] Congress explicitly intended that the relief sought in Title III violations under the ADA and Title II violations under the Civil Rights Act were consistent to ensure equal pleading standards while protecting two different classes of people.[168] Because the ADA and the Civil Rights Act were founded on similar beliefs, and rely upon one another for proper statutory interpretations, Title II of the Civil Rights Act of 1964 should similarly be expanded to include a website and the Internet within its meaning of places of public accommodation.

C. A Website as a Place of Public Accommodation

Pursuant to Title III of the ADA, some courts have begun broadening the meaning of places of public accommodation beyond physical structures.[169] These courts determined that the ADA's legislative history and purpose supports applying disability protections to other mediums.[170] However, other courts seem to grapple with the question of whether a place of public accommodation requires a physical nexus, and thus have concluded that a website is not a place of public accommodation.[171] Specifically, courts

161. *See id.*
162. *See id.*
163. *See id.*
164. Williams v. City of New York, 121 F.Supp. 3d 354, 370 n.19 (S.D.N.Y. 2015).
165. A.R. ex rel. Root v. Dudek, 31 F.Supp. 1363, 1366 (S.D. Fla. 2014).
166. *See id.* at 1368.
167. *See Williams*, 121 F.Supp at 354 n.19 ("Title III of the ADA adopts the remedial scheme of the Title II of the Civil Rights Act of 1964.").
168. *See* Dudley v. Hannaford Bros. Co*.,* 333 F.3d 299, 306–07 (1st Cir. 2003).
169. *See* Brown, *supra* note 160*.*
170. *See id.*
171. *See id.*

within the Third, Sixth, Ninth, and Eleventh Circuit Courts of Appeals found that places of public accommodation must be physical places.[172] But, courts within the First, Second, and Seventh Circuits concluded that a website can be defined as place of a public accommodation under the ADA, independent of any connection to a physical place.[173] Title II of the Civil Rights Act of 1964 should be guided by the principles, standards, and interpretations of courts which hold that a website is a place of public accommodation for disability law purposes, to establish that websites, and Internet access generally, are places of public accommodation.

1. Circuits Recognizing ADA Protections Beyond Physical Places

The First, Second, and Seventh Circuits hold that a website can be a place of public accommodation under Title III of the ADA.[174] In the seminal 1994 *Carparts* decision, the First Circuit began its analysis by looking to the statute in question.[175] Under the plain meaning of the statute, the court found that the statute "does not require public accommodation to have physical structures."[176] The First Circuit rejected the district court's interpretation that a place of public accommodation must have "actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtain services therein."[177] The court reasoned that by including a 'travel service' among the list of places to be considered a place of public accommodations, Congress clearly contemplated that service establishments, like travel, which often lack physical structures due to the nature of business, are still public accommodations because of their substantial effect on commerce.[178] Following the plain reading of the statute, the court was further persuaded by the ADA's legislative history and purpose.[179] The court found that the statute's purpose, which is to "invoke the sweep of Congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities," consistent with its decision, and held that websites are places of public accommodation under Title III of the ADA.[180]

Moreover, within the First Circuit, in *National Ass'n of the Deaf v. Netflix, Inc.*, a federal district court in Massachusetts held that Netflix's Watch Instantly website is a place of public accommodation.[181] The court rejected Netflix's argument that because the statute's list of entities does not include

172. *See id.*
173. *See id.*
174. *See id.*
175. Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19 (1st Cir. 1993).
176. *Id.*
177. *See id.* at 18.
178. *See id.* at 19.
179. *See id.*
180. *Id.*
181. *See* Nat'l Ass'n of the Deaf v. Netflix, 869 F. Supp. 2d 196, 202 (D. Mass. 2012).

websites or streaming video programming services, such services do not fall within the statute's definition of place of public accommodation.[182] Instead, the court reasoned that because such web-based services did not exist when the ADA was passed in 1990, they could not have been explicitly included in the statute.[183] The statute's history makes clear that Congress intended for the ADA to adapt to changes in technology.[184] The court relied on the findings of the Congressional Committee on Energy and Commerce, which stated that, "[T]he Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times."[185] The court ultimately held that Congress intended for the statute to stretch broadly, as Congress stated in a House Report, "[A] person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category."[186] In addition to the ADA's legislative history, the court relied on the text of the statute as well.[187] The court concluded that the ADA covers the services "of" a public accommodation, not services "at" or "in" a public accommodation, and thus found a website to be a place of public accommodation.[188]

Similar to the First Circuit, the Second Circuit held that a place of public accommodation is not limited to physical structures.[189] In *Pallozzi v. Allstate Ins. Co*., the court reasoned that the ADA's language in Title III "suggests to us that the statute was meant to guarantee them more than mere physical access."[190] The court found that Title III "does regulate the sale of insurance policies in insurance offices," and held that a website is a place of public accommodation.[191] The court's interpretation of Title III comports with ADA legislative history. Following *Pallozzi*, subsequent decisions in this circuit adhered to the same broad interpretation of the statute, concluding that a website is a public accommodation.[192]

Likewise, the Seventh Circuit, in *Doe v. Mutual Omaha Ins. Co*., held that, "the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space), that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do."[193] In reaching its decision, the court held that a

182. *Id.* at 200.
183. *See id.*
184. *See id.* at 200–01.
185. *Id.*
186. *Id.* at 201.
187. *See id.*
188. *Id.*
189. Pallozzi v. Allstate Life Ins., 198 F.3d 28, 32 (2nd Cir. 1999).
190. *Id.*
191. *Id.* at 33.
192. *See* Andrews v. Blick Art Materials, 268 F. Supp. 3d 381, 387–88 (E.D.N.Y 2017) (quoting Camarillo v. Carrols Corp., 518 F.3d 153, 156 (2d. Cir. 2008)).
193. Doe v. Mut. of Omaha Ins., 179 F.3d 557, 559 (7th. Cir. 1999) (internal citations omitted).

physical nexus is not required for a place to be considered a public accommodation.[194]

Courts which classify websites as places of public accommodation under Title III remain consistent with the ADA's purposes and legislative history. However, other courts hold that places of public accommodation under Title III require a physical nexus or locale.[195] Nonetheless, such interpretations are inconsistent with the spirit of the ADA, as all persons should be equally entitled to the same benefits and opportunities.

2. Circuits Requiring a Physical Connection

The Third, Sixth, Ninth, and Eleventh Circuits have asserted that a physical connection is required for a place to be considered a public accommodation under the ADA.[196] In *Ford v. Schering-Plough Corp.*, the court determined that while an insurance office may be a place of public accommodation, that does not mean that the insurance policies offered and sold at that location are places of public accommodations.[197] The court reasoned that because the plaintiff received her disabilities benefits through her employer, which had no physical nexus to MetLife's insurance office, she was not discriminated against with regards to being denied access to a public accommodation.[198] Moreover, the court reasoned that the statute's plain meaning controls because the statute is unambiguous, and thus looking to the ADA's legislative history was unnecessary.[199] In doing so, the court determined that the plain meaning of the term "public accommodation" under Title III of the ADA does not refer to non-physical access but a physical structure.[200]

Roughly 10 years later, in *Peoples v. Discover Financial Services, Inc.*, the Third Circuit reaffirmed its position that public accommodations are limited to physical places.[201] The court once again looked to the statute's text and held that the ADA supports the conclusion that a public accommodation is a physical place.[202] The court reasoned that the prohibitions of Title III are restricted to "places" of public accommodation and defined a place as a "facility, operated by a private entity, whose operations affect commerce and fall within at least one" of the twelve public accommodation categories.[203]

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194. *See id.* at 560.

195. *See* Brown & Quackenboss, *supra* note 160.

196. *See* Haynes v. Dunkin' Donuts, 741 Fed.Appx. 752, 753–54 (11th Cir. 2018); Peoples v. Discover Fin. Servs., 387 F. App'x 179, 183 (3d Cir. 2010); Weyer v. Twentieth Cent. Fox Film, 198 F.3d 1104, 1114 (9th Cir. 2000*);* Earll v. eBay, 599 F. App'x 695, 696 (9th Cir. 2015); Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010 (6th Cir. 1997); Gil v. Winn-Dixie Stores*,* 257 F. Supp. 3d 1340, 1349 (S.D. Fla. 2017).

197. *See Ford*, 145 F.3d at 614.

198. *See id.*

199. *Id.* at 613.

200. *Id.* at 612–13.

201. *See Peoples,* 387 F. App'x. at 183–84.

202. *See id.*

203. *Id.*; *see also* C.F.R. § 36.104 (2020).

The logic of these circuit courts fails to analyze the underlying purposes of the ADA. Limiting what constitutes a place of public accommodation only hinders equal participation by people with disabilities. Leading disability advocacy groups, such as the National Federation of the Blind ("NFB") advocate for website accessibility in efforts to ensure that disabled individuals are treated fairly.[204] Recently, in 2018, the NFB advocated for Greyhound's websites and mobile applications to become more user friendly for blind passengers.[205] Recognizing the prevalence and convenience of websites and mobile applications, the NFB wanted to ensure that companies' websites and mobile apps "allow blind users to gain the same information and engage in the same transactions with an ease of use substantially equivalent to that of a sighted person using the same browser or operating system. . . ."[206] The First, Second, and Seventh Circuits correctly apply the ADA's malleable text to determine that websites are places of public accommodation. Furthermore, these circuits align with the positions and policies of some of the Nation's leading disability advocacy groups, whose sole focus is to ensure equality for the disabled.[207]

V. EXPANDING THE DEFINITION OF A PLACE OF PUBLIC ACCOMMODATION

Under Title II of the Civil Rights Act, the Internet should be considered a place of public accommodation. Proper statutory interpretation begins with a plain textual analysis.[208] However, when a statute's text is facially unclear, the Supreme Court is guided by the statute's legislative history.[209] Like Title III of the ADA, Title II states "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation."[210] Nonetheless, illustrated by the circuit split discussed above, courts have grappled with the meaning of the word "place."[211] But guided by the Court's principles of proper statutory analysis, the First, Second, and Seventh Circuits have looked to Title III's legislative text under the ADA to properly determine that websites are places of public accommodation.[212] Because websites are merely components of the Internet, it would be unsound to limit the civil rights

204. *See, e.g.*, Press Release, Nat'l Fed'n of the Blind, Greyhound Website and Mobile App to Become More Accessible to Blind Users (July 17, 2018) (on file with author), https://www.nfb.org/about-us/press-room/greyhound-website-and-mobile-app-become-more-accessible-blind-users.

205. *See id.*

206. *Id.*

207. *See id.*

208. *See* Carter v. United States, 530 U.S. 255, 271 (2000).

209. *See* Garcia v. United States, 469 U.S. 70, 76 n.3 (1984).

210. *See* 42 U.S.C. § 2000(a).

211. *See infra* Part VI; *see also* Tara Thompson, Comment, *Locating Discrimination: Interactive Website as Public Accommodations under Title II of the Civil Rights Act The Scope of Equal Protection*, U. CHI. LEGAL F. 409, 431 (2002).

212. Carparts Distrib. Ctr., 37 F.3d at 20 (1st Cir. 1994).

protections afforded to websites.[213] Due to the repeal of net neutrality and the increasingly likelihood that ISPs will engage in non-neutral practices like blocking, throttling, and paid prioritization, the Internet must be labeled a place of public accommodation to prevent subsequent disparate effects on African Americans, Hispanics, and other people of color. The same way society regards restaurants as places of public accommodations and does not allow discriminatory restrictions on roads and highways which are needed to get to restaurants the FCC should not allow ISPs to use discriminatory methods for providing access to websites.

Moreover, Title II's legislative history demonstrates that the statue's legislators intended for the Civil Rights Act to have sweeping coverage of the meaning of places of public accommodation.[214] Legislators were not merely concerned with implementing restrictions on when and where an individual could be free of racial discrimination, but wanted to eliminate "every trace of discrimination and oppression that is based upon race or color."[215] So, legislators included Section 202, which prohibited discrimination based on race, color, religion, or national origin.[216] Section 202 advances the understanding that the nature of the facility is immaterial because any facility that serves the public and also implements discriminatory practices will be in violation.[217]

Furthermore, the Supreme Court adopted an open and all-encompassing view of the statute.[218] The Court asserted that the scope of the Civil Rights Act should not be restricted to the primary facilities Congress considered when adopting the Civil Rights Act, "when a natural reading of the statute's language would call for broader coverage."[219] Therefore, courts should rely on the Supreme Court's reading of the statute and determine that the Internet is a place of public accommodation under a Title II disparate impact claim. Title II's legislative history establishes that expanding the meaning of a place of public accommodation to include the Internet would not only be appropriate but necessary when eliminating racial discrimination.[220]

Additionally, the Civil Rights Act provides that establishments which affect interstate commerce are considered places of public accommodation.[221] Commerce is defined as "travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State. . . ."[222] In *American Libraries Ass'n v. Pataki*, the Southern District of New York held that "the Internet fits easily within the parameters

213. *Differences and Similarities between the Internet and Web*, GOOGLE, https://sites.google.com/site/Internetandwebinfo/ (last visited Nov. 15 2020) [https://perma.cc/AR4Y-A9BV].

214. 109 CONG. REC. 22,839 (1963).

215. *Id.*

216. 42 U.S.C. § 2000.

217. *Id.*; *See also* Robert R. Bebermeyer, *Public Accommodations and the Civil Rights Act of 1964*, 19 U. MIAMI L. REV. 456, 472 (1965).

218. Daniel v. Paul, 395 U.S. 298, 307–08 (1969).

219. *Id.* at 307.

220. 109 CONG. REC. 22,839 (1963).

221. 42 U.S.C. § 2000(b).

222. 42 U.S.C. § 2000(c).

of interests traditionally protected by the Commerce Clause," and further recognized the general impact the Internet could have on interstate commerce.[223] Moreover, many courts have determined that the Internet falls within the purview of the Commerce Clause.[224] Thus, in addition to the justifications advanced above, the Internet should be considered a place of public accommodation because it is an establishment which affects interstate commerce.

Similar to the logic announced by the First, Second, and Seventh Circuits, the court should include the Internet as a place of public accommodation when evaluating subsequent Title II disparate impact claims following the repeal of net neutrality.

VI. ISPS ENABLED DISCRIMINATORY PRACTICES VIOLATE TITLE II OF THE CIVIL RIGHTS ACT

Part VI will first discuss and explain why disparate impact claims are available under Title II of the Civil Rights Act. Following that discussion, Part VI will analyze ISPs' discriminatory practices as disparate impact claims under Title II.

A. Title II Disparate Impact Claims

While the Supreme Court has not explicitly decided whether disparate impact claims are cognizable under Title II of the Civil Rights Act, and other courts have held that "[w]e have never endorsed or rejected disparate-impact liability under Title II," some courts have applied a disparate impact analysis and have been willing to assume that the Civil Rights Act encompasses such a claim.[225] In *Olzman v. Lake Hills Swim Club*, the court permitted plaintiff's disparate impact claim if they could sufficiently plead that the facially neutral definition of "guest" disproportionately affected minority groups.[226] In *Jefferson v. City of Fremont*, the court did not permit plaintiff to bring a

223. 969 F. Supp. 160, 167 (S.D.N.Y. 1997).

224. *See* United States. v. Pearson, 714 F. App'x 547, 551 (6th Cir. 2017) ("The government proved the commerce element in this case by showing that Person's crimes involved the Internet, which is a channel of interstate commerce."); *see also* United States v. Liton, 311 F. App'x 300, 301 (11th Cir. 2009) ("We have held that the Internet is an instrumentality of interstate commerce and. . . ."); United States v. MacEwan, 445 F.3d 237, 245 (3rd Cir. 2006) ("Having concluded that the internet is an instrumentality and channel of interstate commerce. . . .").

225. *See* Hardie v. Nat'l Collegiate Athletic Ass'n, 97 F. Supp. 3d 1163, 1165 (S.D. Cal. 2015); Hardie v. Nat'l Collegiate Athletic Ass'n, 876 F.3d 312, 315 (9th Cir. 2017); Akiyama v. U.S. Judo Inc., 181 F. Supp. 2d 1179, 1184 (W.D. Wash. 2002) (citing Arguello v. Conoco, Inc., 207 F.3d 803, 813 (5th Cir. 2000) ("If facially neutral definition of "guest" disproportionately affects minority group, burden of justifying the definition shifts to defendant."); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (1974) ("Here it might be shown that the rule change had the effect of discriminating against blacks, because apparently none of the relatives and few of the friends of members were black."); Robinson v. Power Pizza, Inc., 933 F. Supp. 1462, 1464–65 (M.D. Fl. 1998) ("A disparate impact claim . . .charges that a facially neutral practice or test of the employer led to a discriminatory impact on a particular group and that the test or practice cannot be justified as a business necessity.").

226. *Olzman*, 495 F.2d. at 1341.

disparate impact claim solely because the plaintiff failed to sufficiently show the discriminatory impact on the protected class.[227] Thus, upon sufficient pleading, courts may allow parties to assert a disparate impact claim under Title II of the Civil Rights Act.

Moreover, under the analogous Title III of the ADA, the Supreme Court has expressly held that disparate impact claims are cognizable.[228] Pursuant to Title III, when practices or policies disproportionately affect a group of individuals while appearing facially neutral, persons are permitted to bring suit.[229] Although the ADA and the Civil Rights Act differ in their protections, their structures and purposes are one of the same.[230] Not only do the Civil Rights Act and the ADA aim to ensure equal access and opportunities, "Title III under the ADA incorporates the remedies and procedures of Title II of the Civil Rights Act of 1964."[231] Moreover when determining a Title III violation, courts have relied on leading Title II Civil Rights cases to reach a decision.[232] Specifically, in *Ganden v. NCCA*, the court relied on Title II's legislative history and further cited *Welsh v. Boy Scouts of America*—a leading Title II Civil Rights case which presented a similar question of whether membership organization was a place of public accommodation.[233]

Because the ADA and the Civil Rights Act have similar policy aims and the text of the ADA derives from the text of the Civil Rights Act, disparate impact claims should be expressly cognizable under Title II of the Civil Rights Act.[234]

B. A Title II Violation under the Civil Rights Act of 1964

In order to assert a prima facie disparate impact claim under Title II of the Civil Rights Act, a plaintiff must first identify a specific neutral policy or practice and establish that such policy or practice has discriminatory effects on a particularized group.[235] Further, a party must demonstrate, through statistics or other qualified evidence, that the challenged policy has disparate impacts based on race.[236] A plaintiff must assert with particularity that the specific policy has a widespread, rather than a minimal, adverse effect on the

227. Jefferson v. City of Freemont, 73 F. Supp. 3d 1133, 1146 (N.D. Cal. 2014).

228. Raytheon Co v. Hernandez, 540 U.S. 44, 53 (2003).

229. *See id.* at 52.

230. *Introduction to the ADA*, *supra* note 155.

231. *Id.; See also* Schlesinger v. Belle of Orleans LLC, 2015 WL 5944452, *4 (W.D. La. 2008) (citing 42 U.S.C. § 12188(a)(1)).”

232. *See* Ganden v. Nat'l Collegiate Athletic Ass'n, 1996 WL 680000, *9, (N.D. Ill.1996).

233. *See* Welsh v. Boy Scouts of America, 993 F.2d 1267, 1268 (7th Cir. 1993).

234. Williams v. City of New York, 121 F.Supp. 3d 354, 370, n.19 (S.D.N.Y. 2015) ("Title III of the ADA adopts the remedial scheme of the Title II of the Civil Rights Act of 1964"); Dudle v. Hannaford Bros. Co*.,* 333 F.3d 299, 306–07 (1st Cir. 2003). *See* discussion *infra* in Part III.B.

235. *See, e.g.*, Griggs v. Duke Power Company, 401 U.S. 424, 429–30 (1971).

236. *See* O'Neill v. Gourmet Systems of Minn., Inc., 213 F.Supp. 2d 1012, 1022 (W.D. Wis. 2002).

particularized group.[237] Moreover, a court must find that the disproportionate adverse effects are "unjustified by a legitimate business rationale."[238]

Moreover, in pleading a Title II violation, a plaintiff does not need to present evidence illustrative of a defendant's subjective intent to discriminate but merely must show adverse and disproportionate effects.[239] Under the same theory in resolving a Title VII Civil Rights Act violation, the Supreme Court has stated that, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze'" out a particular group.[240] A court must look to see whether there is facially a neutral device that screens out disproportionate numbers of a particular race.[241]

If the Internet becomes cable packaged, African Americans and Hispanics would be disproportionately screened out due to the FCC's allowance of discriminatory practices. In order to sufficiently prove a disparate impacts claim under Title II of the Civil Rights Act, a moving party would have to identify that an ISP's practices, including blocking, throttling, or paid prioritization, although racially neutral on their face, have disparate impacts on African Americans and Hispanics. Unlike *Arguello v. Conoco*, where the plaintiffs failed "to allege that there was a specific Conoco policy which had negative disparate effects on minority customers," here, complainants would allege with specificity that their ISP's practice of either blocking, throttling, or paid prioritization is disproportionally affecting their minority racial group.[242] Unlike in *Akiyama v. U.S. Judo Inc.,* where the court held plaintiffs did not sufficiently plead a Title II disparate impact claim because the court could not identify Plaintiff's religious following as a protected class.[243] Here, that is simply not the case. When surveyed, roughly 75% of African Americans and 64% of Hispanics who own a cell phone reported that they used their cellphone to get the news, compared to 53% of White people.[244] And roughly 25% of Hispanics and 23% of African Americans, compared to 12% of Whites, are "smartphone only" Internet users, and lack traditional home broadband service. African American and Hispanics more substantially rely on access to their cellphones that connect to the Internet to stay readily informed. Moreover, while such numbers on their face may appear minor compared to successful disparate impact claims, the connectedness of the Internet is unprecedented. Because the Internet is fundamental to everyday life, a court should consider this disparate impact seriously concerning. Thus, plaintiffs could establish the widespread disproportionate effects the repeal of net neutrality will have African Americans and Hispanics.

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237. *See id.*

238. Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 524 (2015).

239. *See Raytheon*, 540 U.S. at 52.

240. *See Griggs*, 401 U.S. at 430–31.

241. *See Raytheon*, 540 U.S. at 55.

242. *Arguello*, 207 F.3d at 813.

243. *Akiyama*, 181 F.Supp.2d at 1186 (finding that because hundreds of similarly situated religious followers would not be adversely affected by defendant's policy, the court did not recognize plaintiff's religious following as a protect class).

244. *The Personal News Cycle*, *supra* note 102.

Next, a court is likely to assess whether the repeal of net neutrality is justified by a legitimate rationale.[245] This is likely to be a difficult burden for complainants to overcome, given the fact that the FCC has articulated a number of reasons why the repeal of net neutrality was necessary, including increased innovation, investment, and growth of the U.S. economy. Moreover, ISPs who will likely be the defendant of such claims, can assert that the cable-style pricing is economically efficient because it places more cost on people who use the Internet more, that paid prioritization draws investment, or that throttling helps manage networks in a way that maximizes user-friendliness. ISPs likely will be able to assert a legitimate business reason for engaging in such practices.[246] Moreover, the D.C. Circuit has already found the FCC's articulated reasons for repealing net neutrality legitimate in *Mozilla Corporation v. Federal Communications Commission*.[247] However, complainants can argue that while ISPs may have legitimate reasons for repealing net neutrality, there is a less discriminatory alternative that ISPs can take in order to achieve its articulated goals.[248] Like in *Grano v. Dep't of Dev. of City of Columbus*, where the employee could show that there existed other selection devices which did not screen out disproportionate numbers of minorities, here, complainants could illustrate that ISPs' behavior under the FCC's 2015 Order likely has less discriminatory effects on African Americans and Hispanics than the 2017 Order.[249]

Furthermore, complainants can rely on compelling evidence, which is advanced above to support its prima facie disparate impact case.[250] Unlike in *O'Neill v. Gourmet Sys. Of Minn. Inc.*, where plaintiff provided no evidence in which a reasonable jury could infer that American Indians were disproportionally affected by defendant's policy, plaintiffs here will be able to present to the jury the aforementioned statistical evidence illustrating the disproportionate affects.[251] Furthermore, in *Robinson v. Power Pizza, Inc.*, where plaintiffs presented a verified affidavit which illustrated that the defendant specifically chose "to expand its home delivery service to the predominantly Caucasian community of Amelia Island Plantation and not to the predominantly African-American community of American Beach," a prima facie case was established because "the protected class of African-Americans [was] denied a service rendered to those falling outside of the class."[252] Similarly here, complainants need only show that a more diversified, expanded Internet package is available to those outside the protected class, White customers, under the 2017 Order.

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245. *See* Hardie v. National Collegiate Athletic Association, 876 F.3d 312, 317 (9th Cir. 2017).

246. *See generally 2017 Order*, *supra* note 60.

247. *Mozilla*, 940 F.3d at 55 (D.C. Cir. 2019).

248. *See* Grano v. Dep't of Dev. of City of Columbus, 637 F.2d 1073, 1081 (6th Cir. 1980).

249. *See id.*

250. *See O'Neill*, 213 F.Supp. 2d at 1022.

251. *See id*.

252. *Power Pizza*, 993 F. Supp. at 1465.

If the Internet becomes cable packaged, African Americans and Hispanics can demonstrate their economic limitations in paying for a diverse Internet package and Internet access service, as African Americans and Hispanics are twice as likely to cancel and turn off their cellular service because of its costs.[253] And African Americans and Hispanics are less likely than Whites to purchase news subscriptions.[254] Thus, African Americans and Hispanics would be able to sufficiently establish they would be denied a rendered service available to White families. Because the repeal of net neutrality opens the door for a cable packaged Internet, African Americans and Hispanics will be disproportionately affected due to various economic constraints, the stark digital divide, and their greater reliance on the Internet to stay readily informed.

VII. CONCLUSION

Today, the significance of the Internet and one's ability to freely access the Internet is without question. Americans' reliance on the Internet for news consumption has been increasing, with no signs of slowing down.[255] However, following the recent repeal of net neutrality, the undisputed value of an open Internet is at risk.[256] Under the 2017 Order, ISPs can now engage in discriminatory behavior, including blocking, throttling, and paid prioritization of one's Internet access.[257] And although such policies are facially neutral, they may have substantial adverse effects on African Americans and Hispanics. In particular, if the Internet becomes cable packaged, African Americans and Hispanics will be disproportionately affected due to various economic constraints and their greater reliance on the Internet. Therefore, in efforts to prevent such disparate impacts, the Internet must be made a place of public accommodation under Title II of the Civil Rights Act.[258] Guided by the judicial developments of Title III of the ADA, the meaning of a place of public accommodation must too be expanded to include the Internet.[259] Similar to the ADA, the Civil Rights Act sought to ensure racial and ethnic equality in all facets of life, which should not exclude the Internet.[260] The FCC's polices and rules concerning net neutrality will continue to change as political administrations fluctuate, but the "critical tool for American citizens"—the Internet— must forever be free of discriminatory effects.[261]

253. *See, e.g.*, Perrin, *supra* note 112.
254. *News Consumption*, *supra* note 104.
255. Bialik, *supra* note 17, at 1–2.
256. *See 2017 Order*, *supra* note 60.
257. *Id.*
258. *See supra*, Part V.
259. *See supra*, Part IV.
260. 109 CONG. REC. 22,839 (1963).
261. *See* 2015 Order, *supra* note 29, at 5603.

The Equal Time Rule Is Anything But: How Can the Federal Communications Commission Apply the Equal Time Rule to Make Televised Political Debates Fairer and Ensure That Candidates Receive Relatively Equal Speaking Time?

Sydney Snower*

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* J.D., May 2021, The George Washington University Law School; B.A., Economics & Political Science, Loyola University Chicago. I would like to acknowledge the hard-working staff of the Federal Communications Law Journal for their dedication to the success of this publication. Special thanks to Christopher Kleihege for his guidance during the writing process and acceptance of my allegiance to the Oxford comma.

I. INTRODUCTION

21 minutes and 16 seconds.[1]
9 minutes and 34 seconds.[2]
6 minutes and 22 seconds.[3]

These figures do not represent average wait times for a favorite theme park ride or baking times for the perfect chocolate chip cookie. Instead, the figures represent the difference in speaking time between the candidate who spoke the most and the candidate who spoke the least in three presidential primary debates. Millions of Americans watch the presidential primary debates each election year and some criticize the networks and hosts for unequally allocating speaking time among candidates on the debate stage.[4] In recent years, post-debate news reports featured minute-by-minute tallies of each candidate's speaking time that highlighted these disparities.[5] Can the United States presidential debates be fairer? And is there a mechanism already in place that can address the imbalance of speaking time on the national debate stage?

The equal time rule may provide the solution. Although rarely invoked today, the equal time rule requires broadcasting stations to afford equal opportunity in airtime to all legally qualified candidates who submit a request.[6] The FCC's interpretation of the equal time rule currently excludes

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1. *See* Manuela Tobias, *Debate night: Who got the most talking time?*, POLITICO (Feb. 25, 2016), https://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/02/2016-debate-speaking-times-219751 [https://perma.cc/8MW9-FDZ9] (During the tenth Republican Party debate of the 2016 U.S. presidential election, hosted by CNN and Telemundo, Donald Trump spoke for 32 minutes and 16 seconds, while Ben Carson spoke for only 11 minutes and 10 seconds.).

2. *See* Weiyi Cai et al., *Which Candidates Got the Most Speaking Time in the Democratic Debate*, N.Y. TIMES (Dec. 19, 2019), https://www.nytimes.com/interactive/2019/12/19/us/elections/debate-speaking-time.html [https://perma.cc/PW8L-2T5A] (In the December 2019 democratic primary presidential debate hosted by PBS NewsHour and Politico, Andrew Yang spoke the least amount of time—10 minutes and 56 seconds—as opposed to Bernie Sanders, who spoke for 20 minutes and 30 seconds, the most of any candidate.).

3. *Id*. (In the seventh of twelve primary debates leading up to the 2020 U.S. presidential election, Democrat Tom Steyer spoke for only 12 minutes and 37 seconds, while Elizabeth Warren had the last word, speaking for one second shy of 19 minutes.).

4. *See* John O'Callaghan, *Final McCain-Obama debate had 56.5 million viewers*, REUTERS (Oct. 16, 2008), https://www.reuters.com/article/us-usa-politics-ratings-final/final-mccain-obama-debate-had-56-5-million-viewers-idUSTRE49F9SU20081016 [https://perma.cc/BRF7-GK34]; *see* Andrew Yang @AndrewYang, TWITTER (Nov. 23, 2019, 1:01 PM), https://twitter.com/AndrewYang/status/1198300556885929984 [https://perma.cc/E8MK-S9AB] ("[MSNBC] . . . [has] given me a fraction of the speaking time over 2 debates despite my polling higher than other candidates on stage. At some point you have to call it."); Caitlin Oprysko, *#LetYangSpeak: Andrew Yang accuses NBC of cutting off his mic*, POLITICO (Jun. 28, 2019), https://www.politico.com/story/2019/06/28/andrew-yang-debate-nbc-microphone-1388053 [https://perma.cc/Y5GJ-H4YC] (After Andrew Yang complained that his microphone had been turned off or muted during a Democratic primary debate, Yang supporters tweeted the hashtag #LetYangSpeak.).

5. *See* Tobias, *supra* note 1; Cai et al., *supra* note 2.

6. *See* 47 U.S.C. § 315(a).

political debates. This allows speaking time disparities to occur among candidates without penalty.

This Note explores the equal time rule and its viability as a solution to equalize the disparities in speaking time among candidates during televised debates.[7] Part I introduces the problem of unequal speaking time during televised debates among candidates competing on the same debate stage. Part II discusses the elements of the equal time rule, its origin, its evolution, and concerns about its effectiveness and underlying purpose. Part III addresses the relevance and institutionalized nature of televised debates in U.S. elections, the impact political debates have on voter decision-making, and policy justifications to support continued adherence to and expansion of the equal time rule. Part IV suggests a modification to the equal time rule exemption for on-the-spot coverage of bona fide news events that would subject political debates to the rule. This could be accomplished by applying the two-pronged test created in the FCC's Aspen Institute Program on Communications Memorandum Opinion and Order to determine exemption status for each debate.[8] The FCC could then impose a more exacting interpretation of the Aspen test's requirement that the program be the result of good faith news judgment and not based on partisan purposes. This would encourage broadcasting stations and licensees to afford relatively equal speaking time to all debate participants by making the two-prong test a requirement for exemption from the rule. Alternatively, Congress could amend Section 315 of the Communications Act to codify both the two-part Aspen test and an enhanced standard. Part V discusses further problems of the equal time rule apart from political debates, ranging from lax enforcement to notice issues. Ultimately this Note suggests that the FCC strengthen the equal time rule by broadening its scope and application to the political debate arena.

II. WHAT IS THE EQUAL TIME RULE AND HOW DID IT GET HERE?

A. Elements of the Equal Time Rule

The equal time rule requires broadcasting stations to afford equal opportunity in airtime to all legally qualified candidates who submit a request.[9] This rule consists of the following elements: a legally qualified candidate; an opposing candidate; use of programming; equal opportunity; no censorship; and a timely request. Congress also created four statutory exemptions to the rule.[10]

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7. *See* PHILIP MILLER, MEDIA LAW FOR PRODUCERS 340 (Focal Press, 4th ed. 2003).

8. Petitions of the Aspen Institute Program on Communications and Society and CBS, Inc., For Revision or Clarification of Commission Rulings under Section 315(a)(2) and 315(a)(4), *Memorandum Opinion and Order*, 55 F.C.C. 2d 697 (1975), *aff'd sub nom.* Chisholm v. FCC, 429 U.S. 890 (1976) (denying certiorari) [hereinafter *Aspen Order*].

9. 47 U.S.C. § 315(a); *see* Miller, *supra* note 7, at 340.

10. 47 U.S.C. § 315(a).

A Legally Qualified Candidate.[11] A legally qualified candidate is an individual who has publicly announced her intention to run for office, made a substantial showing that she is a bona fide candidate by participating in campaign activities, and met various local, state, and federal regulations for the office being sought.[12] A substantial showing means engaging "to a substantial degree in activities commonly associated with political campaigning" such as "making campaign speeches, distributing campaign literature, issuing press releases, [and] maintaining a campaign committee."[13] Once a candidate is a legally qualified candidate, she is eligible to invoke the equal time rule.[14]

An Opposing Candidate. Only an opposing candidate may invoke the equal time rule.[15] During a primary election, only a candidate who is of the same political party is an opposing candidate for purposes of the equal time rule.[16] For example, a Democratic primary candidate cannot request equal time based on coverage that a Republican primary candidate received in the same election cycle.[17] However, during a general election, all candidates running for office are considered opposing candidates for purposes of the equal time rule.[18]

***Use* as Defined in Section 315(b) of the Communications Act of 1934.** Only a candidate's use of programming allows an equal time request.[19] Use consists of a candidate's appearance by voice or picture, "regardless of [the] candidate's consent."[20]

Equal Opportunity. The equal time rule requires "equal time at equal cost" and applies to paid and unpaid programming.[21] For example, if a television station affords coverage to Candidate A free of charge, Candidate B may request coverage of an equal duration free of charge.[22] A candidate must also receive coverage during the same or comparable daypart.[23] For example, if a station sells 20 seconds of prime-time access to Candidate A for

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11. *See id*.

12. 47 C.F.R. § 73.1940(e)-(f); *see State Laws Regarding Presidential Ballot Access for the General Election*, NAT'L ASS'N OF SECRETARIES OF STATE (Jan. 2020), https://www.nass.org/sites/default/files/surveys/2020-01/research-ballot-access-president-Jan20.pdf [https://perma.cc/C4RR-WVJ5].

13. 47 C.F.R. § 73.1940(f).

14. *See* 47 U.S.C. § 315(a).

15. *See id*.

16. *See* KWFT, Inc., *Letter*, 43 FCC 284, 284 (1948). While Section 315(a) applies to all legally qualified candidates for federal office, this Note focuses specifically on how the equal time rule can shape presidential debates.

17. *See id*.

18. *See id*.

19. *See* Jonathan D. Janow, *Make Time for Equal Time: Can the Equal Time Rule Survive a Jon Stewart Media Landscape?*, 76 GEO. WASH. L. REV. 1073, 1078 (Jun. 2008).

20. Miller, *supra* note 7, at 340.

21. *See id*.

22. *See* LOUIS SANDY MAISEL & MARK D. BREWER, PARTIES AND ELECTIONS IN AMERICA: THE ELECTORAL PROCESS 351 (Rowman & Littlefield, 2010).

23. *See* Rosenberg v. City of Everett, 328 F.3d 12, 16 (1st Cir. 2003). *See also* Harvey L. Zuckman, *Censorship of Defamatory Political Broadcasts: The Port Huron Doctrine*, 34 N.Y.U. L. REV. 127, 127 n.7 (1959) (noting that "no fixed rule can be drawn" because licensees must consider day of week, time period, and potential size of audience when determining what constitutes equal opportunity).

$10,000, the station must make available to Candidate B a comparable slot—20 seconds during prime-time—for $10,000 if she so requests.

No Censorship. Should a candidate receive equal opportunity for time as a result of her request, the broadcasting station or licensee cannot censor the content.[24] As a result, a candidate who requests and is granted equal time need not appear in the same forum in which her opponent appeared.[25]

A Timely Request. A candidate seeking protection under the equal time rule must request equal time from the broadcasting station within seven days of the date the relevant coverage of the opposing party first aired.[26] A candidate's appearance that stems from an equal time request does not itself trigger an opportunity to request equal time, eliminating requests made ad infinitum.[27] A candidate who has not received equal time may file a complaint with the FCC.[28]

Four Statutory Exemptions. In 1959, Congress passed an amendment listing four categories of programs that are exempt from the equal time rule: (1) bona fide newscasts, (2) bona fide news interviews, (3) bona fide news documentaries, and (4) on-the-spot news coverage of bona fide news events.[29] Although Congress provided little guidance as to which characteristics defined each category, the FCC eventually decided that the fourth exemption, of relevance in this Note, encompasses televised political debates.[30]

B. A Brief History of the Equal Time Rule: Its Origins and Reshaping Since 1927

The equal time rule[31] originated from Section 18 of the Radio Act of 1927 which required radio broadcasters to afford equal time to candidates who requested it.[32] The rule later expanded to television broadcasting after its

24. *See* 47 U.S.C. § 315(a).

25. *See* Shannon K. McCraw, *Equal Time Rule*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/949/equal-time-rule (last visited Apr. 12, 2020) [https://perma.cc/8GL8-JRSA].

26. *See* 47 U.S.C. § 315(c).

27. *See* i*d.*

28. *See Rosenberg*, 328 F.3d at 16.

29. *See* 47 U.S.C. § 315(a).

30. *See* Henry Geller, *Memorandum Opinion and Order*, 95 F.C.C. 2d 1236, paras. 15–19 (1983) [hereinafter *Geller Order*], *aff'd sub nom*. League of Women Voters Educ. Fund v. FCC, 731 F.2d 995 (D.C. Cir. 1983).

31. The equal time rule should not be confused with the reasonable access rule or the now-defunct fairness doctrine. The reasonable access rule mandates that television and radio stations allow candidates to purchase reasonable amounts of broadcast time. *See* 47 C.F.R. § 73.1944(a). The fairness doctrine, repealed in 1987, required broadcasting stations to present a balanced narrative. *See* Andrew Glass, *President Coolidge Signs Radio Act*, POLITICO (Feb. 23, 2019), https://www.politico.com/story/2019/02/23/this-day-in-politics-february-23-1176607 [https://perma.cc/JKC5-DASQ].

32. *See* Sharon L. Morrison, *Radio Act of 1927 (1927)*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://mtsu.edu/first-amendment/article/1091/radio-act-of-1927 (last visited Apr. 12, 2020) [perma.cc/DY8S-6Z3M].

codification in Section 315 of the Communications Act.[33] The law was intended to prevent owners of broadcasting stations from giving more airtime, and thus unfair advantage, to one political candidate over another.[34]

In 1959, Congress amended Section 315 in response to an FCC ruling that "candidate appearances on news programs would trigger the equal time requirements of the Act" and render it virtually impossible to report on a candidate without being required to provide equal time to all other requesting candidates.[35] The amendment created four statutory exemptions to the equal time rule: (1) bona fide newscasts, (2) bona fide news interviews, (3) bona fide news documentaries, and (4) on-the-spot news coverage of bona fide news events.[36] The statute offers no further guidance regarding interpretation of each exemption except that the fourth exemption for on-the-spot news coverage of bona fide news events "include[s] but [is] not limited to political conventions and activities incidental thereto."[37] These exemptions gave broadcasters more latitude over their stations' content and alleviated the burdens posed by giving every candidate, including minor ones, free air time.[38] In adopting the four statutory exemptions, Congress judged that "the public benefits of [dynamic coverage of political campaigns] are so great that they outweigh the risk that may result from the favoritism that may be shown by some partisan broadcasters."[39]

One year later, Congress temporarily suspended the equal time rule in fear that it would thwart a highly sought televised presidential debate.[40] The 1960 presidential election cycle was in full swing and featured frontrunners then-Senator John F. Kennedy (D-MA) and then-Vice President Richard Nixon.[41] By 1960, neither Congress nor the FCC had clarified whether the equal time rule applied to political debates or whether debates fell into any of the exemption categories.[42] Congress recognized this uncertainty would likely deter broadcast stations from hosting a debate out of fear that the rule, if applicable, would require them to accommodate every presidential candidate

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33. Brendan Sasso, *FCC Chief Vows to Require "Equal Time" on TV for Candidates*, THE ATLANTIC, (Oct. 22, 2015), https://www.theatlantic.com/politics/archive/2015/10/fcc-chief-vows-to-require-equal-time-on-tv-for-candidates/457482/ [https://perma.cc/Q53F-N6YG].

34. *See* Frank Stanton, *The Case for Political Debates on TV*, N.Y. TIMES, Jan. 19, 1964, at SM16, https://www.nytimes.com/1964/01/19/archives/the-case-for-political-debates-on-tv-a-broadcaster-analyzes-the.html [https://perma.cc/PK6Z-VRVQ]. *See also* Thomas A. Durbin, *A Legal Analysis of the Equal Time Rule After the FCC's Abolition of the Fairness Doctrine,* AM. L. DIV., (Nov. 23, 1987) http://www.qrd.org/qrd/media/1994/legal.analysis.of.equal.time.rule-08.24.94 [https://perma.cc/4QJF-66EU].

35. *See* Anne Kramer Ricchiuto, Note*, The End of Time for Equal Time?: Revealing the Statutory Myth of Fair Election Coverage*, 38 IND. L. REV. 267, 267 (2005).

36. *See* 47 U.S.C. § 315(a).

37. *Id*. at (a)(4).

38. *See* McCraw, *supra* note 25.

39. Chisolm v. FCC, 538 F.2d, 349, 368 n.18 (1976) (quoting S. REP. NO. 562, 86th Cong., 1st Sess. 10 (1959)).

40. *See 1960 Presidential Debates*, CNN: ALL POLITICS, https://www.cnn.com/ALLPOLITICS/1996/debates/history/1960/index.shtml (last visited Apr. 14, 2020) [https://perma.cc/A5PP-L5R9].

41. *See id*.

42. *See* McCraw, *supra* note 25.

on the debate stage.[43] Temporary suspension of the equal time rule opened the doors for the first nationally televised presidential debate.[44] In response to this pivotal moment in American political history, CBS President Frank Stanton, who proved instrumental in persuading Congress to temporarily suspend the equal time rule, remarked that "[T]he 1960 debates made clear the importance of television as a compelling means of interesting and informing the public—the very foundation of democratic action."[45] CBS, NBC, and ABC, which broadcast four debates between Kennedy and Nixon, had no legal obligation to grant equal opportunity to any of the other twelve candidates in the race.[46] Congress's suspension of the rule lasted only until the end of the 1960 election cycle.[47]

In 1962, under the direction of FCC Chairman Newton Minow, the FCC issued an opinion finding that political debates were not exempt from the equal time rule and should not be read to constitute bona-fide news events.[48] This decision had a chilling effect and "in practice . . . wiped politics off television."[49] Chairman Minow later reflected: "There is no decision I made in public life that I regret more."[50] Not until 1976, sixteen years after the Nixon-Kennedy debates, did a broadcasting station host or televise a presidential general election debate because "there was no way to winnow the field of challengers owed equal time."[51] The risk of being required to provide equal time to every legally qualified presidential candidate who requested such time, including third-party and minor fringe party candidates, was too great and would be administratively unfeasible and financially costly.[52]

The FCC soon reversed course. In November 1983, the FCC declared that political debates constituted on-the-spot news coverage of a bona fide news event.[53] This meant that televised debates were categorically exempt from the equal time rule and licensees needed not invite all candidates to participate in debates.[54] A series of decisions followed that expanded the freedom of broadcasters to exercise discretion in the political debate arena.

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43. *See id*.

44. *See id*.

45. Stanton, *supra* note 34.

46. *See* Jill Lepore, *The State of the Presidential Debate*, NEW YORKER (Sept. 12, 2016), https://www.newyorker.com/magazine/2016/09/19/the-state-of-the-presidential-debate [https://perma.cc/4HKG-FB2H].

47. *See id*.

48. *See id*.

49. Lily Rothman, *The 1983 Decision That Created Today's Packed Debate Schedule*, TIME (Nov. 13, 2015), https://time.com/4105221/democratic-debate-equal-time-rule-fcc/ [https://perma.cc/4S4H-5XNN].

50. *See id*.

51. Lepore, *supra* note 46.

52. *See id*. These concerns were legitimate then and would be legitimate today. For example, earlier this year, in April 2020, at least 552 presidential candidates were registered with the FEC for the 2020 presidential election. *See Presidential Candidates, 2020*, BALLOTPEDIA, https://ballotpedia.org/Presidential_candidates,_2020 (last visited Apr. 13, 2020) [https://perma.cc/84SV-HJNN].

53. *See Geller Order*, *supra* note 30, at 1243–44.

54. *See* Erwin Chemerinsky, *Changing the Rules of the Game: The New FCC Regulations on Political Debates*, 7 HASTINGS COMM. & ENT. L.J. 1, 6 (1984).

An unanimous three-judge panel of the U.S. Circuit Court of Appeals for the District of Columbia held that stations could sponsor debates "without giving equal time to candidates they don't invite."[55] Commentators coined this decision a "victory for broadcasters."[56] Some years later, the U.S. Supreme Court held in *Arkansas Educational Television Commission v. Forbes* that broadcasters have a right to exclude third-party or minor candidates due to First Amendment limitations on content regulation and since debates are not public forums.[57]

The equal time rule has drawn mixed responses. One of the loudest champions of the equal time rule was the League of Women Voters.[58] The League believed that the rule embodied the fundamental notion that a candidate should have the right to engage in political speech free of a broadcast entity controlling the narrative.[59] The League also supported the rule's goals of spurring more robust political debate by entitling all qualified candidates to a national platform which would better inform the public about their electoral options and the political process.[60] During U.S. Senate hearings, League President Dorothy S. Ridings noted that "[b]roadcasters are profit-making corporations operating in an extremely competitive setting, in which ratings assume utmost importance."[61] Without safeguards in place, advocates of the equal time rule believed that ratings would likely remain broadcasting stations' top priority at the expense of democratic access to information.[62] Ridings also believed that the D.C. Circuit's decision in *League of Women Voters Educ. Fund v. FCC* "expand[ed] the all-too-powerful role of the broadcasters in elections, which is both dangerous and unwise."[63]

Critics of the equal time rule cite First Amendment concerns.[64] Critics also note that print media is not subject to the same types of conditions as are radio and television.[65] Neither are online forums, which are an increasingly

55. Jon Pareles, *F.C.C. is Upheld on Equal-Time Rule*, N.Y. TIMES, Mar. 15, 1984, at C32, https://timesmachine.nytimes.com/timesmachine/1984/03/15/053545.html?pageNumber=87. *See also* Kathy Gill, *What is the Equal Time Rule?*, THOUGHTCO. (Aug. 13, 2018), https://www.thoughtco.com/what-is-the-equal-time-rule-3367859 [https://perma.cc/K6ZJ-YXR5]; *League of Women Voters Educ. Fund*, 731 F.2d at 995.

56. *See* Pareles, *supra* note 55.

57. 523 U.S. 666, 688 (1998) (Stevens, Ginsberg, & Souter, JJ., dissenting); McCraw, *supra* note 25.

58. *See* Pareles, *supra* note 55.

59. *See id.*

60. *Equal Time: Hearings Before the S. Subcomm. on Commc'ns of the S. Comm. on Commerce*, 88th Cong. 42 (1963) (statement of Sen. Hartke).

61. *See* Lepore, *supra* note 46.

62. *See id*.

63. *See* Pareles, *supra* note 55.

64. *See* Janow, *supra* note 19, at 1090; *see, e.g.*, Branch v. FCC, 824 F.2d 37, 49–50 (D.C. Cir. 1987) (finding that equal time rule is consistent with and does not violate First Amendment).

65. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that "right to reply" statute as applied to newspapers violated First Amendment).

popular marketplace for political information among American voters.[66] Critics note that the rule's inapplicability to the digital forum creates discriminatory and antiquated standards that lag behind our current technological reality and justifies either expansion or elimination of the rule altogether.[67]

III. THE INSTITUTIONALIZED ROLE OF TELEVISED POLITICAL DEBATES IN U.S. ELECTIONS AND THE CONTINUED IMPORTANCE OF THE EQUAL TIME RULE

A. Why Are Debates Important?

Political debates today constitute on-the-spot news coverage of bona fide news events, making them categorically exempt from the equal time rule.[68] Broadcast stations and licensees have considerable discretion with respect to the format of debates, including which candidates to invite, which questions to ask, and the extent of questioning and engagement for each participating candidate.[69]

Notwithstanding the fact that the equal time rule does not currently apply to televised debates, the overall goals of the rule including independence from dominant media companies, information to voters, and fairness are just as important on the debate stage as they are in the aspects of an election to which the rule applies. The particular relevance of televised political debates today supports the notion that they should not be categorically exempt from the equal time rule.

Televised political debates are particularly influential in current politics. "The debates have now become a much anticipated, institutionalized part of presidential campaigning."[70] In 1960, an estimated 70 million

66. Thomas Blaisdell Smith, Note, *Reexamining the Reasonable Access and Equal Time Provisions of the Federal Communications Act: Can These Provisions Stand if the Fairness Doctrine Falls?*, 74 GEO. L.J. 1491, 1498 (1986). *See also* Mark MacCarthy, *An 'Equal Time' Rule for Social Media*, FORBES, (Jan. 21, 2020), https://www.forbes.com/sites/washingtonbytes/2020/01/21/an-equal-time-rule-for-social-media/#46e174d45338 [https://perma.cc/JL4N-YZAK] (advocating for digital equal time rule to combat false or misleading digital candidate advertisements).

67. *See* John Hebbe, *With all these media options, fairness and equal time will only get lost*, WASH. POST (Jan. 31, 2020), https://www.washingtonpost.com/opinions/with-all-these-media-options-fairness-and-equal-time-will-only-get-lost/2020/01/31/5bc25a02-430b-11ea-99c7-1dfd4241a2fe_story.html [https://perma.cc/V366-R6S4].

68. *See* McCraw, *supra* note 25.

69. *See* Crommelin v. Capitol Broad. Co., 195 So.2d 524, 526 (Ala. 1967) (holding that broadcaster did not violate equitable or legal duty); Julia Azari & Seth Masket, *The DNC's Debate Rules Won't Make The 2020 Primaries Any Less Chaotic*, FIVETHIRTYEIGHT (Feb. 20, 2019), https://fivethirtyeight.com/features/the-dncs-debate-rules-wont-make-the-2020-primaries-any-less-chaotic/ [https://perma.cc/D64D-UM5Q] (The Democratic National Committee, when faced with a crowded field for the 2020 presidential election, established its own rules to determine which candidates qualified for a spot on the debate stage during the primary election.).

70. Maisel, *supra* note 22, at 352.

individuals tuned in to their televisions to watch the first televised presidential debate.[71] During the 2008 presidential campaign cycle, 56.5 million viewers tuned in for the debate between then-Senator Barack Obama (D-IL) and Senator John McCain (R-AZ).[72] More recently, the 2020 debate between former Vice President Joe Biden and President Donald Trump had 73 million viewers.[73] Primary debates have seen substantial viewer numbers as well. Part one of the first Democratic Party primary debate of the 2020 presidential election cycle received 15.3 million viewers while 18.1 million viewers tuned in for part two.[74] Political commentator Walter Lippman wrote, "[t]he TV debate was a bold innovation which is bound to be carried forward into future campaigns, and could not now be abandoned. From now on, it will be impossible for any candidate for any important office to avoid this kind of confrontation."[75]

Despite the rise of online political advertising and streaming, both of which are exempt from the equal time rule, millions of Americans still choose to watch the presidential debates each election cycle.[76] This suggests that broadcast media's influence on voter attitude and preference is not obsolete. Some believe that "television news [has] the most far-reaching voice on who is plausible and who is not as contenders in [elections]."[77]

Televised debates also influence voter perception of candidates by increasing issue knowledge, impacting perception of candidates' character, and potentially altering voter preference.[78] A 2016 study reported that 29 percent of individuals surveyed, the largest percentage of those questioned, found televised debates "most helpful" in deciding for whom to vote.[79] The other categories included news coverage of a campaign, political talk shows, campaign rallies, political advertising, and broadcast interviews of candidates.[80] A 2008 survey reported that two-thirds of voters surveyed found

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71. *First Televised Presidential Debate*, N.Y. TIMES (Sept. 26, 2011), https://learning.blogs.nytimes.com/2011/09/26/septe-26-1960-first-televised-presidential-debate/ [https://perma.cc/Q3AQ-S3KU].

72. *See* O'Callaghan, *supra* note 4.

73. John Koblin, *In TV Ratings, Trump vs. Biden Was No Match for Trump vs. Clinton*, N.Y. TIMES (Sept. 30, 2020), https://www.nytimes.com/2020/09/30/business/media/trump-biden-debate-ratings.html [https://perma.cc/2HWZ-B2SL].

74. Brian Stelter, *Second Night of CNN's Democratic Debate Drew 11.3 Million Viewers on TV and Online*, CNN BUSINESS (Aug. 1, 2019), https://www.cnn.com/2019/08/01/media/cnn-democratic-debate-ratings-second-night/index.html [https://perma.cc/K5E8-GVVR].

75. Lepore, *supra* note 46.

76. *See* Koblin, *supra* note 73.

77. Colin Vandell, Note, *Words Signifying Nothing? The Evolution of 315(a) in an Age of Deregulation and its Effect on Television News Coverage of Presidential Elections*, 27 HASTINGS COMM. & ENT. L.J 443, 445 (2005) (quoting former CBS News Executive Political Director Martin Plissner).

78. *See* William L. Benoit, et al., *A Meta-analysis of the Effects of Viewing U.S. Presidential Debates*, 70 COMM. MONOGRAPHS, 335, 336, (2010), https://www.tandfonline.com/doi/abs/10.1080/03637750320000179133#preview.

79. *See* Jo Holz, et al., *Presidential Debates: What's Behind the Numbers?*, ANNENBERG PUB. POL'Y CTR., Sept. 2016, at 8, https://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/Presidential_Debates_white_paper_Sept2016.pdf [https://perma.cc/7XDW-DM2H].

80. *See id.*

that the Obama-McCain debates were "very or somewhat helpful" in deciding which candidate for whom to vote.[81]

B. Why Is the Equal Time Rule Important?

The purpose of the equal time rule is to "facilitate political debate by qualified candidates."[82] Congress created the rule out of concern that broadcast stations and licensees could manipulate the outcome of elections by discriminating against certain candidates in allowing air time to some and denying it to others.[83] Andrew Schwartzman, head of the Media Access Project, commented that "[O]ver-the-air television and radio remain the most important force shaping public opinion with respect to elections. A broadcaster licensed to serve the public should not be able to put a thumb on the scale."[84] In 1981, former Director of the United Church of Christ's Communication Office, Everett C. Parker, also opined on this topic.[85] Parker noted that, "[I]t's almost impossible for anyone who isn't a major corporation with hundreds of millions of dollars in assets to get a (license for) an effective radio or television outlet."[86] The same is true today. Barriers to obtaining a television or radio station license, much less a forum in which to host a political debate, create a space in which a small handful of wealthy individuals have the keys to control which candidates are able to reach voters during a debate.

In 1981, when asked if FCC regulations impeded coverage of issues, former President of CBS Broadcasting Gene F. Janowski responded that broadcast journalism could better serve as a channel to information if impediments like the equal time rule no longer existed.[87] Janowski remarked: "When you have 23 candidates for an office, and the world knows that only three or four have a chance, the broadcaster, as journalist, wants to have the privilege of concentrating on the leading contenders."[88] In general, the equal time rule has had an equalizing effect in an environment where broadcasting stations and licensees have considerable power to reach the electorate and have advocated for increased autonomy.

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81. *See* Russel Heimlich., *Most Say Presidential Debates Influence Their Vote*, PEW RSCH. CTR. (Sept. 11, 2012), https://www.pewresearch.org/fact-tank/2012/09/11/most-say-presidential-debates-influence-their-vote/ [https://perma.cc/99RL-W79C].

82. *Rosenberg*, 328 F.3d at 16 (quoting Farmers Educ. & Coop. Union of America, N.D. Div. v. WDAY Inc., 360 U.S. 525, 529 (1959)).

83. *See* Durbin, *supra* note 34; *see* Zuckman, *supra* note 23, at 127.

84. Sasso, *supra* note 33.

85. *See id*.

86. *Id*. (Parker further opined: "[The] equal time rule [ensures that] broadcasters [are not] the ones deciding who, if anybody, gets on the air. In the past, newspapers have turned against one or another party or candidate and tried to destroy them by ignoring them. Broadcasters can't get away with that right now. But do you think they are such angels that in some instances they wouldn't use their power to destroy a candidate who has a right to reach the people?").

87. *See* Ernest Holsendolph, *An Equal-Time Disagreement on F.C.C. Rules*, N.Y. TIMES, Oct. 18, 1981 (§4), at 10, https://www.nytimes.com/1981/10/18/weekinreview/an-equal-time-disagreement-on-fcc-rules.html [https://perma.cc/T44G-SV98].

88. *See id*.

Furthermore, political elections should exhibit fairness and the appearance thereof. The appearance of fairness and impartiality likely influence the electorate's confidence in the electoral system which may affect whether they decide to vote at all. Unequal speaking time among candidates may invoke the belief that the U.S. political system is unfair and controlled by a handful of individuals.

IV. IDENTIFYING OPPORTUNITIES FOR REFORM: HOW TO HARNESS THE EQUAL TIME RULE TO ENSURE THAT ALL DEBATE PARTICIPANTS HAVE AN EQUAL OPPORTUNITY TO SPEAK TO THE ELECTORATE

Section 315(a)(4) of the Communications Act does not specify the types of programs that constitute "on-the-spot bona fide news events" exempted from the equal time rule.[89] However, the statute provides that this category "include[s] but [is] not limited to political conventions and activities incidental thereto."[90] In interpreting this provision, the FCC specified that televised political debates fit this category and has granted debates total exemption from the rule.[91]

The FCC currently "make[s] value judgments when applying the exemptions created by Congress."[92] For programs whose exemption status is unclear or disputed, the FCC generally conducts its own inquiry on a case-by-case basis to determine whether the programs qualify as on-the-spot bona fide news events exempt from the rule.[93] The FCC's inquiry involves examining the specific features of the television program.[94] In its 1975 *Aspen Order*, the FCC adopted a two-pronged formula to aid in this inquiry.[95] The first prong requires that "the format of the program reasonably fit within the news event exemption category."[96] The second prong requires that the decision to host and broadcast a particular program or event be "the result of good faith news judgment and not based on partisan purposes."[97] Furthermore, stations are not required before broadcasting, by either statute or administrative rulemaking, to obtain clearance from the FCC that a specific program is covered by an exemption.[98]

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89. *See* 47 U.S.C. § 315(a)(4); *see* Chemerinsky, *supra* note 54.
90. *Id*.
91. *See Geller Order*, *supra* note 30, at 1243–44.
92. *See* Ricchiuto, *supra* note 35, at 268.
93. A.H. Belo Corporation for Declaratory Ruling, *Staff Ruling*, 11 FCC Rcd. 12306, 12308, para. 4 (1996) [hereinafter *Belo*]; *see Aspen Order*, 55 F.C.C. 2d at 716, para. 40, n.20 (1975).
94. *Belo*, *supra* note 93, at 12308, para. 4; *see Aspen Order*, *supra* note 93, at 700, para. 12.
95. *Belo*, *supra* note 93, at 12308, para. 4; *see generally Aspen Order*, *supra* note 93, at 697.
96. *Belo*, *supra* note 93, at 12308, para. 4; *see Aspen Order*, *supra* note 93, at 704, para. 23.
97. *Belo*, *supra* note 93, at 12308, para. 4; *Aspen Order*, *supra* note 93, at 708, para. 30.
98. *Belo*, *supra* note 93, at 12309, n.6.

Departing from its prior "unnecessarily restrictive" standard, the FCC gives broadcasters broad discretion with respect to the *Aspen* test's first prong.[99] Aspen's first prong requires that "the format of the program reasonably fit within the news event exemption category."[100] Broadcasting stations and licensees may decide the formats of programs that reasonably fit within the bona fide news event exemption category.[101] For example, in *Belo*, the FCC held that programming need not be broadcast live to qualify as on-the-spot news coverage and that a taped program later broadcast publicly could satisfy the first prong.[102]

The second prong of the *Aspen* test requires that the decision to carry and broadcast a particular program or event be "the result of good faith news judgment and not based on partisan purposes."[103] While the FCC has not explicitly defined what this aspect of the test requires, the Commission's application of the test has proved helpful in deciphering the meaning of good faith news judgment and non-partisan purposes.[104] In *Belo*, a newscaster moderated a taped program in which congressional candidates were given five minutes to answer questions.[105] The network then merged the candidates' unedited responses into a one-hour program.[106] In evaluating various characteristics of the program, the FCC determined that there existed "no evidence in the record of any intent to advance a particular candidacy."[107] The FCC found that a combination of several factors supported this conclusion.[108] Each featured candidate had the opportunity to respond to the same question for five minutes, the station used objective criteria including independent polling results to select the candidates for the event, and the station had assured candidates that it would not interrupt or edit any portion of their responses.[109] These factors contributed to the FCC's belief that the station took reasonable steps to avoid the appearance of favoritism toward a specific candidate.[110] As a result, the FCC held that the program met the *Aspen* test's second prong in that it was the result of good faith news judgment and not based on partisan purposes.[111]

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99. *Id.* at 12308, n.5.

100. *Id.* at 12308, para. 4.

101. *Id.* at 12308, para. 4, 5.

102. *See id*. at 12310, para. 9.

103. *Id*. at 12308.

104. While the FCC has not formally defined partisanship, one definition is "a firm adherence to a party, faction, cause, or person" where one "exhibit[s] blind, prejudiced, and unreasoning allegiance." *Partisan*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/partisan (last visited Apr. 13, 2020) [https://perma.cc/4TT4-3VTH].

105. *Belo*, *supra* note 93, at 12307, para. 2.

106. *Id.*

107. *Id*. at 12310, para 10.

108. *See id*.

109. *Id.*

110. *Id.*

111. The FCC also reasoned that Congress believed that the equal time rule and its objectives "must be balanced against two other objectives no less vital: encouraging maximum coverage of all news events . . . in order to cultivate a fully informed public, and preservation of licensees' traditional independent journalistic judgment with respect to broadcasting such events." *Id*. at 12309, para 8.

In contrast, televised debates are not subject to this type of FCC inquiry because they are categorically exempt from the equal time rule and not subject to *Aspen's* two-pronged test.[112] The FCC automatically classifies political debates as on-the-spot bona fide news events and does not conduct any inquiry into the characteristics or quality of the debates.[113] This categorical exemption diminishes the responsibility of broadcasting stations and licensees to achieve the principal goals of the equal time rule—equal opportunity to present ideas to the national electorate, less licensee influence on elections, and fairness in national elections and the appearance thereof.

As a result, televised political debates should no longer be categorically exempt from the equal time rule. Instead, a debate should receive the exemption only after having satisfied the two-pronged *Aspen* inquiry which requires the FCC to determine that the debate was "the result of good faith news judgment and [not] based on partisan purposes."[114]

Moreover, the FCC should identify the scope of its inquiry with respect to televised debates. The exemption inquiry for televised debates should specifically contemplate the allocation of speaking time between debate participants. Under this modified approach, a significant difference in speaking time between one candidate and another would be a basis for determining that *Aspen's* second prong was not met. In other words, a disparity in speaking time would constitute evidence that the debate was not a result of good faith news judgment and was instead based on partisan purposes. *Belo* took into consideration the equal amount of speaking time each candidate was afforded but did not find this factor or any others dispositive.[115] Additionally, *Belo* did not indicate how much weight it placed on this factor.[116] Nonetheless, in the context of televised political debates, the *Aspen* test should be expanded to account for differences in speaking time among candidates. Satisfying the *Aspen* test, as the televised program did in *Belo*, would classify the debate as an on-the-spot bona fide news event which would thus be exempt from the rule.[117]

Under the *Aspen* test, if a television program does not satisfy the second prong, it is generally not classified as an on-the-spot bona fide news event, and as a result, it is subject to the equal time rule.[118] The same should apply in the context of televised political debates. If the FCC determines that the format of a political debate was not the result of good faith news judgment or based on partisan purposes—in other words, one candidate received significantly less speaking time than an opposing candidate—the debate should not be granted the bona fide news event exemption. Thus, it would be subject to the equal time rule.

In application, this proposal has several steps. First, Candidate A must receive less speaking time during a debate than Candidate B. The FCC would then apply the *Aspen* test and determine, based on the test's second prong,

112. *See Geller Order*, *supra* note 30, at 1243–44, paras. 16–17.
113. *See id.* at 1244–45, paras. 18–21.
114. *Belo*, *supra* note 93, at 12308, para. 4.
115. *See id.*
116. *See id.*
117. *Id.*
118. *See id.*

whether the program was the result of good faith news judgment or based on partisan purposes. The disparity in speaking time between Candidate A and Candidate B would be a factor in this determination. Upon a finding that the program did not satisfy *Aspen's* second prong, the FCC would subject the broadcasting station or licensee to the equal time rule.

After the debate, Candidate A would be entitled to request equal time at equal cost. Due to the rule's prohibition of censorship, that equal time need not be redeemed in a subsequent debate but could be redeemed in the form of an advertisement slot during an equivalent daypart.[119] In addition, the equal cost requirement would entitle Candidate A to televised coverage at likely no cost since Candidate B's debate appearance was most likely at no cost to her.[120]

It is unreasonable to expect broadcasting stations and licensees to monitor exact speaking time up to the second or to give all participating candidates an exactly equal opportunity to speak and answer questions. Because of this impracticality, the FCC could adopt interpretative rules on how to evaluate the *Aspen* test's second prong. Broadcasting stations and licensees could institute a buffer time, possibly a percentage of the overall debate time, to account for the impracticality of accounting for every second during a debate.[121]

The overarching threat of being required to adhere to the equal time rule would pressure broadcasting stations and licensees to act. The financial and administrative burden alone would provide an incentive for broadcasting stations and licensees to air debates in which the candidates received relatively equal speaking time so as not to trigger the rule. Stations would likely press debate hosts to make changes to debate formats in ways that would satisfy the *Aspen* test: tight regulation of candidates' speaking time, even distribution of questions, and perhaps enlistment of a mute button for interrupting candidates.

V. FURTHER EXPLORATION OF THE EQUAL TIME RULE OUTSIDE OF THE POLITICAL DEBATE ARENA

In addition to its inapplicability on the debate stage, the equal time rule has other flaws. First, the FCC currently has no assigned investigative division to identify instances of television appearances by candidates.[122] Broadcasting stations and licensees are not required to notify a candidate that

119. *See* McCraw, *supra* note 25.

120. This proposal could be achieved in several ways. For example, the FCC could declare that televised political debates are no longer exempt from the equal time rule and adopt an interpretative rule that affords specificity to the meaning of Section 315(a) that includes candidate speaking time as a factor in the *Aspen* test. Alternatively, Congress could exempt debates from the rule and amend Section 315 of the Communications Act to codify the two-part test established in *Aspen*.

121. This Note does not advocate for every candidate to be granted the opportunity to participate in a televised debate. It only suggests that all candidates who have made it onto the debate stage should be granted relatively equal speaking time.

122. *See* Ricchiuto, *supra* note 35, at 285, 287–88.

an opposing candidate received coverage on their station.[123] In a campaign with multiple candidates, broadcasting stations and licensees have no obligation to notify any candidates that an opponent has requested equal time.[124] As a result, candidates do not always know when they may invoke the equal time rule which may impose a greater disadvantage on third-party or fringe candidates who lack the resources and manpower to monitor broadcast content. Rather than expecting candidates to monitor nationally televised media coverage of opponents, the FCC could require broadcasters to notify all candidates when an opposing candidate has received non-exempt media coverage.[125]

Moreover, even when a candidate files a complaint for equal time, Section 315 of the Communications Act only provides for equal time at equal cost.[126] While "willful or repeated" noncompliance with the rule may result in sanctions such as revocation of a licensee or station's broadcasting license, there currently exists no private cause of action for individual candidates who have been injured by a violation of the rule.[127] There is also no possibility for the imposition of monetary sanctions.[128]

The only other avenue for redress is the award of equal time at equal cost.[129] But even when the equal time rule is raised, it is rarely invoked.[130] Some candidates cannot take advantage of the rule because they cannot afford the time to which they are entitled.[131] In the context of primary election debates, third party and fringe candidates often do not have the opportunity to request equal time because only candidates who are of the same political party are "opposing parties" for purposes of the rule.[132]

In addition, Congress should consider other modifications to the equal time rule to reconcile the fact that it does not apply to cable stations, print journalism, or electronic media. Although millions of voters still tune in to televised political debates, the electorate is increasingly influenced by content on other forums.[133] Congress and the FCC should explore how to advance fairness and equity in the digital world in the spirit of the equal time rule.

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123. *See id*. at 287–88.

124. *See id*.

125. *See id.* at 287.

126. *See* Miller, *supra* note 7, at 340.

127. *See* 47 U.S.C. § 312(a)(4) (authorizing FCC to revoke any station license for "willful or repeated violation of . . . or failure to observe" any FCC rule or regulation); Daly v. CBS, Inc., 309 F.2d 83, 85–86 (7th Cir. 1962); Ackerman v. CBS, Inc., 301 F. Supp. 628, 631 (S.D.N.Y. 1969). *But see* Weiss v. Los Angeles Broad. Co., 163 F.2d 313, 315–16 (9th Cir. 1947) (holding that complaint alleging violation of Section 315 failed to state claim upon which relief could be granted but did not foreclose possibility that private cause of action exists).

128. *See* 47 U.S.C. § 315(a)(4).

129. *See id*.

130. *See* Sasso, *supra* note 33.

131. *See* Ross Perot v. ABC, *Memorandum Opinion and Order*, 11 F.C.C.R. 13109, 13117, para. 19 (1996) (citing difficulty of Ross Perot's campaign in purchasing desired time due to limited campaign resources).

132. *See* 47 U.S.C. § 315(a).

133. *See, e.g.*, MacCarthy, *supra* note 66.

VI. CONCLUSION

For the foreseeable future, televised political debates are here to stay. Moving forward, there is no promise that licensees will afford candidates an opportunity for equal speaking time on the debate stage. Minute-by-minute tallies of candidate speaking times in recent years highlight the disparities.[134] The FCC could modify the existing framework of the equal time rule to increase fairness in U.S. televised debates.

The disparities in speaking time among candidates during debates underscore the influence broadcasting stations and licensees have on U.S. debates and in turn, on elections. A broadcasting station or licensee should not be able to "put a thumb on the scale."[135] As a solution, the FCC could eliminate its categorial exemption from the equal time rule for political debates and instead condition the exemption on satisfying *Aspen's* two-pronged test to determine whether the program fits into the category of on-the-spot coverage of a bona fide news event. The inquiry under the *Aspen* test would involve determining whether the debate was a result of good faith news judgment and not based on partisan purposes which would take into account differences in speaking time among debate participants. A candidate who received less than equal time than her opponents during a debate would be able to invoke the equal time rule and redeem her time in an alternative forum.

The equal time rule has the potential to be an equalizing force in U.S. televised debates. By eliminating the categorical exemption for debates, the equal time rule could afford all candidates on the national debate stage an opportunity to be heard by the American electorate.

134. *See* Tobias, *supra* note 1; Cai et al., *supra* note 2.
135. Tobias, *supra* note 1; Cai et al., *supra* note 2.

Reframing Antitrust Law for Big Tech: Lessons from the German Bundeskartellamt

Brennan Weiss*

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* J.D., May 2021, The George Washington University Law School. Thank you Professor William E. Kovacic for inspiring this topic and providing advice throughout the early stages of this Note.

I. INTRODUCTION

Just weeks after news broke of one of the largest data leaks in the history of Facebook—resulting in a third party's use of millions of users' data without their permission—Mark Zuckerberg appeared before Congress in an attempt to mitigate the fallout.[1] But for two days, Zuckerberg played defense as members of Congress berated his leadership and, in particular, the social network's data privacy practices. At one point, Sen. Lindsay Graham (R-SC) zeroed in on Facebook's Terms of Service.

"When you sign up for Facebook, you sign up for Terms of Service . . . It says, 'The Terms govern your use of Facebook and the products, features, apps, services, technologies, and software we offer (the Facebook Products or Products), except where we expressly state that separate terms (and not these) apply.' I'm a lawyer [and] I have no idea what that means. But when you look at the Terms of Service, this is what you get."[2] Sen. Graham then held up a thick stack of papers fastened by an extra-large binder clip. "Do you think the average consumer understands what they're signing up for?" Zuckerberg replied: "I don't think that the average person likely reads that whole document."[3]

In another exchange, Rep. Kathy Castor (D-FL) shed light on the breadth of Facebook's data collection practices as reflected in its Data Policy, which is part of the Terms of Service. She addressed Zuckerberg specifically: "We understand the Facebook users that proactively sign in are part of that platform, but you're following Facebook users even after they log off . . . You are collecting data outside of Facebook. When someone goes to a website and it has the Facebook 'Like' or 'Share' [button], that data is being collected by Facebook, correct?"[4] Zuckerberg's affirmative response was a convenient lead into Rep. Castro's proposal. "Congress should act," she urged.[5] "I do not believe that [Facebook's] controls, the opaque consent agreement, [and] the settings are an adequate substitute for fundamental privacy protections for consumers."[6]

Congress berated Zuckerberg. Yet, in the more than two years since Zuckerberg's testimony, Facebook's Data Policy remains virtually

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1. *Mark Zuckerberg Testimony: Senators Question Facebook's Commitment to Privacy*, N.Y. TIMES (April 10, 2018), https://www.nytimes.com/2018/04/10/us/politics/mark-zuckerberg-testimony.html [https://perma.cc/EX97-3SXB].

2. *Facebook, Social Media Privacy, and the Use and Abuse of Data: Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Commerce, Sci., and Transp.*, 115th Cong. (2018) (statement by Sen. Lindsay Graham, Member, S. Comm. on the Judiciary), https://www.youtube.com/watch?v=qq6NfsWGNu0 [https://perma.cc/PVC3-ZGXV].

3. *Id.* (statement by Mark Zuckerberg, CEO, Facebook).

4. *Facebook, Transparency, and Use of Consumer Data: Hearing Before the H. Comm. on Energy and Com.*, 115th Cong. (2018) (statement by Rep. Kathy Castor, Member, H. Comm. on Energy and Com.), https://www.youtube.com/watch?v=WHszEcin5uE [https://perma.cc/T6ZR-5XVL] (0:43 - 1:40).

5. *Id.* at 3:55 - 4:09.

6. *Id.*

unchanged.[7] It is also unclear whether the average consumer has any better understanding of how Facebook's data collection works, despite the hearings and prolific news stories that followed. Put simply: Congress has failed to rein in Facebook's expansive data collection practices.[8]

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Germany has a different approach to regulating Facebook. On February 6, 2019, Germany's Bundeskartellamt, or Federal Cartel Office (FCO)—the country's top antitrust enforcement authority—held that Facebook abused its market dominance by collecting user data not only on its platforms, but also on third-party websites and applications that have integrated Facebook Business Tools (such as the "Like" or "Share" functions) into their services.[9] The FCO ordered the social network to discontinue this practice.[10]

The FCO's novel legal argument against Facebook's Data Policy—based on an antitrust theory of illegal monopolization—is an especially appealing approach in jurisdictions without comprehensive federal data privacy protections like the United States. This is because it is likely that jurisdictions with data protection laws, if they are at all structured like

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7. Data Policy, FACEBOOK, https://www.facebook.com/about/privacy/update (last visited Oct. 9, 2020) [https://perma.cc/6KM5-6SJF] [hereinafter *Data Policy*]. This policy still allows Facebook to collect data from third-party websites that use Facebook tools, such as the 'Like' and 'Share' functions ("These partners provide information about your activities off Facebook . . . whether or not you have a Facebook account or are logged into Facebook.").

8. *See generally* Cecilia Kang & Kevin Roose, *Zuckerberg Faces Hostile Congress as Calls for Regulation Mount*, N.Y. TIMES (April 11, 2018), https://www.nytimes.com/2018/04/11/business/zuckerberg-facebook-congress.html [https://perma.cc/4487-XS3B]. However, on December 9, 2020, the FTC sued Facebook under Section 2 of the Sherman Act and Section 5 of the FTC Act for allegedly monopolizing the personal social media market based on its acquisitions of Instagram and WhatsApp. FTC Compl. ¶ 174–75 (Dec. 9, 2020), https://www.ftc.gov/system/files/documents/cases/1910134fbcomplaint.pdf [https://perma.cc/LC6H-QW9P]. While this complaint is consistent with the spirit of this article, it does not address the core privacy concerns associated with Facebook's data collection practices that are the focus of this Note.

9. Press Release, Bundeskartellamt, Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html?nn=3600108 [https://perma.cc/2JMT-EMTV] [hereinafter Bundeskartellamt Press Release].

10. Facebook appealed the decision to the Higher Regional Court (HRC) in Dusseldorf, which temporarily suspended the FCO's order, but did not rule on its merits, therefore allowing Facebook to ignore the FCO's demands for the time being. *See* Sara Germano, *Facebook Wins Appeal Against German Data-Collection Ban*, WALL ST. J. (Aug. 26, 2019, 5:04 PM), https://www.wsj.com/articles/facebook-wins-appeal-against-german-data-collection-ban-11566835967 [https://perma.cc/PBQ7-3W9M]. The FCO subsequently appealed the suspension to Germany's top court, the Federal Court of Justice (FCJ). On June 23, 2020, the FCJ lifted the suspension, paving the way for the FCO to temporarily enforce its order. *See German Legal Ruling Deals Facebook Blow in Data Use*, ASSOCIATED PRESS (June 23, 2020), https://apnews.com/58fc6fe8606d7e22bf3e8a06921f7a70 [https://perma.cc/X7B7-MJJA]. The main proceedings regarding the merits of the FCO's order remain pending before the HRC.

Europe's General Data Protection Regulation (GDPR), would use the force of such laws to crack down on expansive data collection practices.[11] However, in the United States, lack of a holistic federal data privacy law[12] makes it difficult for individuals to guard against take-it-or-leave-it data collection practices—to which the user must submit unless he withdraws from the service altogether—by powerful "data-opolies" like Facebook, Apple, Google, and Amazon.[13] Therefore, those in the U.S. seeking to challenge data collection practices by large technology companies must look to other areas of existing law that could serve as a basis for bringing suit.

This Note will argue that U.S. antitrust authorities, including the FTC and the Department of Justice (DOJ) Antitrust Division, should follow Germany's lead and aggressively pursue challenges against take-it-or-leave-it data collection practices by dominant technology companies like Facebook[14] based on an illegal monopolization theory of harm under Section 2 of the Sherman Act. Under Section 2, Facebook's Data Policy is anticompetitive because it impedes market entry by firms with potentially superior products and disincentivizes Facebook to innovate beyond what is necessary to maintain its existing users, thereby reducing the overall quality of its products and services. Part II will provide background on Facebook's Data Policy and describe the various sources from which Facebook collects data. Part III will highlight the antitrust legal framework in Germany, explain how the FCO applied that framework to Facebook, and then summarize relevant aspects of U.S. antitrust law. This section will also raise common criticisms of the use of antitrust law as a means to address privacy harms. Part IV will analyze the facts of the German case against Facebook in the context of U.S. antitrust law. This section will argue that the FCO's legal theory, albeit insufficient under Sherman Act Section 2, provides a framework upon which the FTC or DOJ could build by emphasizing how Facebook's Data Policy harms consumers by impeding market entry and reducing innovation and overall product quality. Such an illegal monopolization theory of harm would be successful under the burden-shifting framework established in

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11. The GDPR came into effect in Europe in 2018. The landmark law sets strict limits on the kinds of data and the circumstances in which private entities can collect data from individuals.

12. Nuala O'Connor, *Reforming the U.S. Approach to Data Protection and Privacy*, COUNCIL ON FOREIGN RELS. (Jan. 30, 2018), https://www.cfr.org/report/reforming-us-approach-data-protection [https://perma.cc/YU6L-GJLP].

13. "Data-opolies" is a relatively new term that refers to companies that dominate a particular platform such that they attract most of the users, sellers, advertisers, and software developers within that space. For example, Facebook is a "data-opoly" within the social networking sphere and Amazon is a "data-opoly" within the online merchant world. *See generally* Maurice E. Stucke, *Should We Be Concerned About Data-Opolies?* 2 GEO. L. TECH. REV. 275 (2018).

14. It is not this author's intention to vilify only Facebook when so many other large technology companies have equally troubling data collection practices. However, Facebook's Data Policy and its timely relevance as a result of the FCO's recent case against it in Germany make Facebook a useful case study to establish a broader framework for discouraging similar take-it-or-leave-it data privacy practices. The goal of this Note is to establish an antitrust framework that transcends the privacy challenges associated with Facebook and applies to any present or future data-collecting entity that dominates a particular domain.

Microsoft v. United States. This section will conclude with a policy discussion of the common criticisms addressed in Part III and argue that antitrust law should be used not as a placeholder for direct data privacy regulation, but rather as a means of challenging anticompetitive conduct that *results* in privacy harms.

II. FACEBOOK'S DATA POLICY

Facebook collects "the content, communications and other information you provide when you use our Products, including when you sign up for an account, create or share content, and message or communicate with others."[15] This seemingly innocuous statement obscures the true scope of its data collection. Facebook divides its data sources into three categories: (1) things users and others do and provide; (2) device information; and (3) information from partners.[16]

The first category—things users and others do and provide—is the most intuitive. It includes information gleaned from user activity on the mobile and desktop versions of Facebook (e.g. user interactions with other Facebook pages, accounts, and groups) and its "products," such as Messenger and Instagram.[17] The second category—device information—includes data from computers, phones, and other web-connected devices that consumers use when they are on Facebook.[18] It also includes information about the consumer's operating system, nearby Wi-Fi access points, device settings, IP addresses, and cookie data.[19]

The third category of data—information from partners—is the most controversial because it enables Facebook to collect information about consumers from sources outside its platform, including advertisers, app developers, and publishers (referred to as Facebook "partners") who use Facebook Business Tools.[20] Such tools include Application Programming Interfaces (APIs), Software Development Kits (SDKs), Facebook code, and the "Like" and "Share" social plugins.[21] For example, if a third party, completely unrelated to Facebook, embeds Facebook's "Like" function into its website, and you access that website, Facebook has the ability to collect information about "your device, websites you visit, purchases you make, the ads you see, and how you use their services—whether or not you have a

15. Data Policy, *supra* note 7.
16. *See id.*
17. *See id*; *What are Facebook Products?*, FACEBOOK, https://www.facebook.com/help/1561485474074139?ref=dp [https://perma.cc/9QPP-E7Z6].
18. *Id.*
19. *Id.*
20. *See* Bundeskartellamt [Federal Cartel Office] Feb. 6, 2019, B6-22/16, 1 (28:100), (Ger.) [hereinafter *Facebook*].
21. *The Facebook Business Tools*, FACEBOOK, https://www.facebook.com/help/331509497253087 [https://perma.cc/T3NR-5LMJ].

Facebook account or are logged into Facebook."[22] This means that Facebook's data collection extends far beyond what users provide on the platform and likely beyond what most users might reasonably expect or to which they might knowingly consent.

III. FACEBOOK IN GERMANY AND COMPETING MODELS OF ANTITRUST LAW

Discussion of potential antitrust implications of Facebook's data collection practices in the U.S. requires a baseline understanding of the current antitrust legal landscape. This section will describe German antitrust law's prohibition on dominance and abusive conduct. It also will explain that in finding against Facebook, the FCO relied primarily on evidence that Facebook's conduct resulted in anticompetitive effects that harmed Facebook's competitors. This section will then transition to discussing U.S. antitrust law and highlight provisions relevant to a potential claim against Facebook under the Sherman Act. And finally, this section will raise common criticisms of the use of antitrust law as a means to address privacy harms, which this Note will rebut at the end of its analysis.

A. German Antitrust Law and the Facebook Case

In Europe, the European Commission enforces antitrust rules pursuant to the Treaty on the Functioning of the European Union (TFEU).[23] Germany, as a member state of the EU, is subject to this treaty.[24] However, the TFEU applies only when a firm's conduct affects trade between EU member states.[25] The FCO has regulatory authority solely over domestic matters in Germany.[26] Therefore, this section will provide an overview of German, not European, antitrust law, including (1) a summary of Germany's antitrust legal framework; and (2) an explanation of how the FCO applied that legal framework to the Facebook case.

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22. Data Policy, *supra* note 7. When a consumer clicks on a "Like" button that is embedded in a third-party website outside of Facebook.com, the "liked" content is automatically displayed on the Facebook platform so that the consumer's friends can see the content. A "share" button works in a similar way. When a consumer clicks a "share" button on a third-party website outside of Facebook.com, that content is automatically shared on the consumer's Facebook feed with his or her Facebook friends. *See* Facebook, *supra* note 20, at 18:56–57.

23. *Directorate-General for Competition*, EUR. COMM'N COMPETITION, https://ec.europa.eu/dgs/competition/index_en.htm (last visited Feb. 28, 2020) [https://perma.cc/UUF9-JLTA].

24. *Countries*, EUR. UNION, https://europa.eu/european-union/about-eu/countries_en (last visited Feb. 28, 2020) [https://perma.cc/U2HT-JVQE].

25. Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Mar. 25, 1957, 2012 O.J. (C 326/01) 88.

26. *The Bundeskartellamt*, BUNDESKARTELLAMT, https://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html (last visited Feb. 29, 2020) [https://perma.cc/72HJ-RE8K].

1. German Legal Framework

German antitrust law is set out in the Act Against Restraints of Competition (ARC).[27] Chapter One of the ARC prohibits agreements restricting competition, such as price-fixing arrangements or other collusive agreements.[28] Chapter Two of the ARC prohibits less overt, but potentially just as harmful activity related to firms that attempt to monopolize the marketplace.[29] Chapter Two is more applicable in the FCO case because Facebook is charged with abusing its dominant position in the social network marketplace resulting from its own actions, as opposed to illegally colluding with another firm to fix prices or otherwise restrict competition, which would violate Chapter One.

Sections 18 and 19 under Chapter Two are at play in the FCO case. These provisions work together. Only when an undertaking is "dominant" under Section 18 and proceeds to abuse its dominant position by engaging in conduct prohibited under Section 19 will a firm violate German antitrust law.[30] Therefore, whether a violation occurs under Chapter Two of the ARC depends on the relationship between a firm's market dominance and its conduct.[31]

A firm is dominant under Section 18 "where, as a supplier or purchaser of a certain type of goods or commercial services on the relevant product and geographic market, it has no competitors, is not exposed to any substantial competition, or has a paramount market position in relation to its competitors."[32] Section 18 also lists five factors that are particularly relevant when a firm's business model involves a multi-sided network such as Facebook,[33] including (1) direct and indirect network effects; (2) parallel use of services from different providers and the switching costs for users; (3) economies of scale associated with network effects; (4) access to data; and (5) innovation-driven competitive pressure.[34]

There are several ways an undertaking may abuse its dominance, including impeding another undertaking in an unfair manner or demanding payment or other business terms which differ from those which would likely arise if effective competition existed.[35] However, sometimes a firm's

27. Gesetz gegen Wettbewerbsbeschränkungen [GWB] [German Act Against Restraints of Competition], Oct. 30, 2017, (Ger.). This Note refers to an English-translated version of the Act [hereinafter *ARC*]: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?__blob=publicationFile&v=3.

28. *See id* § 1.

29. *See generally id. ch. 2.*

30. *See id.* §§ 18, 19.

31. *See Facebook*, *supra* note 20, at 245:873.

32. *ARC*, *supra* note 27, § 18(1).

33. Facebook is a multi-sided network because it provides separate but interrelated products and services to multiple groups of stakeholders, including users, advertisers, developers, and publishers. *See Facebook*, *supra* note 20, at 60–61:219; *see also* Ohio v. American Express Co., 138 S. Ct. 2274, 2280 (2018).

34. *ARC*, *supra* note 27, § 18(3a).

35. *Id.* § 19(2).

dominance may itself manifest abusive conduct.[36] It is therefore "sufficient [for a violation] if the conduct proves to be anti-competitive as a result of market dominance, which does not require strict causality but rather a causality in relation to the outcome."[37] The Facebook case is an example of how a firm's dominance in itself manifests abusive conduct.

2. The FCO's Application of German Antitrust Law to Facebook

The FCO enjoined Facebook's Data Policy on two grounds. First, the FCO argued that Facebook's Data Policy violated the GDPR because Facebook did not obtain voluntary consent from users for use of their personal data.[38] However, the GDPR provisions discussed in the German case and the extent to which the FCO relied on them in its decision against Facebook are not relevant here because there is no comparable data protection regulation in U.S. federal law.[39] Therefore, unlike the FCO, the FTC and DOJ could not support a potential antitrust claim on the basis of a violation of data protection requirements.[40]

Second, the FCO argued that Facebook possessed market power that gave rise to anticompetitive effects.[41] Essentially, the FCO determined that Facebook's high market power—and virtually limitless access to consumer data—made it near impossible for any other social network to compete effectively. The source of Facebook's market power, according to the FCO, was the social network's Data Policy, which combined data collected directly from its platform with data collected from third-party websites and applications.[42] The FCO supported its case for market power by arguing that

36. *See Facebook, supra* note 20, at 245:873.

37. *Id.*

38. *See id.*, at 166:573; *See also* Andreas Mundt Presentation: Implications of the German Facebook Decision 12 (April 17, 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Reden/L1/Andreas%20Mundt%20-%20%20Global%20Competition%20Law%20Centre.html [hereinafter Mundt Presentation]. Article 6 of the GDPR requires entities to obtain consent before processing user data. As the FCO explained, the take-it-or-leave-it nature of Facebook's Data Policy deprived users of such consent.

39. *See* O'Connor, *supra* note 12.

40. It is possible that the FTC could challenge Facebook's Data Policy under Section 5 of the FTC Act, 15 U.S.C. § 45, as an unfair or deceptive act or practice, but the plausibility of this theory is beyond the scope of this analysis.

41. *See* Mundt Presentation, *supra* note 38.

42. *See* Bundeskartellamt Press Release, *supra* note 9, at 2 ("The combination of data sources substantially contributed to the fact that Facebook was able to build a unique database for each individual user and thus to gain market power.").

Facebook had a 90% share of the social network market and that direct network effects[43] prevented users from switching to other services.

The FCO analyzed Facebook and its Data Policy under Sections 18 and 19 of the ARC.[44] Under Section 18, the FCO limited Facebook's geographic market to Germany and narrowly defined its product market to include as competitors only StudiVZ and Jappy—two German social networks—and the now defunct Google+.[45] The FCO also defined Facebook as a multi-sided network because it provides products and services to various stakeholders, including consumers, advertisers, developers, and publishers, thereby triggering the FCO's authority to assess Facebook's market position pursuant to the factors expressed in Section 18 related to multi-sided networks.[46] The FCO's narrow product and geographic market definitions, in addition to its characterization of Facebook as a multi-sided network, made it near certain that Facebook would be "dominant" under Section 18.

Next, the FCO argued that Facebook's Data Policy—specifically its collection of data from third-party websites and applications—constituted abusive business terms within the meaning of Section 19.[47] Essentially, the FCO argued that the Data Policy not only enabled Facebook to gain dominance under Section 18, but it also constituted abusive conduct under Section 19. Two factors weighed heavily against Facebook in both analyses: network effects and access to data.[48]

Direct network effects among private users lead to a more concentrated social network market.[49] This "self-reinforcing feedback loop" created a lock-in effect, meaning, users whose friends and family are also on Facebook are

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43. Facebook, *supra* note 20, at 110–11; 186:646. *Direct* network effects occur when a product or service increases in value as more people join. For example, one of the reasons why so many people use Facebook is because their friends and family are also on Facebook. If an individual joins Facebook, but none of his friends or family do, he would likely find the service useless. On Facebook, *indirect* network effects occur between private users and advertisers because advertisers benefit the more users join the network. Indirect network effects also occur between app developers and private users because developers benefit by having a consistent flow of work to do the more users join. Users also benefit from the increased devotion of resources to app development. *See* D. Daniel Sokol & Roisin E. Comerford, *Antitrust and Regulating Big Data*, 23 GEO. MASON L. REV. 1129, 1148 (2016); *see also* Facebook, *supra* note 20, at 60:218.

44. This Note accepts the FCO's market definition and will apply it when analyzing the facts of the Facebook case under Sherman Act Section 2 in Part IV.B(1). An analysis of the purposes, functionalities, and qualities of each of more than two dozen potential competitors of Facebook is beyond the scope of this Note because it would detract from this Note's focus on the anticompetitive nature of expansive data collection practices by large technology firms.

45. Facebook, *supra* note 20, at 74:265. In total, the FCO considered 32 other websites and applications in determining the relevant market, excluding services such as LinkedIn, Snapchat, Twitter, FaceTime, and YouTube. *Id.* at 78–97.

46. *See id.* at 64–66.

47. *Id.* at 149:524.

48. *See id.* at 76:274. Although these factors are traditionally used only for the purpose of assessing dominance under Section 18, the FCO also discussed them in the context of abusive conduct because they enabled Facebook to effectively exclude and harm competitors and the social network marketplace. Put another way, Facebook's dominance on its own manifested abusive conduct. *See id.* at 250:888.

49. *See id.* at 119.

less likely to switch to other social networks.[50] When users have little incentive to switch services (such as to German social networks StudiVZ and Jappy because most users are already on Facebook) switching costs are considered high.[51] These high switching costs contribute to high barriers of entry for competitors because it is difficult for other social networks to reach the critical mass of users necessary for a functioning social network.[52] Therefore, in Facebook's case, direct network effects essentially limited "the range of potential competitors," especially those with more privacy-minded data collection practices.[53]

In addition, Facebook's access to data is superior to almost every other competitor.[54] It includes data collected from user activity that occurs directly on the social network, Facebook-owned products like Instagram, and third-party websites and applications that use Facebook Business Tools.[55] Data access matters in the context of market dominance because social networks are primarily data-driven products whose characteristics and financial sustainability depend, to a significant degree, on the user data available.[56] The more data Facebook collects, the better positioned it is to secure funding, develop its technology, and personalize its services for users.[57] Thus, according to the FCO, Facebook's wide-ranging data collection constitutes abusive conduct because it enables the social network to impede market entry.[58]

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50. *Id.*

51. *See id*. at 132:464. Admittedly, the reality is that technology enables consumers to use multiple social media apps at once. Therefore, "switching" may not be as accurate an indicator of consumer preferences as it was in a pre-online social media era. Nevertheless, Facebook does not lose market power just because some consumers start using other social media apps. For example, let's assume that younger consumers generally prefer TikTok to Facebook as their form of social expression—and these consumers consist of two different groups. Group A consists of consumers who have both Facebook and TikTok. Group B consists of consumers who only have TikTok—including consumers who never had Facebook and consumers who deleted Facebook when they joined TikTok. For consumers in Group A, retention of Facebook, despite the addition of TikTok, suggests that they still find *unique value* in Facebook's services. Otherwise, why would they keep their account? Facebook may be the only way some of those consumers connect with older family members, for example. In this case, Facebook maintains its market power over these consumers. The same is true for consumers in Group B who don't have a Facebook account. After all, Facebook's Data Policy captures the data of these consumers if they use Facebook Business Tools on third-party websites. For both sets of consumers, Facebook's Data Policy enables the social network to reach consumer data in ways other products do not.

52. *See id.* at 133:467.

53. *Id.* at 82:293.

54. *See id.* at 142:498.

55. Data Policy, *supra* note 7.

56. *See* Facebook, *supra* note 20, at 136–37:482.

57. *See id.* at 138–39:488.

58. *See id.* at 141:494.

B. U.S. Antitrust Law: Illegal Monopolization Under the Sherman Act

The Sherman Act is the defining statute of U.S. antitrust law.[59] Section 1 of the Sherman Act prohibits collusive agreements in restraint of trade, whereas Section 2 prohibits actual or attempted monopolization.[60] Section 2 makes it unlawful for "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce. . . ."[61] Section 2 is applicable here because this Note proposes greater antitrust enforcement against monopolizing firms engaged in unilateral conduct, such as Facebook's unilateral enforcement of its invasive data collection practices, but does not comment on firms engaged in concerted activity in restraint of trade, which falls under Section 1.

Illegal monopolization under Section 2 has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[62] Monopoly power (or dominance) alone under Section 2 does not constitute illegal monopolization.[63] Instead, a firm must possess monopoly power and also demonstrate anticompetitive conduct.[64] However, the Supreme Court famously remarked that antitrust law protects competition, not competitors.[65] Conduct that exclusively harms a particular firm's competitors is not cognizable.[66] Rather, anticompetitive conduct must harm the competitive process *and* consumers.[67]

One of the leading cases governing Section 2 jurisprudence is *United States v. Microsoft*, in which the DOJ alleged that Microsoft engaged in improper exclusionary conduct through its licensing and software developer agreements.[68] In *Microsoft*, the D.C. Circuit Court of Appeals outlined the burden-shifting steps in a Section 2 claim. First, the plaintiff must establish a prima facie case that the defendant possesses monopoly power that results in anticompetitive effects (i.e. exclusionary acts harming the competitive process and consumers).[69] Monopoly power is the ability to control prices or

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59. Sara A. Solow, *Prosecuting Terrorists as Criminals and the Limits of Extraterritorial Jurisdiction*, 85 ST. JOHN'S L. REV. 1483, 1537 (2011).

60. *See* 15 U.S.C. §§ 1, 2.

61. 15 U.S.C. § 2.

62. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

63. *See generally* U.S. Dep't of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act,* 19 (2008) [hereinafter *Competition and Monopoly*].

64. *See* Verizon Commc'ns Inc. v. Law Off. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

65. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (internal citation and quotation marks omitted).

66. United States. v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

67. *Id.*

68. *Id.* at 47.

69. *Id.* at 59.

exclude competition.[70] To determine whether monopoly power exists, it is necessary to first define the relevant product and geographic markets.[71]

Federal courts in the United States define the relevant product market by examining "products that have reasonable interchangeability for the purposes for which they are produced," including consideration of the price, use, and qualities of those products, as well as the firm's market share and general entry conditions.[72] The geographic market of the product at issue may encompass an entire country or a single region or city, but in any case it must reflect the commercial realities of the industry and the areas in which the business operates in an economically significant way.[73]

After the plaintiff establishes a prima facie case of monopoly power and anticompetitive effects, the second step under *Microsoft's* burden-shifting framework provides the defendant with an opportunity to offer procompetitive justifications for its behavior, such as greater efficiency or consumer appeal.[74] If the defendant does so, the burden then shifts back to the plaintiff to rebut those justifications.[75] However, if the plaintiff cannot rebut the defendant's procompetitive justifications, the plaintiff must show that the anticompetitive harm of the defendant's conduct substantially outweighs its procompetitive benefits.[76] This burden-shifting framework can be applied to Facebook in the context of a Sherman Act Section 2 claim of illegal monopolization. However, before launching into that analysis, it is first necessary to confront the criticisms of the use of antitrust law as a mechanism to remedy privacy harms as reflected in the ongoing antitrust-privacy policy debate.

C. Criticisms of Antitrust as a Mechanism to Address Privacy Harms

The oft-cited purpose of antitrust law is to protect competition, so on the surface, this makes antitrust law a curious mechanism for addressing privacy harms.[77] Critics of the use of antitrust law in the privacy domain often argue that the appropriate response to privacy concerns should not be antitrust enforcement, but rather greater privacy protections.[78] As one critic noted, "If elected officials believe that large Internet companies are not doing enough to protect privacy, the proper response is to enact national privacy regulation."[79] But one might think that the lack of a comprehensive federal privacy law in the United States along with Congress's perceived inability to pass bipartisan

70. United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).
71. *Competition and Monopoly*, *supra* note 63, at 26.
72. *Id.* at 21; *Du Pont*, 351 U.S. at 404.
73. Brown Shoe Co. v. United States, 370 U.S. 294, 336–37 (1962).
74. *Microsoft*, 253 F.3d at 59.
75. *Id.*
76. *See id.*
77. *See Brunswick*, 429 U.S. at 488.
78. Joe Kennedy, *Data and Privacy Are Not Antitrust Concerns*, INNOVATION FILES (Oct. 15, 2019), https://itif.org/publications/2019/10/15/data-and-privacy-are-not-antitrust-concerns [https://perma.cc/MBU6-DBFT].
79. *Id.*

legislation[80] demonstrate the need for an exception to the seemingly hard-and-fast rule that antitrust and privacy cannot mix. Nevertheless, critics maintain that antitrust law should only be used when there is harm to competition, not to fill gaps in privacy laws.[81]

Critics argue that antitrust may also be inappropriate to address privacy harms because although U.S. antitrust regulators have considered challenging data practices of large technology companies on antitrust theories of harm in the past, they ultimately declined to pursue such theories or concluded no violation.[81] For example, in their 2016 article assessing the application of antitrust to privacy harms, Daniel Sokol and Roisin Comerford point to the FTC's decision in 2007 to clear Google's merger with DoubleClick as evidence of regulators' reluctance to use antitrust to address privacy concerns.[82] In its statement concerning the proposed merger, the FTC argued that it lacked the legal authority to require conditions that do not relate to antitrust, and that regulating the privacy practices of one company could actually harm competition.[83]

Critics contend that court intervention into the data practices of specific companies may disincentivize innovation if firms are worried about violating antitrust laws. [84] As a consequence, companies may reduce investment in research and development, thus providing consumers with lower quality products and services.[85] Court intervention also raises administrative concerns because a firm's data policies and technological operations tend to be complex.[86] Even if a court deems a particular data practice illegal, it may simply lack the expertise and competence needed to apply the appropriate legal remedy.

In addition, critics argue that data collection may not actually restrict or harm competition because it is widely accessible, at very little cost, to virtually everyone.[87] The data that Facebook collects, for example, is not exclusive to Facebook. Users can, and often do, share the data they voluntarily provide to Facebook to other companies as well.[88] Therefore, critics argue that data does not implicate competition because "its use by one party does not diminish its value to anyone else."[89]

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80. *See* O'Connor, *supra* note 12; *see generally Congress and the Public*, GALLUP, https://news.gallup.com/poll/1600/congress-public.aspx (last visited Oct. 9, 2020) [https://perma.cc/JR8W-ND5F] (demonstrating Congress's poor public approval ratings).

81 *See* Sokol & Comerford, *supra* note 43, at 1159.

81. *See id.* at 1151.

82. *Id.* at 1152.

83. Statement of the Federal Trade Commission, *Statement Concerning Google/DoubleClick*, FTC File No. 071-0170, at 2–3, Dec. 20, 2007, https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

84. *See* Sokol & Comerford, *supra* note 43, at 1159.

85. *See id.*

86. *See id.* at 1159–60.

87. *See* Kennedy, *supra* note 78.

88. See *id.*

89. *Id.*

IV. FACEBOOK IN THE UNITED STATES: APPLYING THE GERMAN DECISION UNDER U.S. LAW

Having established the legal frameworks of illegal monopolization claims in Germany under the ARC and in the U.S. under Sherman Act Section 2, and having identified criticisms of the use of antitrust as a means to remedy data privacy harms, this section will (1) explain that the FCO's theory, albeit a strong foundation for a viable antitrust claim, falls short under Sherman Act Section 2 because the FCO failed to emphasize consumer harm; (2) describe how the FTC or DOJ should strengthen the FCO's theory of illegal monopolization and present a viable challenge against Facebook under Sherman Act Section 2; and (3) rebut criticisms of the use of antitrust to address privacy harms because they miscalculate the relationship between data collection, privacy, and competition, are outdated, and fail to factor in political considerations unique to the U.S.

A. The FCO's Legal Theory Fails Under the Sherman Act

The FCO's theory of abusive conduct would provide a strong foundation for challenging Facebook's Data Policy in the U.S. under the Sherman Act. In particular, the FCO's theory of market dominance would likely satisfy the monopoly power requirement under a Sherman Act Section 2 claim. However, the FCO's theory of abuse of dominance would likely fail under the Sherman Act because it does not sufficiently demonstrate how Facebook's Data Policy harms consumers. Therefore, the DOJ or FTC could not likely bring a successful Sherman Act Section 2 claim against Facebook without further developing the FCO's legal theory to address consumer harm.

The elements necessary to prove illegal monopolization under the German ARC are nearly identical to those under Sherman Act Section 2. Both require monopoly power and bad conduct, although the terms used to express each of those elements differ. For example, whereas Section 18 of the ARC refers to "market dominance," Section 2 of the Sherman Act refers to "monopoly power."[90] However, they are interchangeable because the factors courts consider in deciding whether either one exists—including substitutability, entry conditions, and market share—are roughly the same. Both require a market definition consisting of relevant product and geographic markets.[91] Under German law, courts determine the relevant product market—or the "market position" of the firm in question in relation to its competitors (as the ARC describes it)—by considering various factors.[92] One factor is "switching,"[93] which is synonymous with substitutability, a key component of the product market analysis under the Sherman Act.[94] The

90. *ARC*, *supra* note 27 at § 18; *Grinnell*, 384 U.S. at 570–71.

91. *See ARC*, *supra* note 27, at § 18(1); *see also Competition and Monopoly*, *supra* note 63, at 26.

92. *ARC, supra* note 27, at § 18(1).

93. *Id.* at § 18(3a) n.2.

94. *See Du Pont*, 351 U.S. at 404.

product market analysis under both the ARC and the Sherman Act also require consideration of entry conditions.[95]

Moreover, in the German case against Facebook, the FCO analyzed the purposes and functions of over a dozen potential competitors, including media such as Snapchat, Google+, Twitter, LinkedIn, Telegram, and YouTube, to determine whether users regard those companies as competitors of Facebook.[96] This analysis essentially mirrors the test for product substitutability under the Sherman Act established in *United States v. Du Pont*, which requires consideration of the "price, use and qualities" of products reasonably interchangeable by consumers.[97]

In addition, the FCO's consideration of Facebook's 90 percent market share[98] is also a relevant factor in a typical Sherman Act analysis. Therefore, based on the FCO's consideration of Facebook's substitutability, barriers to entry, and market share—the three main characteristics of a product market analysis under the Sherman Act—the FCO's theory of market dominance would satisfy the first element of an illegal monopolization claim under Sherman Act Section 2.

Because monopoly power alone is insufficient to constitute illegal monopolization under the Sherman Act, it is necessary to examine whether the FCO's theory of Facebook's abuse of dominance would satisfy the anticompetitive conduct element of an illegal monopolization claim under the Sherman Act. If so, both elements of Section 2—monopoly power and anticompetitive conduct—would be satisfied and the FCO's case against Facebook could constitute a viable antitrust claim in the U.S. However, the FCO's theory likely falls short of the Sherman Act's anticompetitive standard because it does not sufficiently emphasize how Facebook's Data Policy harms consumers.

Section 19 of the ARC prohibits "abuse of a dominant position" whereas Section 2 of the Sherman Act prohibits anticompetitive conduct. These prohibitions are synonymous because under the ARC, the FCO will only find that a firm abused its dominant position if it engages in anticompetitive conduct, such as impeding another firm in an unfair manner or demanding unfair business terms.[99] In its case against Facebook, the FCO argued that Facebook's Data Policy constituted abusive business terms by raising the barriers to entry into the social network market, thereby excluding competitors.[100] This theory, however, would be problematic under American law because it focuses almost exclusively on harm to competitors.

U.S. antitrust regulators typically require a showing of *consumer* harm. Under the Sherman Act, conduct is not anticompetitive solely because it excludes competitors.[101] It must also harm the competitive process and

95. *See ARC, supra* note 27, at § 18(3) n.5; *see also Competition and Monopoly*, *supra* note 63, at 21.

96. *See generally Facebook*, *supra* note 20, at 73–97.

97. *Du Pont*, 351 U.S. at 404.

98. *See Facebook, supra* note 20, at 110.

99. *ARC, supra* note 27, at § 19(2) nn.1, 2.

100. *Facebook*, *supra* note 20, at 149:524; 250:888.

101. *Microsoft*, 253 F.3d at 58.

consumers.[102] Therefore, although the FCO's theory would provide a strong foundation for challenging Facebook's Data Policy under the Sherman Act, the FTC and DOJ would have to better emphasize how the policy harms consumers.

B. A Revised Theory of Anticompetitive Harm Under Sherman Act Section 2

The FCO's theory of Facebook's market dominance and its subsequent finding that Facebook abused its dominance would be inadequate under Section 2 of the Sherman Act. However, a reworking of the FCO's theory, including greater emphasis on the harm that Facebook's Data Policy causes consumers, could lead to a successful challenge against Facebook in the U.S. This section will apply the burden-shifting framework established in *Microsoft* and argue, using the facts of the German case, that the FTC and DOJ could bring a successful claim against Facebook under Sherman Act Section 2.

1. The Government Could Make a Prima Facie Case of Facebook's Monopoly Power

Under the first step of the *Microsoft* burden-shifting framework, the FTC and DOJ would be able to satisfy the two elements of a Sherman Act Section 2 claim—first, that Facebook possesses monopoly power and second, that Facebook's willful acquisition or maintenance of that power is distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident—thereby establishing a prima facie case of illegal monopolization.[103]

Proof of monopoly power depends on how the FTC and DOJ define the relevant product and geographic markets. Here, the relevant product market includes Google+, StudiVZ, and Jappy.[104] More popular websites and applications such as Snapchat, Twitter, LinkedIn, Telegram, and YouTube differ substantially in their use and qualities as compared to Facebook.[105] Therefore, consumers do not regard these other websites and applications as having "reasonable interchangeability for the purposes for which they are produced."[106]

Having established the relevant market, the case for Facebook's possession of monopoly power is strengthened by examining Facebook's share of the relevant market in addition to general entry conditions.[107] Within the defined market, Facebook's share of daily active users exceeds 90

102. *Id.*

103. *Grinnell*, 384 U.S. at 570–71; *see Microsoft*, 253 F.3d at 59.

104. *Facebook*, *supra* note 20, 74:265.

105. As explained in *supra* note 44, this Note accepts the FCO's market definition because such an analysis (which took the FCO years of investigation) would detract from this Note's focus on anticompetitive effects.

106. *Du Pont*, 351 U.S. at 404.

107. *Competition & Monopoly*, *supra* note 63, at 21.

percent.[108] This is well above the 70 percent minimum American courts generally require for Section 2 cases.[109] In addition, Facebook has the most daily active users of any social network in the world[110] and thus benefits from both direct and indirect network effects, which enable Facebook to employ wide-ranging data collection practices at the expense of potential competitors. Therefore, social networks seeking to enter the market are impeded because they simply may not be able to compete with the sheer amount of data that Facebook collects from its users. Having defined Facebook's relevant market by assessing the extent to which consumers regard Facebook as interchangeable with various other websites and applications and considering Facebook's 90 percent market share and difficult market entry conditions for nascent firms, the FTC and DOJ would likely be able to prove that Facebook possesses monopoly power.

2. The Government Could Make a Prima Facie Case of Anticompetitive Effects

The FTC and DOJ will also likely be able to show that Facebook has been able to maintain its monopoly power through anticompetitive means—by use of its invasive Data Policy—rather than as a consequence of its superior product, business acumen, or historic accident, thereby satisfying the second element under Section 2. Facebook's Data Policy effectively excludes competitors that might employ better privacy-protective measures by collecting so much data from consumers that it becomes difficult for other firms without such data to compete. This "locks-in" consumers who might otherwise consider switching to other social networks.[111] Furthermore, absence of a vigorous competitive environment disincentivizes innovation, thereby reducing overall product and service quality and harming consumers.

Facebook's Data Policy enables it to collect data not just from the information users voluntarily provide directly on the Facebook platform, but also from user activity on separate Facebook-owned products like Instagram, and on third-party websites and applications with embedded Facebook Business Tools.[112] Data that enables use of algorithms is perhaps the most important commodity in the social network market because it serves as the foundation of any social network's business model.[113] For example, data provides funding for Facebook through its advertisers, who are able to use data to target advertisements towards specific groups of people.[114] Data also provides Facebook's software developers with the flexibility necessary to

108. *Facebook*, *supra* note 20, at 110.

109. *See Competition & Monopoly*, *supra* note 63, at 21.

110. Dustin W. Stout, *Social Media Statistics 2020: Top Networks By the Numbers*, https://dustinstout.com/social-media-statistics/ (last visited Oct. 9, 2020) [https://perma.cc/87Z9-N9DN].

111. *See Facebook, supra* note 20, at 130:460.

112. *Data Policy*, *supra* note 7.

113. *Facebook*, *supra* note 20, at 136–37:482.

114. *See Ad Targeting*, FACEBOOK, https://www.facebook.com/business/ads/ad-targeting (last visited Oct. 9, 2020) [https://perma.cc/2GDK-EM77].

create better and more personalized technologies that in turn attract and satisfy more users.[115]

Such network effects enable Facebook to enforce its Data Policy with few, if any, repercussions because it has already reached the "critical mass" of users needed to establish a successful social network. Moreover, most users seeking Facebook-like services would find it inconvenient to delete their Facebook accounts.[116] The cycle of network effects harms competition because it doesn't give competitors who might otherwise succeed in the marketplace, especially those with more privacy-minded data collection policies, the chance to do so. Facebook already dominates the social network market and will likely continue to dominate it so long as its Data Policy remains in force. The Data Policy, therefore, impedes market entry.

Facebook's Data Policy is similar to the license agreements in *Microsoft* in that both effectively blocked consumer access to competitor products and increased the overall usage share of each company's respective product. In *Microsoft*, the DOJ sued the tech giant for imposing restrictive licensing agreements on manufacturers of computer operating systems, among other alleged exclusionary acts.[117] The D.C. Circuit held that the license agreements were restrictive, and consequently anticompetitive, because they required manufacturers to pre-install Microsoft's internet browser on operating systems in place of competitor browsers like Netscape.[118] This restriction effectively reduced the overall usage share of competitors' browsers, thereby preserving Microsoft's browser monopoly.[119]

Usage share matters for companies like Facebook and Microsoft because it correlates with direct network effects.[120] Direct network effects, in turn, determine in large part whether a product in the digital context fails or succeeds.[121] The more people use Microsoft's browser, the more data Microsoft will be able to collect about users' search queries, which will enable Microsoft to better adapt its browser to consumer tendencies and preferences. Indirect network effects were also important in *Microsoft* because the more people used Microsoft's browser, the more that browser attracted software developers who could write sophisticated code for applications that attracted even more users.[122] Therefore, just as Microsoft's restrictive licensing agreements prevented rival browsers from gaining the critical mass of users necessary to attract more users and software developers (thereby solidifying Microsoft's monopoly in the browser market), Facebook's Data Policy provides the social network with the data it needs to adapt its products and services just enough so that its existing users do not leave, thereby protecting Facebook's monopoly over social networks.

115. *See Facebook, supra* note 20, at 138–39:488.
116. *See id.* at 133:467.
117. *See Microsoft*, 253 F.3d at 47.
118. *Id.* at 60–61.
119. *Id.*
120. *See Facebook*, *supra* note 20, at 186–87:646.
121. *See id.* at 60:218.
122. *Microsoft*, 253 F.3d at 60.

The Data Policy also disincentivizes Facebook to innovate to attract new users or provide better quality products and services. Facebook can maintain its dominance in the marketplace simply by retaining its existing users. Therefore, its Data Policy is sufficient to collect the data necessary to improve its products and services for the purpose of maintaining its user share, but not for the purpose of offering better quality products and services to improve the social network marketplace in general. If Facebook had access to less data, it may not appeal as successfully to user tendencies and preferences, which might cause a substantial number of dissatisfied users to delete their accounts. Faced with the prospect of competitors attracting those dissatisfied users, Facebook would likely be incentivized to innovate and invest more in research and development.[123]

Facebook's Data Policy is also anticompetitive because it harms consumers. Direct network effects "lock in" consumers, which means that they generally do not find it useful to switch to an alternative network because they have already established many connections on Facebook.[124] It is likely that users will only switch products if they can convince their family and friends to do so as well, but this can be difficult.[125]

Facebook takes advantage of the "lock-in" effect by enforcing its Data Policy, essentially leaving consumers with no choice but to accept the terms of their data collection practices if they want to remain on a network where they can easily connect with most of their family and friends. Therefore, consumers are harmed by the exclusion of potential competitors of Facebook who, without the lock-in effect, might actually succeed in the marketplace by innovating in unique ways and providing better services. Such vigorous competition would benefit consumers. Yet potential competitors who do not have the critical mass of users necessary to trigger direct network effects (and therefore do not collect the amount of data needed to challenge Facebook's control of the market) are shut out of the marketplace, irrespective of their business acumen or the superiority of their products and services.

Here, the FTC or DOJ would likely meet its burden of establishing a prima facie case of anticompetitive effects. However, an additional harm to consumers is worth a mention, not to lend support to the anticompetitive

123. This is not to say that Facebook fails to innovate completely in response to the evolving social media landscape. In August 2020, for example, Facebook launched "Instagram Reels," a feature similar to TikTok. *See* Shannon Bond, *Facebook Launches Instagram Reels, Hoping to Lure TikTok Users*, NPR (Aug. 5, 2020), https://www.npr.org/2020/08/05/899319721/facebook-launches-reels-hoping-to-lure-tiktok-users [https://perma.cc/X4ME-ZAHZ]. Similarly, in 2016, Facebook added "stories" to Instagram that nearly mirrored Snapchat's prominent story feature. *See* Shannon Bond, *Instagram's New Stories Are a Near-Perfect Copycat of Snapchat Stories*, THE VERGE (Aug. 2, 2016), https://www.theverge.com/2016/8/2/12348354/instagram-stories-announced-snapchat-kevin-systrom-interview [https://perma.cc/BD98-GXA9]. These "innovations" suggest that Facebook may indeed face competition. However, Facebook arguably still offers a more comprehensive social media product than any other company, while other companies are left competing at the edges of service differentiation instead of taking on Facebook's main platform head-on.

124. *See Facebook, supra* note 20, at 131:462.

125. *Id.*

element of a Sherman Act Section 2 claim, but rather to demonstrate the kind of harm against which antitrust law can protect if anticompetitive conduct is framed in the right way. Facebook's collection of data from third-party websites and applications includes sensitive data, such as device-identifying information and location data.[126] As the FCO explained, this "makes it possible to identify users, ensuring they can be fully traced on the Internet, while the users concerned have virtually no control mechanisms."[127] Large data collections increase the risk of data leaks to third parties.[128] Even if the leaks are unintentional, they can cause serious harm in the form of identity theft, extortion, or fraud.[129]

In light of the fact that the FTC and DOJ have never used their antitrust authority to solely safeguard privacy, making such a case would be highly unpredictable, and likely unsuccessful, considering the DOJ only filed *one* monopolization case under Section 2 from 2000-2018.[130] Therefore, anticompetitive conduct, such as the imposition of Facebook's Data Policy, should be framed in traditional antitrust terms (i.e. exclusionary conduct that harms consumers by reducing Facebook's incentive to innovate, thereby reducing the quality of its products and services), rather than through revolutionary notions of antitrust harms that are uncertain to appeal to courts.

3. Facebook's Likely Procompetitive Justifications Fail

The second step under the *Microsoft* burden-shifting framework offers Facebook the opportunity to offer procompetitive justifications for its Data Policy.[131] Facebook argues that its Data Policy, including its collection of data from third-party websites and applications, makes it easier to "tailor each person's Facebook experience so it's unique to you."[132] It also argues that its Data Policy helps Facebook protect people's safety and security by disabling accounts tied to terrorism, child exploitation, and election interference.[133]

However, Facebook does not explain how a more limited data collection policy would interfere with its personalization operations.[134]

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126. *Id.* at 237:838.

127. *Id.*

128. David Ingram, *Facebook Says Data Leak Hits 87 Million Users, Widening Privacy Scandal*, REUTERS (Apr. 4, 2018), https://www.reuters.com/article/us-facebook-privacy/facebook-says-data-leak-hits-87-million-users-widening-privacy-scandal-idUSKCN1HB2CM [https://perma.cc/QH58-NNKG].

129. *Facebook*, *supra* note 20, at 256:910.

130. *Antitrust Division Workload Statistics FY 2000-2009*, DOJ, https://www.justice.gov/sites/default/files/atr/legacy/2012/04/04/281484.pdf [https://perma.cc/P7EE-PNR9]; *Antitrust Division Workload Statistics FY 2009-2018*, DOJ, https://www.justice.gov/atr/file/788426/download [https://perma.cc/8J57-VJWW].

131. *See Microsoft*, 253 F.3d at 59.

132. Yvonne Cunnane & Nikhil Shanbhag, *Why We Disagree With the Bundeskartellamt*, FACEBOOK (Feb. 7, 2019), https://about.fb.com/news/2019/02/bundeskartellamt-order/ [https://perma.cc/96Y9-MA9N].

133. *Id.*

134. *See Facebook*, *supra* note 20, at 209:736.

Presumably, Facebook can tailor each person's experience based on the data it collects from user activity that occurs directly on the Facebook platform. It is not clear why Facebook will not be able to personalize user experiences without collecting data from Facebook-owned products like Instagram and third-party websites and applications with embedded Facebook Business Tools.[135] No evidence suggests that Facebook's Data Policy increases efficiency or improves Facebook's ability to appeal to consumers. Simply stating that is the case does not make it so. Therefore, the FTC and DOJ would be able to successfully rebut Facebook's first procompetitive justification.

The FTC and DOJ would also be able to successfully rebut Facebook's second procompetitive justification concerning improved safety and security. Facebook does not articulate how it is able to better detect and disable accounts tied to terrorism, child exploitation, and election interference as a result of its collection of data from Facebook-owned products and third-party websites and applications.[136] Would collecting data *only* from user activity on the Facebook platform harm Facebook's ability to track and remove dangerous accounts? If so, to what extent? Or would the effect of such a revised data policy be negligible? It is difficult to imagine how Facebook would even be able to measure any difference. Therefore, Facebook's second procompetitive justification would likely fail, and the FTC and DOJ would have a cognizable claim against Facebook's Data Policy under Sherman Act Section 2.

C. Why the Critics Are Wrong: Antitrust Should Be Used to Address Privacy Harms

The final hurdle in bringing an antitrust claim against Facebook's Data Policy involves the ongoing debate among policymakers and academics about the use of antitrust law to address privacy concerns. However, if antitrust is to be used at all against dominant technology companies like Facebook, claims under Section 2 of the Sherman Act are most likely to succeed in countering critics who believe that antitrust and privacy should not mix. Criticisms of the use of antitrust to address privacy harms do not pass muster for three main reasons. First, they miscalculate the relationship between data collection, privacy, and competition. Second, they are outdated because they fail to consider technology advancements that enable companies to collect more data. And finally, they fail to address U.S. political considerations.

Critics argue that antitrust law should only be used when there is harm to competition, not to fill gaps in privacy laws.[137] This is valid criticism. There are legitimate concerns about whether antitrust enforcement agencies have the authority to address privacy harms. Moreover, if the FTC and DOJ start using antitrust to remedy privacy harms, elected officials may become complacent and refrain from proposing significant federal privacy legislation if they think there are competent agencies already addressing privacy issues.

135. *See id.* at 212:743.
136. *See id.* at 214:750.
137. *See* Kennedy, *supra* note 78.

Therefore, critics are correct to the extent that antitrust law should not be used to crack down on conduct for the *purpose* of safeguarding privacy. However, antitrust law should be used more aggressively to challenge anticompetitive conduct that *results* in privacy harms. For example, Facebook engages in anticompetitive conduct by enforcing an invasive data policy that excludes competitors and harms consumers by limiting social network alternatives, disincentivizing Facebook to innovate beyond that which is necessary to retain its existing users and reducing the overall quality of its products and services.[138]

None of these harms directly involve privacy. However, if the DOJ or FTC bring a successful Sherman Act Section 2 claim against Facebook under the anticompetitive theory proposed here, an injunction or other similar court order would inevitably reduce privacy harms by restricting Facebook's Data Policy and limiting Facebook's access to user data. Therefore, critics overlook how the FTC or DOJ could address privacy harms by applying the traditional antitrust framework and maintaining focus on protecting competition. This Note simply proposes more aggressive use of the traditional framework to keep up with the many unprecedented privacy challenges we face today.

The notion that antitrust should not be used to address privacy harms simply because there is no relevant case law on the matter[139] is outdated and overlooks the extent to which technological capabilities have improved over the last couple of decades. Daniel Sokol's and Roisin Comerford's reference to the FTC's clearance of the Google/DoubleClick merger in 2007 as evidence that regulators would not want to bring an antitrust challenge against a future privacy harm neglects the realities of today's technology companies. In the last decade, computing power, network speed, data capture, storage capabilities, and internet bandwidth have improved dramatically.[140] These improvements have enabled sophisticated technology companies to collect more consumer data than ever before.[141] This reality calls for increased skepticism of corporate data collection and alternative theories for how to remedy associated privacy harms. To this end, antitrust law should be used more aggressively to address such privacy concerns.

Arguments concerning the difficulties of administering antitrust remedies for privacy harms are equally unconvincing. Judges hear cases all the time involving issues in which they lack expertise. *Microsoft*, for example, involved complicated facts about operating system browsers and other technological concepts, yet the D.C. Circuit managed to make sense of the facts and apply the law as it saw fit. Moreover, aggressive use of antitrust law would not require judges to learn the ins and outs of privacy law because privacy issues would not serve as a basis of any claim. As noted above, more aggressive use of antitrust law would not require the abandonment of the traditional antitrust framework. Therefore, arguments by the FTC and DOJ

138. *See supra* Part IV.B.2.

139. *See* Sokol & Comerford, *supra* note 43, at 1152.

140. NAT'L ACADS. OF SCIENCES, ENG'G, AND MED., INFO. TECH. AND THE U.S. WORKFORCE 34 (2017), https://www.nap.edu/read/24649/chapter/1.

141. *See id.* at 22–23.

would still focus on anticompetitive conduct. Privacy harms would not play any role in the parties' briefs or arguments before the court.

Finally, several political considerations in the U.S. support the notion that antitrust should be used more aggressively to address privacy concerns. Unlike Europe, the U.S. lacks a comprehensive federal privacy law.[142] This is unlikely to change anytime soon considering gridlock in Congress and the difficulty that comes with passing major bipartisan federal legislation.[143] Therefore, antitrust regulators can play a useful role in filling the void by more aggressively exercising their authority under Sherman Act Section 2 to challenge anticompetitive conduct that results in privacy harms to consumers.

There is substantial public support for greater enforcement.[144] For example, 40 percent of more than 1000 respondents in a May 2019 survey said they would support antitrust action against Facebook.[145] Moreover, only 22 percent of more than 2,000 respondents in an October 2018 survey said they trust Facebook with their personal data, including their browsing history, location data, contacts, and photos.[146] The public's frustration with Facebook and other large technology companies provides federal antitrust regulators with greater incentive to intervene.

V. CONCLUSION

In February 2019, Germany's FCO challenged Facebook's Data Policy on a novel antitrust theory of abuse of dominance, holding that its collection of data from user activity on the Facebook platform, other Facebook-owned products such as Instagram, and third-party websites and applications constituted abusive conduct. Although the FCO's theory would likely fail under U.S. antitrust law because of its inadequate emphasis on anticompetitive harm to consumers, the FTC and DOJ could still learn from the FCO's aggressive use of antitrust to remedy privacy harms. By reworking the FCO's theory to focus more on consumer harm, the FTC and DOJ could challenge Facebook's data collection practices under Sherman Act Section 2, thereby staying true to traditional antitrust goals of combatting anticompetitive conduct while also addressing related privacy harms.

Admittedly, antitrust law will not address all privacy harms. But then again, no one body of law, save perhaps comprehensive federal privacy legislation, will fully address all privacy concerns associated with the data collection practices of so many of today's largest technology companies. Regulators already have at their disposal the tools they need to protect

142. O'Connor, *supra* note 12.

143. *See* GALLUP, *supra* note 80.

144. Felix Richter, *American Public Supports Antitrust Action Against Facebook*, STATISTA (May 15, 2019), https://www.statista.com/chart/18024/public-support-for-antitrust-action-against-facebook/ [https://perma.cc/Q4GE-YD2K].

145. *See id.*

146. *How Much Do US Internet Users Trust Select Companies with Their Personal Data?* HARRIS POLL (Nov. 8, 2018), https://www.emarketer.com/chart/227523/how-much-do-us-internet-users-trust-select-companies-with-their-personal-data-of-respondents-oct-2018 [https://perma.cc/F3JZ-HZ7C].

consumers from invasive take-it-or-leave-it data collection practices. They should use them.