Institutional Considerations for the Regulation of Internet Service Providers

Daniel T. Deacon*

TABLE OF CONTENTS

* Lecturer, University of Michigan Law School. Many thanks to Tejas Narechania and Erik Stallman for their helpful comments and to participants at the symposium at which this paper was presented. I am also grateful for feedback on an earlier version of this project that was presented at the University of Michigan Law School Governance Group Workshop.

I. INTRODUCTION

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

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

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

---

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

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

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

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

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

6. *Id.*

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

Part II briefly describes how we got here, cataloguing the history of the FCC's efforts to regulate ISPs, most recently in the context of the controversy over net neutrality. Part III then turns to considering potential institutional settlements that could prove more enduring than that currently prevailing. After discussing two alternatives that could be implemented largely within the legal status quo—reliance on antitrust and state-level regulation—I turn to the main competing Republican and Democratic legislative proposals. Those proposals, I will argue, suffer from a similar defect—namely, failing to provide the FCC with sufficient flexibility to adapt to changing circumstances and treating today's regulatory controversies as if they will continue to define the field going forward. Part III ends by discussing a legislative option, modeled on what Congress did in 1993 regarding cellular voice service, which has greater promise.

II. THE CURRENT MORASS

The history of how the FCC has come to its current posture regarding ISPs has been well told in the numerous court decisions and regulatory orders dealing with the issue. This part will provide a brief recap of that history. The Communications Act is divided into different Titles, which include: Title II (dealing with "common carriers");[7] Title III ("radio communications");[8] and Title VI ("cable communications").[9] Communications services that do not fit neatly within any Title but are still subject to the FCC's general jurisdiction

7. Communications Act of 1934 tit. II, 47 U.S.C. §§ 201-21.
8. *Id.* tit. III, 47 U.S.C. §§ 301-29.
9. Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-73.

over "all interstate and foreign communication by wire or radio"[10] fall under Title I. The FCC has some, but limited, authority over Title I services.

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

Whether in performing these functions the ISP acts as a "common carrier" subject to Title II of the Communications Act has enormous consequences. The Act defines common carriers, rather circularly, as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio."[12] The Act imposes a range of duties on such carriers, including obligations to charge "just and reasonable" rates,[13] to file detailed rate tariffs,[14] and to refrain from "unjust or unreasonable discrimination."[15] Those requirements automatically attach to common carriers, except the Commission may "forbear" from applying them to particular providers, or category of providers, if certain conditions are met.[16]

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

---

10. 47 U.S.C. § 152(a).

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

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

13. 47 U.S.C. § 201(b).

14. *Id.* § 203.

15. *Id.* § 202(a).

16. *Id.* § 160(a).

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

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

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

traditional telephony), which continued to be regulated under principles of common carriage.[20]

The Telecommunications Act of 1996 largely codified the distinction between enhanced and basic services, albeit using different nomenclature. Corresponding to the old "basic services" category was a new term, "telecommunications service," which Congress defined as "the offering of telecommunications for a fee directly to the public."[21] "Telecommunications" was further defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[22] In contrast with telecommunications service, Congress introduced the term "information service," which corresponded to the old regulatory category of enhanced service and was defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[23]

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

The controversy regarding how to classify ISPs really kicked off when cable providers began to offer high-speed (broadband) Internet service using their own facilities.[27] These companies, like earlier non-facilities-based ISPs, offered their customers a suite of functionalities, including e-mail and other

---

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

21. 47 U.S.C. § 153(53).

22. *Id.* § 153(50).

23. *Id.* § 153(24).

24. *Id.* § 153(51).

25. *Id.*

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

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

add-ons, that had traditionally been considered unregulated information services. But they also offered last-mile transmission of the type that had been the domain of highly regulated local telephone companies Were these companies offering telecommunications services, information services, or a bundle that included both?

After first declining to answer that question,[28] the FCC ruled that broadband Internet offered over cable facilities was an integrated information service not subject to Title II.[29] It did so based on the FCC's determination that such ISPs offer customers certain functionalities—such as Domain Name System (DNS)[30]—properly classified as "information services" and that are functionally inseparable from the pure "telecommunications" aspects of the ISPs' overall service offering.[31] The Supreme Court upheld the FCC's classification decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, applying the *Chevron* framework to hold that the Communications Act was ambiguous regarding the proper classification of broadband Internet service and that the FCC had reasonably construed the Act to exclude ISPs from Title II.[32] Following *Brand X*, the FCC extended the approach that it had taken regarding broadband over cable to broadband over DSL and to other types of broadband service.

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

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

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

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

31. *Id.* para. 39.

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

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

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

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

providers will favor certain edge providers—most prominently, perhaps, those affiliated with the access provider itself—and disfavor others, to the long-term detriment of Internet innovation and consumer welfare.[36]

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

After having been sent back to the drawing board, the FCC cast about for other options for regulating ISPs' network practices. The Commission first considered reclassifying broadband Internet access as (at least in part) a Title II telecommunications service.[41] But the FCC pulled back from that option and, in 2010, once again relied on grounds outside of Title II to impose net neutrality rules on ISPs—namely, section 706 of the Telecommunications Act of 1996.[42] As most relevant here, section 706(a) directs the Commission to:

---

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

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

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

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

40. *Id.* at 658.

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

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

> [E]ncourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[43]

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

This time, the FCC won a partial victory at the D.C. Circuit, but the court went on to strike down the bulk of the Commission's net neutrality regulations. First siding with the FCC against ISP challengers, the court determined that section 706 provided the FCC with substantive regulatory authority and deferred to the FCC's "virtuous cycle" theory.[46] But the D.C. Circuit went on to vacate the no-blocking and nondiscrimination rules that made up the core of the *Open Internet Order*.[47] It did so based on the statutory prohibition, mentioned above, on treating "information services" providers—including broadband Internet service providers—as "common carrier[s]."[48] In essence, the court found that the *Open Internet Order*'s nondiscrimination rule—which prevented access providers from distinguishing among edge providers in providing service—constituted a classic "compelled carriage obligation" that the FCC is statutorily prohibited from placing on non-telecommunications carriers.[49] As for the no-blocking rule, the court held that it too ran afoul of the common-carrier prohibition by denying access providers' discretion over what traffic to carry and on what terms.[50]

---

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

44. *Id.*

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

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

47. *Id.* at 659.

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

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

50. *Id.* at 657-59.

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

The FCC's proposal met widespread opposition from net neutrality activists and consumer groups, who argued that bright-line rules against discrimination and blocking were necessary, and, in light of *Verizon*, that the only way to ensure such rules would survive judicial review was to reject the hybrid approach and go "full Title II."[53] Following President Obama's release of a YouTube video endorsing a full Title II approach, the Commission did just that, declaring that ISPs offered telecommunications services.[54] As to DNS (and caching), the FCC found that those services fell within the Act's "telecommunications management exception," which treats as a telecommunications service "any use [of an information service] for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[55] Having found that ISPs offered telecommunications services, the Commission then went on to "forbear" from applying many of the obligations found in Title II, rendering them inapplicable to ISPs.[56] These obligations included, most importantly, Title II's tariffing regime. The FCC did not forbear from Title II's ban on "unjust or unreasonable discrimination,"[57] which it used to root the 2010 *Open Internet Order*'s no-discrimination and no-blocking rules.[58] On appeal, the D.C. Circuit handed the FCC a total victory, applying *Brand X*'s finding

---

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

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

53. *See id.*

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

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

56. *Id.* at 5838-64 paras. 493-536. Section 10 of the Communications Act allows the Commission to "forbear" from applying provisions of the Communications Act "to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets," provided that the Commission makes certain public-interest determinations. 47 U.S.C. § 160(a).

57. 47 U.S.C. § 202 (2018).

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

that the Act was ambiguous and thus concluding that the FCC had discretion to move ISPs back and forth between Title I and Title II.[59]

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

But, perhaps, not for long. With the Biden administration in town, the Commission is widely expected, once it reaches full strength, to put Title II back on the table.[66] And once the Commission does, finally, re-re-re-classify ISPs[67] as telecommunications carriers, you can expect litigation to follow—this time, maybe, all the way to the Supreme Court.

***

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

- ISPs are Title I "information service providers."
- Under the D.C. Circuit's prevailing view, ISPs could be shunted back to Title II. The FCC would then be free to apply (or not apply, using forbearance) the various provisions of Title II to ISPs.

---

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

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

61. *Id.* at 415.

62. *Id.* at 378.

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

64. *Id.* at 68-70.

65. *Id.* at 86.

66. *See* Reid, *supra* note 4.

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

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

III. ESCAPE ROUTES

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

A few words at the outset. I am more concerned, for present purposes, with coming to a sensible institutional framework than I am with defending particular approaches to specific regulatory controversies, net neutrality included.[68] That said, a sense of the policy stakes necessarily informs those higher-order institutional questions, and I will argue, for example, that placing sole reliance on background law such as antitrust is likely insufficient because it takes certain regulatory tools off the table that are at least plausibly necessary in certain contexts. I also proceed with some sense in mind of the politically possible. Of course, this involves some amount of guesswork. But certain political realities seem clear enough. For example, it is difficult to see

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

a congressional majority coalesce around a regime requiring ISPs to file tariffed end-user rates for all services. Similarly, one might doubt whether "doing nothing" will be a stable political approach, especially given the dissatisfaction with the status quo as described in Part II. That said, given the realities of American politics, "doing nothing" has often shown a tendency to prevail over the seeming odds.

A. The Market (and Antitrust)

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

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

While stressing that competition will discipline ISP behavior in most cases, proponents of a market-based approach also stress that background antitrust law already has the tools to address potential abuses. Advocates for an antitrust approach see net neutrality in particular as a matter of regulating vertical contractual relationships.[74] And they point out that antitrust law views

---

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

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

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

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

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

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

vertical contracts as likely to be pro-consumer or at least benign.[75] When challenged as anti-competitive, antitrust deploys a rule-of-reason approach that looks to the specifics of the particular contractual relationship in question and, deploying modern analytical tools, decides whether the specific contract in question harms competition. Antitrust advocates argue that this approach allows for a more fine-grained determination that recognizes that the effects on competition from vertical contracts are often nuanced.[76]

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

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

75. *Id.* at 798.
76. *See* Hazlett & Wright, *supra* note 69, at 797; Nuechterlein, *supra* note 68.
77. *See 2020 Communications Marketplace Report*, *supra* note 72, at para. 126.
78. *Id.*
79. *Id.*
80. *See Title II Order*, *supra* note 2, at para. 81.
81. *See* Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 50-51 (2007).
82. For some classic explorations, *see* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).
83. *See* Barbara van Schewick, *Network Neutrality and Quality of Service: What A Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 70-74 (2015).

and, relatedly, (3) the potential for regulation through ex post adjudication to bias the system against less-well-financed players.[84]

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

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

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

---

84. *Id.* at 70-74.

85. *See infra* Part III.E.

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

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

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

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

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

In recognition of the special role of communications platforms, communications regulation has historically treated those platforms as subject to public superintendence and control, treating such superintendence as a worthwhile goal in itself. As then-Commerce Secretary Herbert Hoover put it in defending what would become the Federal Radio Act of 1927, which extended administrative control over the spectrum, the bill "recognizes that the interest of the public as a whole supersedes the desire of any individual. This is a new and highly desirable feature in the radio law."[94] And that public interest has been attendant to a range of values other than ensuring bare access to technology. Through a variety of tools ranging from market entry and exit requirements, merger review, licensing, and others, communications

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

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

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

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

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

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

regulation has pursued a variety of social goals such as equality, diversity, "free speech" (as more broadly defined than in the First Amendment context), and privacy, none of which are easily captured by the "market-plus-antitrust" framework.

B. State-Level Regulation Under a Title I Regime

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

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

Under the legal status quo, I also believe there are also serious legal difficulties with relying on the states. To be sure, the *Mozilla* court, with Judge Williams dissenting on this point, held that the *Restoring Internet Freedom Order* could not expressly preempt state regulation in the area.[98] The court held, essentially, that to expressly preempt the states, the FCC had to point to a statutory source of authority allowing it such power.[99] And having moved ISPs to Title I, the FCC could not rely on anything in Title II to do so.[100] Thus, somewhat counterintuitively, the act of deregulating ISPs meant that the FCC could no longer prevent the states from regulating them.

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

---

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

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

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

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

99. *Id.* at 74-76.

100. *Id.* at 76-86.

101. *Id.* at 85.

flow from agency decisions to deregulate just as they can flow from decisions to affirmatively regulate.[102]

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

Although each state law will present unique considerations depending on its particulars, I believe that, at a minimum, state laws placing obligations on ISPs that the FCC has specifically foresworn conflict with federal policy objectives and thus call for obstacle preemption. That is because the driving force behind the FCC's decision to move ISPs back to Title I was its judgment that such obligations were inappropriate as a policy matter. As the FCC explained, in its view, "[t]he record evidence, including [the Commission's] cost-benefit analysis, demonstrates that the costs of [common-carrier] rules to innovation and investment outweigh any benefits they may have."[106] Reimposing those obligations on ISPs at the state level thus presents a plain case of conflict between state and federal prerogatives.

Proponents of state-level net neutrality laws respond with a similar argument as carried the day in *Mozilla*.[107] They say that by moving ISPs out of Title II, the FCC took the position that the FCC had no jurisdiction over them and, thus, there can be no federal interest in maintaining federal policy in an area over which the FCC doesn't even have power.[108] This argument misconceives the nature of the FCC's authority. Under *Brand X*, the FCC does have jurisdiction over ISPs.[109] But it has the choice, using *Chevron*, to exercise that jurisdiction by treating ISPs as telecom carriers or not. That is fundamentally a policy choice. And placing ISPs within Title I does not strip

---

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

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

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

105. *Id.* at *13.

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

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

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

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

the FCC of jurisdiction. ISPs remain engaged in the provision of interstate communications by wire. It is just that Title II of the Act does not apply to them. True, that means that, as a practical matter, the FCC can do very little to regulate ISPs. But that was the FCC's choice, based on its determination that regulation was largely inappropriate, and that choice embodies the relevant federal policy for obstacle preemption purposes.[110]

Mozilla does not change this bottom line. There, the court was searching for a particular provision that allowed the FCC to announce, as a general rule, that states were preempted from acting.[111] It found none.[112] But under *Brand X*, the FCC has authority to announce, as a rule, that ISPs are not telecom carriers.[113] Obstacle preemption then asks what the consequences of *that* determination are.[114] No further source of statutory authority is required. And on that question, courts are likely to find that those consequences include the preemption of any state law that the FCC specifically chose not to apply under Title II, including net neutrality protections. Thus, as long as the Title I framework stands at the federal level, I believe many state net neutrality laws are on shaky legal ground.

C. Republican-Sponsored Bills

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

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

More generally, the Republican bills give a false sense that they are putting to bed today's controversies through imposing "clear" obligations on ISPs while at the same time kneecapping the FCC's ability to adapt the

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

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

112. *Id.* at 74.

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

114. *See Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978) (explaining that "where failure of … federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation").

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

116. *Id.*

regulatory regime to new circumstances. For example, in dealing with paid prioritization, one bill provides that ISPs "may not throttle lawful traffic by selectively slowing, speeding, degrading, or enhancing internet traffic based on source, destination, or content, subject to reasonable network management."[117] The bill's sponsors see this provision as enshrining what net neutrality proponents have always wanted, but even from today's vantage point its application to emerging controversies is unclear. Take "zero rating," which describes the practice of allowing users to use certain apps free from otherwise applicable data caps or fees.[118] Those who wish to regulate zero rating argue that it may have the same harmful effects on innovation that classic paid prioritization arrangements have.[119] Those on the other side argue that zero rating may be beneficial to consumers, allowing ISPs to have lower prices and expand access.[120] What's important for present purposes is not who's right, it is that the bills in question don't resolve the issue. And that is to say nothing of controversies over network practices that haven't even emerged yet.

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

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

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

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

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

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

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

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

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

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

toward a system of regulation by adjudication by statutory provisions that made it more onerous for the FTC to engage in rulemaking.[125] The result has been that the FTC has formulated, through adjudication and (often) consent decrees, a body of common-law-like obligations in areas such as privacy.[126] Commentators, including academics, have criticized this system for violating fundamental norms such as the right to fair notice.[127] And yet, the Republican bills would seemingly require the FCC to proceed similarly, subject only to a hazy backstop prohibiting it from "expanding" on the obligations contained in the bills.

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

D. The Save the Internet Act

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

Those provisions were, at the time the bill was originally introduced, basically it. What was left unclear was the extent to which the bill actually enshrined the Obama-era order in the U.S. Code, such that a future FCC could

125. *See id.*

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

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

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

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

130. *Id.* § 2(a)(1).

131. *Id.* § 2(a)(2).

132. *Id.* § 2(b)(1).

not depart from it, or whether it simply reinstated the order subject to future revision. My personal understanding was that it "restored" the Obama-era order, but would allow—consistent with normal principles of administrative law—a future FCC to depart from it, at least to the extent that the resulting legal regime was not "substantially the same" as the Trump-era one. But uncertainty remained.

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

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

In addition, section 2(c)(2) specifically states that it is permanently restoring the Obama-era order's "decisions" regarding which statutory provisions and regulations to forbear from applying to ISPs. For example, the Obama-era FCC decided to forbear from section 203 of the Communications Act—dealing with tariffing requirements.[135] Presumably, then, the Save the Internet Act would bar the FCC from reapplying section 203 to ISPs. But the Obama-era order also reserved the FCC's authority to act more aggressively going forward, including by imposing forms of rate regulation under its sections 201 and 202 authority, which the FCC did not forbear from.[136] If a future FCC did decide to get more aggressive, how far could it push such rate regulation before running afoul of the Save the Internet Act's apparent intent not to allow forms of rate regulation resembling section 203 tariffing? Again, it's not clear.

It's similarly unclear how the Act would apply to future deregulatory actions. The seeming intent of the bill is to set the Obama-era rules as a floor. But given the rigidity this reading would impose, it is possible that a future FCC could try to cheat, and a sympathetic court could potentially allow the FCC to do so. For example, say a future FCC promulgates a new rule, formally codified some other place in the CFR, exempting a subset of Internet

133. *Id.* § 2(c)(2).
134. *Id.*
135. *Id.*
136. *Id.*

service providers—fixed wireless ISPs,[137] for example—from the Obama-era net-neutrality rules "notwithstanding" those rules, which continue to appear in the CFR just as before. Would that violate the bill's command that the Obama-era rules be "permanent"? A good argument could be made that it would, but that conclusion wouldn't necessarily be a slam dunk, particularly if there was solid evidence that the rules were wreaking havoc on some category of providers.

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

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

E. The CMRS Model (Tweaked)

The final option I'll survey is the one I believe has the most promise. This I'll call this the CMRS option because it is based on, with some tweaks, the model that Congress enacted for commercial mobile radio services—most importantly, cellular voice service. The emergence of CMRS raised similar issues as the emergence of the commercial Internet. A new technology developed with exciting applications. The FCC tentatively waded into the waters, distributing licenses for CMRS services and regulating around the edges using a hodgepodge of authorities.[138] But the application of the Communications Act to CMRS was unclear. Broadcast radio, the closest historical kin to CMRS, had not traditionally been regulated as a common

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

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

carrier service under Title II. And the CMRS market was far from perfect. Most early CMRS markets had a duopoly structure.[139] One player in each market was typically the legacy landline voice monopolist, with an incentive not to allow burgeoning competition in the CMRS market to affect their legacy profits.[140] This dynamic led to disputes regarding the terms on which CMRS providers were entitled to interconnect their networks with the local landline provider and other CMRS providers.[141]

Congress's solution, passed in 1993, was what became 47 U.S.C. § 332(c). Section 332(c) does a number of things. First, it expressly classifies CMRS as a Title II common carrier service. Second, it provides that the FCC may "specify by regulation" that certain provisions of Title II do not apply to CMRS.[142] Third, it states that the FCC may not nullify, using this "specification" authority, certain provisions of the Communications Act, including those prohibiting unjust or unreasonable charges and discrimination.[143] Fourth, it provides that the FCC may nullify provisions as applied to CMRS only if three conditions are met.[144] Fifth, it expressly preempts the states from regulating CMRS providers in certain ways, particularly with regard to charges.[145]

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

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

---

139. *Id.* at 133-34.

140. *Id.*

141. *Id.* at 143.

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

143. 47 U.S.C. § 332(c)(1)(A).

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

145. *Id.* § 332(c)(3).

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

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

So far, this looks a lot like a statutory codification of the Obama-era FCC's order and, for that reason, it is likely to be a political nonstarter. Indeed, the Obama-era FCC pointed to the CMRS experience when crafting its Title II-plus forbearance framework.[148] Partly due to that political reality, the CMRS model would likely need to be tweaked somewhat in order to garner support. In particular, Congress could specify that certain provisions of the Communications Act *could not* be applied to ISPs. That is, the legislation would set both a regulatory floor and a ceiling. What the FCC should be prohibited from doing could be left to political negotiation, but one obvious candidate is ex ante (and perhaps ex post) price regulation of consumer rates. When the Obama-era FCC re-classified ISPs as Title II carriers, it simultaneously forbore from those provisions of the Act, like tariffing requirements, that are designed to facilitate ex ante price controls. ISPs and the dissenting Commissioners complained, however, that a future FCC could always "unforbear" and apply such requirements, and they pointed out that the FCC retained the power, under its general authority to investigate "unjust rates," to engage in ex post price regulation.[149] These latent powers have been seen as an existential threat to ISPs and provided a basis for ISP arguments that, although they did not object to net neutrality regulation per se, they do object to Title II.[150]

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

To quell ISP concerns about state regulation, the imagined legislation could also contain a broad express preemption provision. Title II already

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

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

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

151. 15 U.S.C. § 45(a)(2).

expressly prohibits states from imposing requirements that are the same as those the FCC has forborne from, and that could be expanded to preempt states from regulating other issues that are thought best left to uniform federal regulation. At the same time, state authority could be preserved for matters, such as deceptive or fraudulent advertising or local franchising, that the states have traditionally had an active role in.

What are the benefits of this framework? First, by finally putting the Title II issue to bed, this approach would allow the FCC to focus on the right issues. Whether broadband ISPs should be regulated in this or that way does not depend, in my view, on whether they "offer" a telecommunications service as the Act defines it, or on such technical sub-issues as whether DNS or caching fall within the telecommunications management exception. Accepting the applicability of Title II while modulating regulation through the exercise of forbearance, by contrast, allows the FCC to focus on the right questions. The forbearance factors themselves are quite broad and allow the FCC a fair amount of discretion. But they point toward what should be the central inquiry: Does FCC regulation provide a valuable addition to background forms of regulation, such as antitrust? And answering this question properly focuses the FCC on whether regulatory interventions are justified, or whether other institutions, such as the courts or FTC, are better able to police the issue.

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

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

The primary drawbacks of the CMRS model follow from its strengths. ISPs will argue that any model that involves investing the FCC with authority as vague as the prohibition against "unjust" or "unreasonable" discrimination will lead to regulatory uncertainty and depress investment in broadband networks, thus undermining the FCC's goals regarding broadband deployment. That concern can be partially militated against, as discussed above, through legislation that provides a regulatory ceiling as well as a floor, taking at least certain things off the table, such as ex ante price regulation of consumer rates, that have been viewed as especially threatening to ISP profits.

Moreover, the prohibition against unjust and unreasonable discrimination has a long history and much precedent attached to it. And although the FCC has the ability, under *Chevron*, to depart from that precedent to some degree, its presence should operate to reduce the uncertainty associated with a Title II framework. Indeed, in the years that ISPs were classified under Title II, the evidence of grave uncertainty, at least as reflected in investment numbers, was difficult to detect.

IV. CONCLUSION

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