

The Individual as Both Capable and Needy: Internet Access Reimagined Under Martha Nussbaum’s Capability Approach to Human Development

Jamie Reiner*

TABLE OF CONTENTS

I.	INTRODUCTION.....	349
II.	BACKGROUND	350
	<i>A. Deficiencies and Reliance: Internet Shortcomings</i>	350
	1. Shortcomings and Reliance Brought on by the Pandemic.....	350
	2. General Reliability: Interpersonal and Political Relationships.....	351
	<i>B. Government Recognition of Internet Shortcomings and Import</i>	353
	1. Federal Action.....	354
	2. Community Gap Filling: Furthering Access Through Creativity.....	354
	<i>C. Internet Access as a Human Right: The Approach of the United Nations</i>	359
	<i>D. Martha Nussbaum’s Capability Theory</i>	360
	1. Introduction to Capability Theory	360
	2. Capabilities, Not Functions: On Their Difference and Why it Matters	362
	3. Tripartite Form of Capabilities	363
III.	ANALYSIS	365

* J.D., May 2023, The George Washington University Law School; B.A., Philosophy, May 2020, Washington University in St. Louis, *cum laude*. Thank you to Ethan Lucarelli, Journal Adjunct, and Julia Heasley, Notes Editor, for their help and encouragement in drafting this Note. And an enduring thank you to Christopher Wellman, for opening my eyes to the magic of philosophical inquiry.

A. <i>Application</i>	366
B. <i>Consequences of Adhering to Nussbaum’s Capability Approach</i>	368
1. <i>Municipal Broadband and Beyond</i>	368
2. <i>Federal Asset Deployment</i>	369
IV. CONCLUSION	370

I. INTRODUCTION

“They sit in hot cars, some switching the air conditioning on and off to save fuel. Some just sit on the asphalt using portable TV trays as desks, trying to find shade while staying tethered to the signal.”¹ Without reliable Internet access at home, school children like 8-year-old Gabriel Alston struggled to find adequate Wi-Fi to attend remote classes during the throes of the COVID-19 pandemic: “I hate it . . . I can’t hear anything on the computer, but when we’re in real life, I can hear everyone.”²

Among the diverse structural deficiencies exposed in the United States through the strain and horror of the COVID-19 crisis, America’s lack of reliable and fast Internet access finds itself on the long list. And the numbers support the anecdotes. The Federal Communications Commission (“FCC”) approximates that more than 21 million people in the United States do not have reliable Internet connection, and the distribution is not equal.³ The households without reliable Internet access most often are those that cannot afford it, and thus the children in those homes are left to struggle to find an Internet connection to attend class and complete assignments.⁴ This particular manifestation is just one example of how the lack of fast, reliable Internet can hold people back from equal enjoyment, participation, and opportunity in society.

Representative John Lewis encapsulated the current digital chasm in a simple yet prophetic way: “. . . the availability to have access to the Internet . . . is the civil rights issue of the 21st century.”⁵ How do we understand Internet access? How should our social policies be structured to increase it? What is the proper role of government facilitation? At bottom, this Note seeks to answer those questions through an application of an established theoretical framework to a unique context.

Applying American philosopher Martha Nussbaum’s Capability Approach to Internet access would recognize a positive duty on states to secure Internet access as a necessary background condition to providing individuals with the choices and opportunities necessary to decide how to lead their lives. Once accepted, this recognition is helpful for a variety of policy

1. Petula Dvorak, *When ‘Back to School’ Means a Parking Lot and the Hunt for a WiFi Signal*, WASH. POST (Aug. 27, 2020, 4:47 PM), https://www.washingtonpost.com/local/when-back-to-school-means-a-parking-lot-and-the-hunt-for-a-wifi-signal/2020/08/27/0f785d5a-e873-11ea-970a-64c73a1c2392_story.html [<https://perma.cc/H2LL-DLXG>].

2. *Id.*

3. Joyce Winslow, *Digitally Divided*, 25 TR. MAG., no. 1, Summer 2019, at 26, 28.

4. Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021), <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/> [<https://perma.cc/P5Q7-LLE9>].

5. The Morning Briefing, *Rep. John Lewis (D-Ga) and Comcast Exec. VP David Cohen Discuss the Internet Essentials Program with Tim Farley*, SIRIUSXM POTUS RADIO, at 02:45 (Aug. 24, 2012), https://soundcloud.com/comcast-1/rep-john-lewis-d-ga-and?utm_source=clipboard&utm_campaign=wtshare&utm_medium=widget&utm_content=https%253A%252F%252Fsoundcloud.com%252Fcomcast-1%252Frep-john-lewis-d-ga-and [<https://perma.cc/5ST8-7D76>].

questions surrounding attempts to distill what the proper extent of government involvement should be in securing Internet access. Marshalling creativity and innovation from individuals within communities, resulting in broader access, should be the ultimate goal of such policy planning.

Section II lays out four discrete background sections. Subsection A puts forward examples of the deficiencies in the current digital landscape and our increased reliance on Internet access that was amplified by the COVID-19 pandemic, as well as examples of reliance that predated the pandemic. Subsection B explains some of the ways government at the federal, state, and local levels have tried to dampen the digital lacuna. Subsection C explains how the United Nations has taken a human rights approach to the challenge of Internet access rights but argues that this approach does not go far enough towards establishing a positive duty on the State. Lastly, Subsection D lays out the core precepts of Martha Nussbaum's Capability Approach to human development, providing its relevant details and why the nuance matters.

Section III has two sections. Subsection A applies Nussbaum's established theory to the topic of Internet access and suggests that Internet access is required for several of Nussbaum's Central Capabilities. The upshot of this application leads the reader to the conclusion that the government has a positive obligation to promote Internet access. Subsection B then illustrates the consequences of this conclusion by discussing two ways the duty might be implemented by policymakers.

II. BACKGROUND

A. Deficiencies and Reliance: Internet Shortcomings

To appreciate the importance of Internet access, one might start with noting the effects of its absence. The "Homework Gap" and the increase in telehealth use illustrate both the lack of equal access and the need for Internet across all sections of society.⁶ Further, beyond the current COVID-19 environment, it is important to appreciate the Internet as a general prerequisite to engaging both in our interpersonal relationships and with our larger political environment.

1. Shortcomings and Reliance Brought on by the Pandemic

The "digital divide" is more than a catchy phrase. It is real, and it manifests itself in a myriad of ways throughout different cross-sections of society.⁷ One concerning manifestation is the "Homework Gap" which refers to the lacuna between students who have sufficient Internet access at home and those that do not.⁸ The challenges faced by students who lack reliable

6. See COLBY LEIGH RACHFAL, CONG. RSCH. SERV., R46613, THE DIGITAL DIVIDE: WHAT IS IT, WHERE IS IT, AND FEDERAL ASSISTANCE PROGRAMS 7 (2021).

7. *Id.*

8. *Id.*

Internet access have been exacerbated in the COVID-19 environment as students are dependent on reliable Internet to attend class and complete their assignments.⁹

During the beginning of the COVID-19 pandemic, 125,000 schools went remote.¹⁰ According to data collected by Pew Research Center's April 2020 survey, "one in five of the surveyed parents said it was at least somewhat likely their children would not be able to complete their schoolwork because they did not have access to a computer at home or would have to use public Wi-Fi to finish their schoolwork."¹¹ The divide falls on socioeconomic lines as 59% of parents with lower incomes said it's likely their homebound children would face at least one digital obstacle to doing their schoolwork.¹²

The reliance on Internet to continue schooling is just one representation of the strain COVID-19 places on the need for Internet connectivity. The meteoric increase in the use of telehealth represents an additional illustration. As virtual appointments become the new normal for medical care, communities lacking Internet access and digital literacy face steep obstacles to receiving quality care.¹³ "Among American adults [over] 65 years old . . . most likely to need chronic disease management, only 55%-60% own a smartphone or have home broadband access."¹⁴ Without reliable Internet access, people are hindered in their ability to go to school and complete our assignments, receive medical care, and even show up for work.¹⁵ In short, those that lack reliable and affordable Internet access often find themselves left behind.

2. General Reliability: Interpersonal and Political Relationships

While the COVID-19 pandemic brought our reliance on Internet access to a critical point, the prominence of the Internet and our dependence on it is not unique to the COVID-19 era. Since its inception, Internet connection has been an integral way to communicate and coordinate our lives with one another. This Note will flesh out two forms of reliance: companionship, the

9. See *id.*

10. *Id.*

11. Emily A. Vogels, *59% of U.S. Parents with Lower Incomes Say Their Child May Face Digital Obstacles in Schoolwork*, PEW RSCH. CTR. (Sept. 10, 2020), <https://www.pewresearch.org/fact-tank/2020/09/10/59-of-u-s-parents-with-lower-incomes-say-their-child-may-face-digital-obstacles-in-schoolwork/> [<https://perma.cc/EWD4-55LU>].

12. *Id.*

13. Gezzer Ortega et al., *Telemedicine, COVID-19, and Disparities: Policy Implications*, 9 HEALTH POL'Y & TECH. 368, 369 (2020).

14. Sarah Nouri et al., *Addressing Equity in Telemedicine for Chronic Disease Management During the Covid-19 Pandemic*, NEJM CATALYST, May 4, 2020, at 1, 2.

15. See RACHFAL, *supra* note 6; see generally Ashira Prossack, *5 Statistics Employers Need to Know About the Remote Workforce*, FORBES (Feb. 10, 2021, 8:51 PM), <https://www.forbes.com/sites/ashiraprossack/2021/02/10/5-statistics-employers-need-to-know-about-the-remote-workforce/> [<https://perma.cc/K8SH-Q8VH>] (observing that 74% of the survey volunteers believed that remote work will become the norm even as the pandemic lessens).

way we form and cultivate our relationships with one another; and political involvement, the manner in which we come to learn about our political climate. That is to say, without Internet access, we are unable to fully decide how we foster and grow our social interactions and relationships, nor are we able to fully participate in the political process.

The advent of the Internet ushered in a new realization: affiliation with one another can transcend physical space.¹⁶ Since the Internet's proliferation, relationships have been created, fostered, and endured online as "the Internet provides the means for inexpensive and convenient communication . . . it increases communication among friends and family, especially contact with those who are far away."¹⁷ A ripe example can be seen through the trend in finding one's life partner through Internet platforms.¹⁸ According to one study from Stanford University, "Internet meeting is displacing the roles that family and friends once played in bringing couples together."¹⁹ The study found that there has been a consistent increase in romantic relationships beginning online, and the trend only continues to increase as technology and smartphone use maintains a dominant presence in our lives.²⁰ Further data supports what, in retrospect, seems patently obvious:

Internet use provides online Americans a path to resources, such as access to people who may have the right information to help deal with a health or medical issue or to confront a financial issue The result is that people not only socialize online, but they also incorporate the Internet into seeking information, exchanging advice, and making decisions.²¹

Internet access has replaced our physical communities as the nexus for communication and personal connection. Without the Internet, we are stymied in the quantity, quality and richness of the relationships we are capable of having with one another. Without reliable Internet access, we are limited in the communities we are able to create and the people that we may meet.

A further facet of our reliance on Internet access comes in the form of political participation. Widespread use of technology is now how we get information about our elected officials, leading to a more informed

16. JEFFREY BOASE ET AL., PEW INTERNET & AM. LIFE PROJECT, THE STRENGTH OF INTERNET TIES, at ii (2006), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/media/Files/Reports/2006/PIP_Internet_ties.pdf.pdf [<https://perma.cc/9V4D-CCB3>].

17. Barry Wellman, et al., *The Social Affordances of the Internet for Networked Individualism*, 8 J. COMPUT.-MEDIATED COMM. 1 JCMC834 (2003); see also BOASE ET AL., *supra* note 16, at 10 (noting the prominence of Internet in everyday life).

18. Michael J. Rosenfeld et al., *Disintermediating Your Friends: How Online Dating in the United States Displaces Other Ways of Meeting*, 116 PNAS 17753, 17753 (2019).

19. *Id.*

20. *Id.* at 17756.

21. BOASE ET AL., *supra* note 16, at 10.

citizenry.²² Because the Internet not only provides a platform for voters to receive information, but also a way for candidates to communicate with voters, political engagement is increasingly occurring online.²³ Without reliable Internet access, informed citizenship is strained, and political involvement dampened.

Beyond social media's use for engagement in elections, it also facilitates social movements.²⁴ Social media is a tool to streamline organization, as well as a platform to express discontent with the status quo.²⁵ Approximately 23 percent of adults that use social media note that their views on a political or social issue have changed as a result of being tuned into the digital political discourse.²⁶ Lastly, democratic engagement set aside, social media, and Internet access more generally, has and continues to play a central role in political reformation across the world.²⁷

B. Government Recognition of Internet Shortcomings and Import

Despite the contemporary necessity of and reliance on Internet access articulated above, the United States continues to fall short in providing accessible and affordable Internet access. While government, at all levels, has not been silent on this issue, persistent inequality endures.²⁸

Action taken by the federal government to reach further equity often takes the form of broad, top-down funding schemes, while courses of action taken by local and state governments tend to utilize creative, innovative methods to further broadband access.²⁹ This section takes a non-exhaustive look at the policies currently in place and the various obstacles faced.

22. See JANNA ANDERSON & LEE RAINIE, PEW RSCH. CTR., *MANY TECH EXPERTS SAY DIGITAL DISRUPTION WILL HURT DEMOCRACY* 92 (2020), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2020/02/PI_2020.02.21_future-democracy_REPORT.pdf [<https://perma.cc/MX5D-QQVN>].

23. PEW RSCH. CTR., *CHARTING CONGRESS ON SOCIAL MEDIA IN THE 2016 AND 2020 ELECTIONS* 4 (2021), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2021/09/PDL_09.30.21_congress.twitter.final_.pdf [<https://perma.cc/RE2B-3X6X>].

24. Brooke Auxier, *Social Media Continue to Be Important Political Outlets for Black Americans*, PEW RSCH. CTR. (Dec. 11, 2020), <https://www.pewresearch.org/fact-tank/2020/12/11/social-media-continue-to-be-important-political-outlets-for-black-americans/> [<https://perma.cc/Q37P-W664>] (finding that, especially for Black Americans in the wake of police brutality, social media has provided outlets to connect with one another and gain information on protests and political activism generally).

25. Andrew Perrin, *23% of Users in U.S. Say Social Media Led Them to Change Views on an Issue; Some Cite Black Lives Matter*, PEW RSCH. CTR. (Oct. 15, 2020), <https://www.pewresearch.org/fact-tank/2020/10/15/23-of-users-in-us-say-social-media-led-them-to-change-views-on-issue-some-cite-black-lives-matter/> [<https://perma.cc/74LX-NV62>].

26. See *id.*

27. See Nouredine Miladi, *Social Media and Social Change*, 25 DIG. MIDDLE E. STUD. 36, 38 (2016) (noting the role of Twitter in Egyptian and Tunisian revolutions).

28. See Vogels, *supra* note 4.

29. See discussion *infra* p. 354.

1. Federal Action

Most recently, the Infrastructure Investment and Jobs Act, passed in 2021, allocates significant resources to broadband buildout.³⁰ Specifically, the legislation apportioned \$42.45 billion to the states to be used for broadband programs.³¹ Further, \$14.2 billion is allocated to subsidize the cost for low-income households.³² This funding scheme demonstrates a financial commitment toward lessening digital inequity in the United States. Beyond the new infrastructure scheme, in January 2020, the FCC implemented the Rural Digital Opportunity Fund that works to expand broadband access to rural communities.³³ Specifically, this program allocates \$20.4 billion over the course of ten years “to fund the deployment of high-speed broadband networks in rural America.”³⁴

2. Community Gap Filling: Furthering Access Through Creativity

Setting aside the federal programs discussed above, the focus below is to highlight distinctive and creative ways that government action at the local and state level tries to fill the gaps in access left unfilled by the private-sector.³⁵ That is to say, while the federal government has taken cognizable steps in furthering Internet access, the federal programs have been largely removed from on-the-ground community needs. This section focuses on two resourceful ways communities have tried to further broadband access: municipal broadband and federal asset deployment.

Municipal broadband, also known as community broadband, is an inventive way through which various communities throughout the United States, often underserved and lacking accessible and/or affordable broadband, have taken matters into their own hands.³⁶ The ultimate goal is to both

30. See Margaret Harding McGill, *Infrastructure Bill Includes Billions for Broadband*, AXIOS (Nov. 8, 2021), <https://www.axios.com/infrastructure-bill-broadband-911dea37-b38d-4f33-901e-ec6eb73650c4.html> [<https://perma.cc/LPT2-VG2D>].

31. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60102(b)(2), 135 Stat. 429, 1184 (2021).

32. § 60502, 135 Stat. at 1238, 1382.

33. *Auction 904: Rural Digital Opportunity Fund*, FCC, <https://www.fcc.gov/auction/904> [<https://perma.cc/SL2T-HMX8>].

34. COLBY LEIGH RACHFAL, CONG. RSCH. SERV., R46307, STATE BROADBAND INITIATIVES: SELECTED STATE AND LOCAL APPROACHES AS POTENTIAL MODELS FOR FEDERAL INITIATIVES TO ADDRESS THE DIGITAL DIVIDE 3 (2020).

35. These varied programs and initiatives often take the form of broad, top-down policy plans necessarily removed from the on-the-ground needs in communities underserved or even sometimes forgotten by private Internet service providers (“ISPs”). See discussion *infra* p. 355.

36. See LENNARD G. KRUGER & ANGELE A. GILROY, CONG. RSCH. SERV., R44080, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE 1 (2016).

increase the number of people that have access to broadband and provide the service at a low cost.³⁷

Municipal broadband is distinct from the traditional way most Americans receive their Internet access.³⁸ Broadband, used interchangeably with the term “high-speed Internet,” is most often provided by private sector telecommunication companies (e.g., Verizon, Comcast).³⁹ This typical broadband structure is effective in providing reliable Internet access to cities and metropolitan suburbs.⁴⁰ But these companies often overlook more rural areas.⁴¹ Municipal broadband can improve upon the deficiencies of private market companies.⁴² Communities underserved by private-sector Internet Service Providers (“ISPs”) often find themselves disappointed in their lack of broadband access or if they do receive broadband, in the quality of their connection.⁴³ As of 2015, approximately 500 communities were implementing some type of municipal broadband by building (and in some cases operating) their own publicly-financed broadband infrastructure.⁴⁴ Municipal broadband programs take varied forms because “[p]ublic entities that provide broadband service can be local governments or public utilities . . . [s]ince each community is different and faces unique challenges, there is no one size that fits all.”⁴⁵

Lafayette, Louisiana is an example. In 2005, the citizens of Lafayette voted to build a municipal fiber network.⁴⁶ This network ushered in lower prices, furthered access, and brought jobs into the community.⁴⁷ It also had trickle-down effects that extended beyond the scope of broadband. Because the speed was so fast—100Mb/s down—and because the rates were affordable, the project led companies to create office locations in Lafayette.⁴⁸ As this example illustrates, the most obvious advantage of municipal broadband is what it enables smaller communities to accomplish: faster download and upload speeds.⁴⁹ It also serves the function of injecting

37. See *Our Vision*, CMTY. BROADBAND NETWORKS, <https://muninetworks.org/content/our-vision> [<https://perma.cc/89BL-2MJD>] (last visited Mar. 15, 2023).

38. See KRUGER & GILROY, *supra* note 36, at 1.

39. See *id.*

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.*

44. See KRUGER & GILROY, *supra* note 36, at 1.

45. See *id.*

46. *Id.* at 5.

47. See *id.*

48. See *id.*

49. See *id.* at 3.

competition into markets where it often is scant.⁵⁰ Competition in the market is important, as it serves to keep costs low and quality high.⁵¹

Although municipal broadband tends to be championed by the communities it serves, it is a contested policy, and its lifespan remains threatened by many state legislatures.⁵² For example, nineteen states have passed laws or otherwise placed restrictions on the creation of local municipal networks.⁵³ The success of municipal broadband rises and falls with the state legislatures because local governments are considered “political subdivisions of a state” and therefore do not have any independent authority to act “absent a delegation of such power from a state.”⁵⁴

The upshot is that if a state legislature decides against municipal broadband, it can pass a state law that prevents municipalities from implementing their own broadband schemes.⁵⁵ States may hesitate to allow municipal broadband to flourish for several reasons.⁵⁶ One concern is that it is “inappropriate” for government-funded networks to compete with private providers.⁵⁷ Other reasons proffered look to the complicated deployment of broadband and the insistence that taxpayer funds should be spent on basic needs that traditionally fall under the government’s domain such as bridges and roads.⁵⁸

Faced with pushback from states, municipalities have approached the FCC “to preempt state laws that restrict municipal participation in broadband or telecommunications.”⁵⁹ In 1987, a Missouri law prevented municipalities from providing telecommunications services.⁶⁰ Subsequently, the municipalities petitioned the FCC to preempt the state law under Section 253 of the Communications Act of 1934, which gave the FCC the power to preempt state or local laws that “may prohibit or have the effect of prohibiting the ability of any entity to provide”⁶¹ telecommunications services.⁶² But the FCC declined to intervene because “the term ‘any entity’ in section 253(a) . . . was not intended to include political subdivisions of the state, but

50. See KRUGER & GILROY, *supra* note 36, at 4.

51. EXEC. OFF. OF THE PRESIDENT, COMMUNITY-BASED BROADBAND SOLUTIONS: THE BENEFITS OF COMPETITION AND CHOICE FOR COMMUNITY DEVELOPMENT AND HIGHSPEED INTERNET ACCESS 11 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/community-based_broadband_report_by_executive_office_of_the_president.pdf [<https://perma.cc/9N4Z-5BNN>].

52. See *id.* at 13.

53. See *id.* at 4.

54. CHRIS D. LINEBAUGH & ERIC N. HOLMES, CONG. RSCH. SERV., R46736, STEPPING IN: THE FCC’S AUTHORITY TO PREEMPT STATES LAWS UNDER THE COMMUNICATIONS ACT 34 (2021).

55. Tyler Cooper, *Municipal Broadband 2022: Barriers Remain an Issue in 17 States*, BROADBANDNOW (Oct. 23, 2022), <https://broadbandnow.com/report/municipal-broadband-roadblocks/> [<https://perma.cc/6D3G-D9JG>].

56. See KRUGER & GILROY, *supra* note 36, at 4.

57. See *id.*

58. See *id.*

59. LINEBAUGH & HOLMES, *supra* note 54, at 31.

60. MO. REV. STAT. § 392.410 (2016).

61. See 47 U.S.C. § 253(a); see also LINEBAUGH & HOLMES, *supra* note 54, at 31-32.

62. See 47 U.S.C. § 253(a).

rather appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation.”⁶³ The dispute rose through the courts in *Nixon v. Missouri Municipal League*.⁶⁴

Nixon eventually reached the United States Supreme Court, where the Court agreed with the FCC.⁶⁵ Justice Souter argued that the “working assumption that federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism.”⁶⁶ Without a clear delegation of power given from Congress to the FCC, the Commission lacked clear authorization to preempt state laws.⁶⁷

After *Nixon* came *Tennessee v. FCC*, which furthered the preemption debate.⁶⁸ The cities of Wilson, North Carolina and Chattanooga, Tennessee “sought to expand coverage of their broadband networks beyond what state law would permit and asked the FCC to preempt their respective state’s law to allow expansion.”⁶⁹ This time, the FCC stepped in, relying on Section 706 of the Communications Act of 1934, which states: “the Commission . . . shall encourage 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 . . . or other regulating methods that remove barriers to infrastructure investment.”⁷⁰

While the text of § 706 does not expressly give the FCC preemption power, the FCC considered preemption to be encapsulated by the words “regulate and remove barriers.”⁷¹ The Sixth Circuit rejected the FCC’s interpretation and overturned its preemption, citing that the state’s decision, akin to *Nixon* “implicate[d] core attributes of state sovereignty . . .”⁷² These cases make clear that the FCC is currently limited in its ability to preempt state laws that prevent community broadband without Congress first issuing a plain statement to the FCC.⁷³

A constitutional question still lingers: because the Supreme Court and the Sixth Circuit rested their holdings on the fact that Congress had not issued a “plain statement,” it remains a Constitutional question “whether Congress could, consistent with the Constitution, provide the FCC with the power to preempt state laws regulating municipal broadband.”⁷⁴ Although there is no

63. Mo. Mun. League, *Memorandum Opinion and Order*, 16 FCC Rcd 1157, para. 9 (2001), *vacated sub nom.* Mo. Mun. League v. FCC, 299 F.3d 949 (8th Cir. 2002), *rev’d sub nom.* *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004); see LINEBAUGH & HOLMES, *supra* note 53, at 33 (noting that this issue arises because Congress has not issued a “plain statement” delegating pre-emption power to the FCC).

64. See *Nixon*, 541 U.S. at 140-41.

65. See *id.* at 140-41.

66. See *id.* at 140.

67. See *id.* at 140-41 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 495 (1991)).

68. See *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016).

69. LINEBAUGH & HOLMES, *supra* note 54, at 5.

70. See 47 U.S.C. § 1302.

71. See *id.*; see also LINEBAUGH & HOLMES, *supra* note 54, at 32.

72. *Tennessee*, 832 F.3d at 611-12.

73. LINEBAUGH & HOLMES, *supra* note 54, at 32.

74. See *id.* at 33.

clear answer, precedent suggests that such an authorization would be constitutionally permissible.⁷⁵

Beyond municipal broadband, another creative approach to furthering broadband buildout is to use existing infrastructure.⁷⁶ This includes assets such as “tower facilities, buildings, and land . . .”⁷⁷ Private companies can obtain federal permits to use these assets, which facilitate easier broadband buildout.⁷⁸ These permits provide private companies that struggle reaching rural communities with infrastructure needed for broadband buildout, furthering the ultimate goal of providing access to more people.⁷⁹ Eliminating the obstacle of insufficient infrastructure is one way access can be furthered.⁸⁰

Importantly, marshaling these assets requires fostering a relationship between private-sector companies and federal agencies such as the Department of Interior and the Department of Homeland Security in order “to streamline the federal permitting process and make it easier for network builders to access federal assets and rights-of-way.”⁸¹ The ultimate goal is to open up existing federal assets through a permitting process, which would ultimately decrease the cost of furthering broadband access and encourage private companies to broaden their deployment.⁸²

Action taken by Arizona Governor Doug Ducey provides a helpful illustration of this idea. In January 2020, Governor Ducey announced that almost \$50 million in funding would be given to the Arizona Department of Transportation to install “more than 500 miles of broadband conduit and fiber optic cable along designated highway segments in rural areas of the state.”⁸³ Here, the pre-existing highway will be used as a means to further deploy broadband to more rural communities.⁸⁴ Through this action, broadband will reach remote communities often left behind by traditional Internet planning schemes.

The above section detailed a variety of governmental actions undertaken to curtail digital inequity. Yet, a lacuna still remains. From a conceptual standpoint, the United States has stopped short of understanding and actualizing Internet access as a human right, a theory that has been endorsed by the United Nations.⁸⁵

75. See *Lawrence Cnty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 270 (1985) (finding that a federal statute authorizing a local government to spend federal funds preempted state law requiring funds to be spent in a particular manner).

76. RACHFAL, *supra* note 34, at 7.

77. See *id.* at 8.

78. See *id.*

79. See *id.*

80. See *id.* at 7.

81. See *id.* at 8.

82. See RACHFAL, *supra* note 34, at 8.

83. See *id.*

84. See *id.*

85. See discussion *infra* p. 359.

C. Internet Access as a Human Right: The Approach of the United Nations

Although the United States has stopped short of defining Internet access as a human right, the United Nations (“UN”) has embraced the categorization.⁸⁶ Created in the shadow of WWII, the UDHR is a document treated as the standard for the codification and protection of fundamental human rights and is understood as a cross-border standard “for all peoples and all nations.”⁸⁷

The UDHR is a collective check on governmental power, as it specifies rights that should be protected cross-culturally.⁸⁸ Specifically, Article 19 states that “everyone 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.”⁸⁹ In 2016, based on Article 19, Section 2 of the International Convention on Civil and Political Rights, the UN issued a non-binding resolution stating that all persons have a right to Internet access.⁹⁰ The thirty-second session of the Human Rights Council, titled “The Promotion, Protection, and Enjoyment of Human Rights on the Internet” further detailed the right to freedom of expression on the Internet.⁹¹

Although the UDHR is not binding, it serves as a foundational, guiding document in the drafting of “many national constitutions and domestic legal frameworks.”⁹² Important for the present discussion, the UN’s non-binding resolution is couched in terms of negative liberty.⁹³ Governments should not block or limit Internet access.⁹⁴ Negative liberty importantly stops at interference. It does not work to promote Internet access, but rather, it addresses actions taken by government in restricting access. This Note argues that understanding government responsibilities in the negative—that is, through a non-interference lens—does not go far enough in actualizing human rights.

There has been substantial debate within the scholarly discourse, and among rights theorists more generally, about whether states have a positive

86. See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Human Rights Council Res. 32/L.20, U.N. Doc. A/HRC/RES/32/L.20, at 2 (June 27, 2016).

87. See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights; see Catherine Howell & Darrell M. West, *The Internet as a Human Right*, BROOKINGS (Nov. 7, 2016), <https://www.brookings.edu/blog/techtank/2016/11/07/the-internet-as-a-human-right/> [<https://perma.cc/2U8V-GLHT>].

88. See generally G.A. Res. 217 (III) A, *supra* note 84.

89. See *id.* at Art. 19.

90. Human Rights Council Res. 32/L.20, U.N. Doc. A/HRC/RES/32/L.20, at 2.

91. See *id.* at 2.

92. *Universal Declaration of Human Rights*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/> [<https://perma.cc/LYN9-ZGT4>] (last visited Mar. 15, 2023).

93. *Id.*

94. See Howell & West, *supra* note 87.

duty to promote (or even provide) Internet.⁹⁵ The biggest concern is placing a technology at the same level of importance as uncontroverted human rights such as the freedom of movement or expression.⁹⁶ Can something that is less than forty years old be equated with the most fundamental and essential rights of individuals?⁹⁷ Does this imply that human life lacks meaning without reliable and fast Internet access?⁹⁸ Should we be concerned with elevating technology to such a high status?⁹⁹ Martha Nussbaum's adaptation of Capability Theory provides a framework for addressing the concern behind these theoretical questions.

D. Martha Nussbaum's Capability Theory

This section will introduce Martha Nussbaum's Capability Theory. It represents a human-centered approach to public and social policy planning which, when applied to the issue of Internet access, allows for a re-understanding of government involvement in securing broadband access.

1. Introduction to Capability Theory

Broadly speaking, Nussbaum's Capability Approach to human development is a conceptual framework used in the fields of human development, moral philosophy, and human rights.¹⁰⁰ Capability Theory (hereinafter used interchangeably with the term "Capability Approach") is first and foremost a theory of human development and justice.¹⁰¹ It is a global theory that argues for a floor, not a ceiling, in asking what the basic, non-arguable requirements that all human beings need in order to live a truly human life.¹⁰² Put differently: What are the basic threshold requirements that allow people to "function well"?¹⁰³ At bottom, Nussbaum's flavor of

95. See Brian Skepys, *Is There a Human Right to the Internet?*, 5 J. POL. & L., no. 4, 2012, at 15, 15 (arguing that Internet should not be considered a human right because it is not a prerequisite for membership in a political community, but rather its absence can be understood as a "potentially urgent threat to a more basic list of human rights"); see also Jonathan W. Penney, *Internet Access Rights: A Brief History and Intellectual Origins*, 38 MITCHELL L. REV. 10, 17 (2011) (noting one strain of Internet rights advocates focus on the new advent of the cyberspace and the need to be able to connect with one another); Vinton G. Cerf, *Internet Access Is Not a Human Right*, N.Y. TIMES (Jan. 4, 2012), <https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html> [<https://perma.cc/BTU6-7LXZ>] (arguing that Internet access is valuable as a means, rather than an end that is independently valuable).

96. See Cerf, *supra* note 95.

97. See *id.*

98. See *id.*

99. See *id.* (noting one cause for concern is technology's ever-evolving nature, which raises the question: does each subsequent technology get added to the list of basic human rights?).

100. See Chad Kleist, *Global Ethics: Capabilities Approach*, INTERNET ENCYC. OF PHIL., <https://iep.utm.edu/ge-capab/#H3> [<https://perma.cc/T59F-R66U>] (last visited Sept. 27, 2022).

101. See *id.*

102. See *id.*

103. Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202, 214 (1992).

Capability Theory begins by asking a simple question: “What are people actually able to do and be?”¹⁰⁴

By premising her theory on a value-laden question, Nussbaum presupposes “. . . a certain conception of ‘the good life.’”¹⁰⁵ In articulating her list of the Ten Central Capabilities (detailed below), without which one’s basic human needs are not being met, Nussbaum’s articulation of the good life is one of “human flourishing,” one that is engaged in a normative evaluation.¹⁰⁶ Nussbaum contends that her list of Ten Central Capabilities represents a “thick but vague conception of the good.”¹⁰⁷ It is “thick” because her analysis originates from and is targeted to a central, value laden question: What do people need to be able to do, regardless of what community they belong to?¹⁰⁸ By asking that question, and further, by centering her entire theory around that question, she outlines an ideal (although minimalistic and basic) of what a truly “human” life looks like.¹⁰⁹ The Ten Central Capabilities consider human beings both “capable and needy.”¹¹⁰

Ten Central Capabilities¹¹¹

1. Life
2. Bodily health
3. Bodily Integrity
4. Senses, imagination, and thought
5. Emotions
6. Practical reason
7. Affiliation
 - a. Friendship
 - b. Respect
8. Other species
9. Play
10. Control Over One’s Environment
 - a. Political
 - b. Material

Describing each of Nussbaum’s Central Capabilities is not needed to understand the thrust of her argument. However, because they are relevant for the application section below, two capabilities will be explained: “Affiliation,” specifically “Friendship,” and “Control Over One’s Environment,” specifically “Political.”

104. *See id.*

105. Kleist, *supra* note 100.

106. *See id.* (noting that Nussbaum’s “‘thick’ but ‘vague’” theory is conceptually different from other theories); *see also* Nussbaum, *supra* note 103, at 214-15 (distinguishing her “thick vague theory of the good” from John Rawls’ “thin theory of the good,” which is a theory of justice focusing on what is needed by anyone living out any conception of the good).

107. Kleist, *supra* note 100.

108. *Id.*

109. Nussbaum, *supra* note 103, at 220.

110. *Id.* at 216, 220.

111. *See* Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 287-88 (1997).

Nussbaum defines “Friendship” as “being able to live for and to others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship.”¹¹² Nussbaum defines “Control Over One’s Environment,” specifically one’s “Political” environment, as: “being able to participate effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association.”¹¹³

Nussbaum is clear: “all the central capabilities, like all human rights, are best seen as occasions for choice, areas of freedom . . .”¹¹⁴ The capabilities on this list constitute Combined Capabilities.¹¹⁵ Combined Capabilities require both “the internal preparation for action and choice, plus circumstances that make it possible to exercise that function.”¹¹⁶ For instance, “the capability of free speech requires not only the ability to speak,” (internal capability), “but also the actual political and material circumstances” that make it possible to exercise that function.¹¹⁷

The Combined Capabilities are necessarily pre-political, meaning they attach to human beings “independently of and prior to membership in a state.”¹¹⁸ Importantly, when the ideas are combined, “the ten capabilities then are *goals* that fulfill or correspond to people’s pre-political entitlements In the context of a nation, then it becomes the job of government to secure them”¹¹⁹

The policy implications of Nussbaum’s list of Central Capabilities are that government planning should be focused around setting up every person to be able to decide if they want to actualize their capabilities. At bottom, the connection between these ten capabilities dictates the focus of government planning.

2. Capabilities, Not Functions: On Their Difference and Why it Matters

Before moving on to further discussion of capabilities, it is important to understand the difference between capabilities and functions. This section explains the relationship between capabilities and functions and how capability—that is, the choice structure to actualize the function—represents the heart of Nussbaum’s theory.¹²⁰ A comparative discussion of capabilities and functions helps to distill the subtle difference between the two levels of abstraction.

112. *Id.* at 287.

113. *Id.* at 288.

114. Martha C. Nussbaum, *Capabilities, Entitlements, Rights: Supplementation and Critique*, 12 J. HUM. DEV. & CAPABILITIES 23, 28 (2011).

115. *Id.* at 25.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. See Nussbaum, *supra* note 112, at 277-78.

Nussbaum's account requires appreciating the conceptual difference between capabilities (ten of which are listed above as part of Nussbaum's Central Capability List) and functions. Nussbaum is clear: "capability, not functioning, is the political goal."¹²¹ The distinction is key because it strikes to the very heart of the theory's framework. Functions are undertakings that individuals can pursue, such as education, traveling, and getting married.¹²² Capabilities "are the real, or substantive, opportunit[ies] that they have to achieve . . ." their specific functions, such as access to schooling, public infrastructure and civil institutions (for marriage).¹²³ Capabilities necessarily come prior to functions.

An illustrative example helps capture the distinction between a capability and a function: the difference between fasting and starving.¹²⁴ The difference between not eating because one decides to fast versus not eating because there is no available food is the difference between a function and capability.¹²⁵ An individual does not *have* to eat (the opportunity or choice structure here is the function), but an individual needs to have the ability or capability to give their body nutrients.¹²⁶ Opportunity (function) is premised on the existence of capabilities because "[a] capability . . . is simply the freedom that people have to do or be certain things."¹²⁷

The ultimate goal for the government is one that secures capabilities, not functions, because in a free society, it is up to each individual to decide how much to eat and work, what to do, how to think, and what to feel and believe.¹²⁸ Securing capabilities gives the individual the building blocks, or the choice structure, to decide how to lead their lives.¹²⁹ At bottom, capabilities are worried about securing for each individual "the opportunity to choose."¹³⁰

3. Tripartite Form of Capabilities

There are three different kinds of capabilities under Nussbaum's framework.¹³¹ The first, most elemental type of capability is denoted as a basic capability.¹³² A basic capability is understood as "the innate equipment of individuals that is the necessary basis for developing the more advanced capability."¹³³ Nussbaum provides the example of infants: "most infants have

121. *See id.* at 289.

122. *See id.* at 288.

123. Ingrid Robeyns & Morten Fibieger Byskov, *The Capability Approach*, STAN. ENCYC. OF PHIL. ARCHIVE, <https://plato.stanford.edu/archives/win2021/entries/capability-approach/> [https://perma.cc/8ACS-UPLA] (last updated Dec. 10, 2020).

124. Nussbaum, *supra* note 112, at 289.

125. *See id.*

126. *See id.*

127. Robeyns & Byskov, *supra* note 124.

128. Nussbaum, *supra* note 112, at 289.

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.*

from birth the *basic capability* for practical reason and imagination . . .”¹³⁴ Infants possess these basic capabilities even though they are unable to fully use these capabilities until they are older and “have a lot more development and education.”¹³⁵ Basic capabilities are the essential building blocks that can be further actualized as more life experience is gained.¹³⁶

Second, internal capabilities focus on the individual self and look at “states of the person herself that are, so far as the person herself is concerned, sufficient conditions for the exercise of the requisite function.”¹³⁷ A clarifying example: most adult human beings have “the internal capability to use speech and thought in accordance with their own conscience.”¹³⁸ Internal capabilities are, by definition, inwardly focused.¹³⁹ They capture the manner in which the individual is positioned to actualize functions if they choose.¹⁴⁰

Third are combined capabilities, which are defined as “internal capabilities *combined with* suitable external conditions for the exercise of the function.”¹⁴¹ To secure combined capabilities, the internal capability of an individual needs to be met with the relevant environmental and political circumstances that allow the capability to actually mean something.¹⁴² An example of the way a combined capability operates: “citizens of repressive non-democratic regimes have the internal but not the combined capability to exercise thought and speech in accordance with their conscience.”¹⁴³

Nussbaum asserts that “the aim of public policy is the production of Combined Capabilities.”¹⁴⁴ That is to say, the state has the duty to ensure that individuals have both the internal and external factors to be able to perform the functions of the Central Capabilities.¹⁴⁵ To be considered a free state, citizens must be able to decide how to lead their lives.¹⁴⁶ By setting Combined Capabilities as a governmental goal, the focus is placed on creating the opportunities for people to decide how to lead their free and autonomous lives.¹⁴⁷ Internal capabilities are promoted “by providing the necessary education and care” and the external capabilities are promoted through external conditions that allow functions to occur.¹⁴⁸ Although internal capabilities are necessarily directed toward functioning, as stated above, the goal of this theory is to put individuals in a position to be able to actualize those functions if they *choose*; it is not coercive.¹⁴⁹ The ultimate goal is to

134. Nussbaum, *supra* note 112, at 289.

135. *See id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.* at 290.

140. Nussbaum, *supra* note 112, at 290.

141. *See id.* at 289-90.

142. *See id.* at 290.

143. *See id.*

144. *See id.*

145. *See id.*

146. Nussbaum, *supra* note 112, at 289.

147. *See id.*

148. *See id.*

149. *See id.*

promote internal and external factors so that if an individual wants to exercise certain functions, such as practical reason, they are positioned to successfully actualize their desires.¹⁵⁰ Nussbaum makes clear: “I am not pushing individuals into the function: once the stage is fully set, the choice is up to them.”¹⁵¹

While the state lacks the ability to control internal factors, under Nussbaum’s theory, the state has the power to create the relevant external factors that are needed.¹⁵² The focus of state policymaking should therefore be on the external, material background conditions that the state has the ability to promote.

Once the basic contours of the Capability Approach are understood, the theory illustrates a larger point: “what is involved in securing a right to people is usually a lot more than simply putting it down on paper.”¹⁵³ The theory is creative because it is able to cut through traditional rights discourse as, “the right to political participation, the right to religious free exercise . . . are all best thought of as human capacities . . . to function in certain ways.”¹⁵⁴ Importantly, Nussbaum’s theory highlights the interdependence between the two component parts (internal capabilities as well as external conditions of the environment) and illustrates that possessing one and not the other is insufficient as “a citizen who is systematically deprived of information about religion does not really have religious liberty, even if the state imposes no barrier to religious choice.”¹⁵⁵ Having the internal capability but lacking the necessary external conditions also comes up short.¹⁵⁶

The language of capabilities underscores the importance of being able to actually *act* on the choices you have.¹⁵⁷ If securing background conditions is the ultimate goal, states must do more than simply not block individuals from acting.¹⁵⁸ Ultimately, negative liberty will be insufficient.¹⁵⁹

III. ANALYSIS

Applying Nussbaum’s Capability framework to Internet access illuminates its importance and the corresponding government responsibility in two main ways. First, Nussbaum’s approach sidesteps common theoretical obstacles that rights theorists often face when engaging in human rights

150. *See id.* at 290.

151. *See id.*

152. *See* Nussbaum, *supra* note 112, at 291.

153. *See id.* at 293.

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id.*

158. *See* Martha C. Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21, 22 (2007).

159. Polly Vizard, et al., *Introduction: The Capability Approach and Human Rights*, 12 J. HUM. DEV. & CAPABILITIES 1, 2-4 (2011).

discourse.¹⁶⁰ Instead of starting with struggling to define what constitutes a human right and then working to shoehorn an understanding of Internet access into an existing framework, Nussbaum's Capability Approach looks to what background conditions are required in order for people to decide how to lead their lives.¹⁶¹ The conversation can pivot away from a rights-centric discussion and take a less radical, more functional approach that looks to determine what individuals, both *capable and needy*, require to lead autonomous lives.¹⁶² Under Nussbaum's framework, Internet access is the necessary external component.¹⁶³ It is the linchpin to securing many of the Central Capabilities.

Second, adopting the framework has real-time policy consequences. Once accepted, Nussbaum's framework makes clear that government has a positive duty to facilitate widescale broadband access. The upshot of this suggests that there should be a greater degree of government involvement in reducing obstacles to furthering digital equity.

A. Application

Without substantive efforts to provide reliable Internet access, the United States government fails to provide the "material institutional environment" needed to secure several of the Central Capabilities on Nussbaum's list.¹⁶⁴ Internet access is a necessary background condition needed to actualize many of Nussbaum's Central Capabilities. This section will focus on two of Nussbaum's Central Capabilities: "Affiliation," specifically "Friendship," and "Control Over One's Environment," specifically "Political."¹⁶⁵ By showing how Internet access is needed for these Central Capabilities to exist, the case for Internet access as a necessary material condition is established, thus placing a positive duty on governments.

For the vast majority of individuals in the U.S., our affiliations, and more generally, our companionships, have evolved and now require the background condition of Internet access. As discussed above, Nussbaum defines friendship as the ability to "live for and to others, to recognize and show concern for other human beings, to engage in various forms of social interaction . . ."¹⁶⁶ Having the capability, and, thus, the associated choice structure, requires "protecting institutions that constitute such forms of affiliation."¹⁶⁷ Without Internet access, social interaction generally and friendship specifically are diminished. When we seek engagement, be it with friends or strangers, we connect over the Internet. Social media platforms

160. See Cerf, *supra* note 95 (noting the concern of classifying a technology as a human right). Nussbaum's Capability framework is able to avoid a conceptually challenging conversation of weighing the advantages and disadvantages of classifying a technology as a human right.

161. See *id.*

162. See *id.*; Nussbaum, *supra* note 103, at 216, 220.

163. See Nussbaum, *supra* note 112, at 293.

164. See Nussbaum, *supra* note 115, at 23, 31-32.

165. Nussbaum, *supra* note 112, at 288.

166. See *id.* at 287-88.

167. See *id.* at 287.

have usurped the traditional roles of in-person meet-ups and town hall discussions.¹⁶⁸ Not only is social media where we connect with those that we know; social media also has the power to connect strangers seeking human connection.¹⁶⁹

Second, having control over one's political environment now requires Internet access. The Internet is needed to secure background conditions of engaging in the political process, as most political engagement occurs online. Without reliable Internet access, one's ability to research, interact, and learn political information is materially dampened. In one study conducted by Pew Research Center, about half of the people who use social media between the ages of eighteen to twenty-nine explained that they use social media to gain information about political rallies and gatherings.¹⁷⁰ A lack of digital equity creates divergences in political education and involvement. Those who have Internet access are able to engage in the broader community and are thus able to be part of larger social and political networks.¹⁷¹ Those that do not have access are left out. Even beyond domestic social movements, Internet access broadly and social media generally has played integral roles in political revolutions, such as in Tahrir Square in 2011.¹⁷² For example, social media played a critical role in the Egyptian revolution.¹⁷³ The environment it created enhanced peaceful political and human rights activism as opposed to violent protests.¹⁷⁴

Internet access is part of the external environment and, therefore, is part of the specific circumstances needed for both the capability to affiliate with others and to engage in political discourse. Without reliable Internet access existing in the background, internal abilities, while possessed, cannot be meaningfully realized.¹⁷⁵ Nussbaum's framework sheds light on what might seem obvious but has not yet been considered: the negative duty proclaimed by the UN is not enough—there is a positive obligation to actively promote and spread its accessibility and affordability.

168. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (holding that the Internet has now become “the modern public square” and restricting access to certain websites was in violation of an individual’s First Amendment rights); see also *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019) (finding that while Donald Trump was serving as a government employee, Donald Trump’s Twitter account constituted a public forum).

169. Amber D. DeJohn et al., *Identifying and Understanding Communities Using Twitter to Connect About Depression: Cross-Sectional Study*, 5 J. JMIR MENTAL HEALTH, no. 4, 2018, 1, 8 (finding that people who suffer from depression are increasingly looking to social networking platforms, especially Twitter, for support systems).

170. Brooke Auxier, *Activism on Social Media Varies by Race and Ethnicity, Age, Political Party*, PEW RSCH. CTR. (July 13, 2020), <https://www.pewresearch.org/fact-tank/2020/07/13/activism-on-social-media-varies-by-race-and-ethnicity-age-political-party/> [<https://perma.cc/WTM3-RTDV>].

171. See Perrin, *supra* note 25 (noting the impact that social media has on exposing people to new ideas that in turn change their opinion on the subject); see also Miladi, *supra* note 27, at 36-51 (stating that the role of Twitter is integral in political participation and rallying efforts in both the Tunisian and Egyptian revolutions).

172. See Miladi, *supra* note 27, at 42, 47.

173. See *id.* at 49.

174. See *id.*

175. See Nussbaum, *supra* note 112, at 290.

The Capability Approach is both a creative and intuitive human-centered social policy planning tool. For substantive policy goals to be met, there must be positive involvement by the government. This amounts to active involvement allowing Internet access to be understood as part of the external component that governments must secure in order for individuals to be able to decide how to lead their lives.

B. Consequences of Adhering to Nussbaum's Capability Approach

If one accepts the above analysis, the implications for social policy planning are varied. This approach provides a framework for assessing policy choices and priorities, which is a useful tool for policymakers when faced with evaluating different approaches. Application of the Capability Approach serves as a useful policymaking tool whether one is sitting in federal, state, county, municipal, or tribal governments. The two specific examples discussed below are meant to illustrate a larger theme once the Capability Approach is accepted: there are creative and resourceful ways for government, at all levels, to actualize its positive duty to secure and promote reliable Internet access.

Although, as indicated in the Background section, Congress and the Biden Administration took concrete steps to further accessibility and cut down on costs of reliable Internet access in the first year of President Biden's term in office, the Capability Approach illuminates gaps and opportunities for movement and growth.¹⁷⁶ The approaches put forward in this section are particularly ripe for current discussion and ultimate execution—that is to say, there is meaningful space to make advancements. Varied government action can and should act to fill the space left open both by existing federal initiatives and powerful private-sector companies to ultimately increase Internet access throughout the United States. The purpose of the two examples below is to illustrate ways in which government action can be increased and the positive duty better actualized. At bottom, creativity and innovation from those in the community should influence policy decisions.

1. Municipal Broadband and Beyond

The obstacles faced by local communities in efforts to implement municipal broadband illustrate the ways that state government inhibits furthering both the accessibility and affordability of broadband. Understood through Nussbaum's Capability Approach, support for municipal broadband projects may be one way for federal, state, or municipal governments to fulfill their positive duties to promote the actualization of citizens' Central Capabilities through expansion of the background condition of Internet access. Therefore, the obstacles that currently exist should be removed. The principal way this should occur is through congressional action. Specifically,

176. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60102, 135 Stat. 429, 1182 (2021).

Congress should issue a plain statement to the FCC granting it the power to preempt state laws that seek to block or dampen the spread and accessibility of municipal broadband.¹⁷⁷

Because the FCC currently has no plain statement authorization from Congress to preempt state municipal broadband restrictions, it remains an open question if such an authorization would withstand constitutional muster. However, there is precedent to suggest that it would.¹⁷⁸ Additionally, in *Nixon*, there was an indirect suggestion “that a clear statement might be sufficient to support such preemption.”¹⁷⁹ At bottom, Congress should issue a clear statement rule to the FCC, allowing it to preempt state laws thwarting municipal broadband efforts. Any remaining constitutional concerns should be addressed once Congress issues the plain statement, but such delegation would likely withstand constitutional scrutiny.¹⁸⁰ Barring congressional action, states could still look to the Capability Approach as justification for removing restrictions and offering support for projects like municipal broadband.

Beyond support for municipal broadband, there are multiple other activities and programs Congress could engage in to further implement its positive duty to support affordable and available Internet access. For instance, Congress could hold hearings that seek to solicit and incorporate community and state needs into already existing federal broadband programs.¹⁸¹ This could also extend to backing more programs that provide resources for questions and concerns as they relate to the use and functionality of the Internet more generally. Broadband literacy is an important element of furthering the reach of broadband.

2. Federal Asset Deployment

Another way to further actualize widespread Internet access is to expand the reach of federal infrastructure that is already in place. This should work in concert with municipal broadband initiatives.¹⁸² In some regions of the country, municipal broadband is more desirable, whereas in other regions, Federal Asset Deployment might be possible. The federal government should expedite permitting for broadband infrastructure along highways and railways.¹⁸³ For example, the Federal Highway Administration recently published a rule that will allow broadband infrastructure to be installed at the

177. See *Tennessee v. FCC*, 832 F.3d 597, 611-12 (6th Cir. 2016).

178. See *Lawrence Cnty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 270 (1985).

179. See *id.*; see also *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) (noting that “preemption could operate straightforwardly to provide local choice”).

180. If the central thrust of this Note is adopted, there would be an increase in government involvement in the distribution of Internet access. While it is possible that this may raise First Amendment concerns, such concerns fall outside the scope of this Note, but addressing them will be critical as government involvement in broadband access increases.

181. RACHFAL, *supra* note 34, at 13.

182. See *id.* at 7.

183. See *id.* at 8.

same time as road construction.¹⁸⁴ This is a helpful step because it will speed the process up and promote a policy of “dig once.”¹⁸⁵ ISPs that traditionally struggle reaching rural communities would stand to benefit (or have less financial reasons not to deploy broadband to harder to reach communities) if the pre-existing infrastructure from other federal activities can be used.¹⁸⁶ The permitting process should be efficient, made possible through the relationship between the National Telecommunications and Information Administration (“NTIA”) and various federal agencies.¹⁸⁷

In sum, these two illustrations—municipal broadband and deployment of federal assets to enable private ISPs to broaden the reach of their broadband—are two distinct solutions to further broadband access that should become more ubiquitous around the country. When appreciated through the lens of Martha Nussbaum’s Capability Approach, federal, state, and local governments, should marshal these tools to fulfil their positive duty: promote the background condition of furthering broadband access.¹⁸⁸

IV. CONCLUSION

Representative John Lewis saw things, believed things, and fought for things before they even appeared on the horizon. He was no less accurate about the role that securing equitable Internet access would play in society.¹⁸⁹ Human-centered social policy planning is an important step to reaching digital equity. Nussbaum’s theory provides needed insight into the positive role that must be placed on government to promote reliable Internet access. Adopting this framework would go a long way in preventing children from being forced into public parking lots to complete their schoolwork. While our need and reliance on Internet only increases, digital inequity still remains.

This Note has shown that Internet is a material background condition to human flourishing and, therefore, government must actively work to provide it. More should be done. Nussbaum’s theoretical framework applied in a unique context illuminates the shortcomings of negative duty and highlights the importance of implementing policy initiatives that further the state’s positive duty to provide background conditions that individuals need in order to decide how to lead their lives.

184. Broadband Infrastructure Deployment, 86 Fed. Reg. 68553 (Dec. 3, 2021) (to be codified at 23 C.F.R. pt. 645).

185. See 86 Fed. Reg. at 68555.

186. See *id.*

187. See *id.*; Agency Profile, Nat’l Telecomm. & Info. Admin, U.S. Dep’t of Com., NTIA At-A-Glance 1, 3-4, 6 (2022), https://www.ntia.doc.gov/files/ntia/publications/ntia_at_a_glance_march_2022.pdf [<https://perma.cc/YHX5-A4QC>].

188. These represent just two examples. Other creative approaches that go beyond the scope of this project should also be considered.

189. See JONATHAN SALLET, BENTON INST. FOR BROADBAND & SOC’Y, BROADBAND FOR AMERICA NOW 8 (2020), https://www.benton.org/sites/default/files/BroadbandAmericaNow_final.pdf [<https://perma.cc/SF57-CKM7>].