
COMMUNICATIONS REGULATION—RIPE FOR REFORM

Kevin Ryan[†]

Of all the federal agencies and commissions, the [Federal Communications Commission] is the one that Americans ought to be most interested in; after all, it is involved with a business sector that accounts for about fifteen percent of the American economy, as well as important aspects of daily life—telephone and television and radio and newspapers and the Internet.¹

I. INTRODUCTION

Nearly thirty years after early predictions and much fanfare,² convergence has finally arrived in the communications industry.³ Now, consumers can watch television programs on computers and mobile phones and read the *New York Times* on their digital music player. The mantra of the convergence para-

[†] J.D. and Institute for Communication Law Studies Certificate Candidate, May 2010, Catholic University of America, Columbus School of Law. The author expresses his sincere appreciation to Derek Khlopin and Jonathan Kastoff for their thoughts and comments on earlier versions of this Comment.

¹ Nicholas Lemann, *The Chairman*, NEW YORKER, Oct. 7, 2002, at 48.

² See James B. Speta, *Making Spectrum Reform “Thinkable,”* 4 J. TELECOMM. & HIGH TECH. L. 183, 184 (2005) [hereinafter Speta, *Thinkable Reform*] (citing ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 8 (1983) (discussing convergence)); see William H. Read & Ronald Alan Weiner, *FCC Reform: Governing Requires a New Standard*, 49 FED. COMM. L.J. 289, 291 (1997) (“The telephone, television and computer are rapidly merging into a single, very intelligent box—a telecomputer . . . [that] will be linked to the rest of the world by high-capacity smart wires.” (quoting George Gilder, *Cable’s Secret Weapon*, FORBES, Apr. 13, 1992, at 80, 84)).

³ See Richard E. Wiley, “*A New Telecom Act*”—Remarks, 31 S. ILL. U. L.J. 17, 22–23 (2006). Convergence has been given a variety of definitions, including “the use of the same technological platform to provide multiple services.” *Id.* at 17. For the purpose of this Comment, convergence encompasses three overlapping and interweaving components: (1) the digitization of communications content, replacing the traditional analog format; (2) the expansion of traditionally separate service offerings by businesses—for example, cable companies offering telephone service; and (3) the integration of devices, allowing mobile devices to provide, among other things, telephone, television, and Internet access. See John C. Roberts, *The Sources of Statutory Meaning: An Archaeological Case Study of the 1996 Telecommunications Act*, 53 SMU L. REV. 143, 156–57 (2000).

digm shift is whatever content you want, whenever you want it, and on whatever device you want it.⁴ On-demand video services and Internet-based video may be replacing the top-down model of traditional over-the-air television broadcasting.⁵ Traditional landline telephone companies are bleeding customers who have become un-tethered—relying only on their mobile phones.⁶ Satellite radio and other Internet-based music sources, such as podcasting,⁷ are supplementing traditional AM and FM broadcast radio industry formats.⁸ While convergence can be observed plainly in today's consumer marketplace, the underlying technological cause making convergence possible is the digitalization of the content consumers receive and send: voice, data, audio, and video.⁹

⁴ See, e.g., OLIVER WYMAN, THE UPSIDE FOR CONVERGED COMMUNICATIONS IN NORTH AMERICA 3 (2008), http://www.oliverwyman.com/ow/pdf_files/OW_EN_CMT_PUBL_2008_UpsideforConvergedCommunications.pdf (explaining that growth in the communications industry “will be fueled by consumers’ and business’ ever-increasing desire for anywhere, anytime, anyplace communications connectivity, information exchange, and content viewing”); *New Technologies*, COMM. DAILY, Oct. 8, 2008, at 14 (noting the Society of Motion Picture and Television Engineers has started to develop “a broadband content delivery technical standard” with the goal of letting consumers buy content from any online destination and play it back on any device).

⁵ See Posting of Bill Gorman to TV by the Numbers, Today's Threat to Broadcast TV Networks, <http://tvbythenumbers.com/2009/02/28/todays-threat-to-broadcast-tv-networks/13686> (Feb. 28, 2009). Using data from Nielsen Media Research, Bill Gorman estimated that the prime-time audience for broadcast networks has fallen from nearly eighty-five percent in 1984–85 to under fifty percent in 2007–08. Posting of Bill Gorman to TV by the Numbers, Broadcast Prime-time for 2008–09: Look Out Below!, <http://tvbythenumbers.com/2008/09/19/broadcast-prime-time-for-2008-9-look-out-below/5182> (Sept. 19, 2008).

⁶ Stephen J. Blumberg & Julian V. Luke, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JANUARY–JUNE 2008, at 1 (2008), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200812.pdf>. This 2008 study, conducted by the National Center for Health Statistics, found that 17.5% of U.S. households had no landline telephone, and an additional 13.3% that did have a landline service received “all or almost all calls on wireless telephones.” *Id.*

⁷ PC Magazine, Encyclopedia, <http://www.pcmag.com/encyclopedia/> (search for “podcast”) (last visited Mar. 21, 2009) (defining a podcast as “[a]n audio broadcast that has been converted to an MP3 file or other audio file format for playback in a digital music player”).

⁸ BILL ROSE & JOE LENSKI, ARBITRON INC. & EDISON MEDIA RESEARCH, THE INFINITE DIAL 2008: RADIO'S DIGITAL PLATFORMS 3–4, 22 (2008), available at http://www.arbitron.com/downloads/digital_radio_study_2008.pdf. While AM and FM radio's audience has remained fairly stable, the study found that MP3 audio player usage, Internet radio listening, and podcasting continue to grow dramatically.

⁹ See Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy 5* (Fed. Comm'n's Comm'n, OPP Working Paper No. 29, 1997) [hereinafter Werbach, *Digital Tornado*], available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp29.pdf.

Digitalization means that all of the formerly distinct content types are reduced to a stream of binary ones and zeroes, which can be carried by any delivery platform. In practical terms, this means not only that specific boundaries—between a telephone network and a cable system, for example—are blurred, but also that the very exercise of drawing any such boundaries must be fundamentally reconsidered or abandoned.

However, this radical shift in the capability of devices, transmission methods, and content creation has not spurred a significant shift in the regulatory framework of the Federal Communications Commission (“FCC” or “Commission”), which oversees the communications industry.¹⁰ Both the Commission’s bureaucratic structure and regulatory framework remain industry-based.¹¹

Often directed at the Commission’s outdated regulatory structure and operations, scores of complaints from a variety of stakeholders have been leveled at the FCC, often directed at the Commission’s outdated regulatory structure and associated operations. Former FCC Chairman Reed Hundt, for example, lamented the courts’ reversal rate of FCC actions is “scandalously high.”¹² Additionally, numerous groups criticized the FCC for voting to admonish Comcast for violating the FCC’s Internet policy principles, which themselves are mired in a debate about their enforceability.¹³ Finally, the Commission received criticism for placing overly stringent requirements on the 700 MHz D-Block public safety network spectrum auction, setting back the development of an interoperable network for first responders by months, if not years.¹⁴ Finally, criticisms concerning the FCC’s operational procedures grew so loud that the House of Representatives’ Energy and Commerce Committee began a congressional

Id. (citations omitted). *See generally* NICHOLAS NEGROPONTE, BEING DIGITAL (1995) (providing an overview of the impacts of digitalization). Not to be overlooked in discussing the digitalization of content is the rise of more convenient consumer electronic devices on which the digitalized content can be accessed. The advances in such devices can in large part be attributable to Moore’s Law. Susan Ness, *Preface*, 7 COMMLAW CONSPECTUS 229, 299 (1999) (defining Moore’s Law as the doubling of “processing power available at a given price . . . approximately every 18 months”).

¹⁰ *See* Jessica Finely, Comment, *Anticipating Regulation of New Telecommunications Technologies: An Argument for the European Model*, 26 NW. J. INT’L L. & BUS. 447, 447 (2006).

¹¹ *See id.* (“Regulation of telephone, broadcast communication, and wired communications, such as the internet and cable television, are still segregated and do not account for overlap among the various telecommunication modalities.”)

¹² Reed E. Hundt & Gregory L. Rosston, *Communications Policy for 2006 and Beyond*, 58 FED. COMM. L.J. 1, 33 (citing *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004); *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)).

¹³ *Compare* Posting of Harold Feld to Public Knowledge Policy Blog, *Why Comcast Can’t Appeal—A Story of Prior Notice and Procedural Problems*, <http://www.publicknowledge.org/node/1670> (July 22, 2008, 17:39 EST) (arguing that because Comcast participated in an adjudication where the FCC established that it had authority to enforce its Internet policy principles and “would review future complaints . . . [Comcast] had an obligation to seek reconsideration or judicial review” at that time), *with* BARBARA S. ESBIN, “THE LAW IS WHATEVER THE NOBLES DO”: UNDUE PROCESS AT THE FCC, PROGRESS AND FREEDOM FOUND. PROGRESS ON POINT NO. 15.12, at 3–5 (2008) (arguing that the FCC’s Comcast decision was procedurally and substantively flawed in failing to go through the Commission’s rule-making process and improperly relying on Title I ancillary jurisdiction).

¹⁴ *See* Spencer S. Hsu & Cecilia Kang, *FCC Asked to Probe Auction: Failure of Public Safety Band to Draw Bids Raises Suspicion*, WASH. POST, Mar. 20, 2008, at D1.

investigation.¹⁵

With a new Presidential administration and a strengthened Democratic Congress that has expressed significant interest in communications issues,¹⁶ the time is right for reforming the bureaucratic and regulatory framework of the FCC. In recognition of the need for change at the Commission, members of Congress over the past few years have introduced legislation to expand oversight over the FCC's structure and operations.¹⁷ Like any other industry-specific regulatory agency experiencing fundamental changes in the industry it oversees, the FCC needs to adapt its outdated regulatory structure to account for the paradigm-shift brought on by convergence. While even former FCC commissioners have noted the need for reforming the agency,¹⁸ the regulatory models and their associated public policy goals remain remarkably similar to the original framework established in 1934, when the FCC was formed.¹⁹ In

¹⁵ See John Eggerton, *House Launches FCC Investigations; Warns Against Destroying Documents*, BROAD. & CABLE, Jan. 8, 2008, <http://www.broadcastingcable.com/article/CA6518202.html>.

¹⁶ See, e.g., Edward Markey, U.S. Representative, Keynote Address at the Consumer Federation of America's Consumer Assembly (Feb. 1, 2007), available at http://markey.house.gov/index.php?option=com_content&task=view&id=2577&Itemid=141 (stating the Telecommunications and Internet Subcommittee of the Energy and Commerce Committee in the House of Representatives will be very active in oversight regarding the communications issues). At a hearing of the Subcommittee on Telecommunications and the Internet of the 110th Congress, Rep. Markey said, "In particular, our oversight will analyze whether it is operating at maximum efficiency, what constructive proposals can be considered to improve its operations, whether it is adhering to congressional intent in implementing our Nation's laws and to what extent its policy agenda advances the public interest." *Oversight of the Federal Communications Commission: Hearing Before the H. Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 110th Cong. (2007) (statement of Rep. Markey, Chairman, H. Subcomm. on Telecommunications and the Internet) The new Chairman of the Subcommittee on Telecommunications and the Internet, Rep. Rick Boucher, has indicated a similar interest in communications issues. Satellite, Broadband, DTV Top Telecom Agenda This Congress, Comm. Daily, March 20, 2009 at 1.

¹⁷ E.g., FCC Reorganization Act, H.R. Res. 2982, 109th Cong. §§ 2-3 (2005) (forcing the FCC to reorganize its operational structure); see John Eggerton, *Barton Bill Would Overhaul FCC*, BROAD. & CABLE, July 31, 2008, http://www.broadcastingcable.com/article/95411-Barton_Bill_Would_Overhaul_FCC.php (discussing a draft bill by Rep. Joe Barton (R-Tex.) that would make the FCC's process "more transparent and accountable").

¹⁸ See, e.g., Glen O. Robinson, *The FCC in the Year 2000*, 37 FED. COMM. L.J. 155, 158-59 (1985) [hereinafter Robinson, *FCC 2000*]; Fed. Comm'n's Comm'n, *Strategic Plan: A New FCC for the 21st Century* 15 (1999), http://www.fcc.gov/21st_century/draft_strategic_plan.pdf [hereinafter *FCC Strategic Plan*]; PHILIP J. WEISER, FCC REFORM AND THE FUTURE OF TELECOMMUNICATIONS POLICY 4 (2009), available at <http://fcc-reform.org/sites/fcc-reform.org/files/weiser-20090105.pdf> (quoting former FCC Commissioner Glen Robinson and former FCC Chairman Reed Hundt, both of whom criticized and critiqued the FCC's operations and effectiveness).

¹⁹ See 47 U.S.C. §§ 151-609 (2000); Communications Act of 1934, ch. 652, 48 Stat. 1064.

light of technological convergence and shifting regulatory paradigms, the Commission's organizational structure and the regulatory framework it applies need to adapt to address the needs of industry and consumers adequately. To facilitate reform, the Telecommunications Act of 1996²⁰ should be amended in order to move policy-making functions currently at the FCC to the executive branch, leaving the Commission jurisdiction to serve an adjudicatory role—overseeing interconnection disputes and spectrum interference.

This Comment argues that the FCC's regulatory models are outdated and examines possible remedies for solving the shortcomings of the current regulatory models. Part II of this Comment explores the origins of the FCC from the Interstate Commerce Commission to the 1934 Communications Act through the present day, including the legislative history and policy rationales behind key statutes, such as the Radio Act of 1927 and the Telecommunications Act of 1996. In Part III, the Comment examines the FCC's five regulatory models and their concomitant public policy goals.²¹ The Comment then explains the current structure and regulatory framework of the FCC, surveying the array of criticisms of the FCC and evaluating possible reform options suggested by other commentators in Part IV. Finally, in Part V, this Comment concludes by offering suggestions to bring the regulatory framework for communications into the twenty-first century by calling for a major update to the 1996 Telecommunications Act. This legislation would remove policy-making powers from the FCC and transfer that power to the executive branch and other independent agencies, preempt most state regulation of the communications industry, and allow the FCC to focus on adjudicatory tasks, such as spectrum disputes and interconnection obligations.

II. HISTORY OF THE FEDERAL COMMUNICATIONS COMMISSION

The FCC can easily be labeled one of the New Deal alphabet soup regula-

²⁰ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

²¹ The Commission's five primary regulatory models are: the no-regulation print model; the common carrier telephone model; the public trustee broadcast radio and television model; the hybrid common carrier and public trustee cable television model; and the Internet and information services model. PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA 2 (2001); see BARBARA S. ESBIN, FCC REFORM: SCALPEL OR STEAMROLLER?, PROGRESS AND FREEDOM FOUND. PROGRESS ON POINT 15.15, at 5 (2008) [hereinafter, ESBIN, SCALPEL OR STEAMROLLER] (stating that broadband services are being treated as "unregulated 'information services' subject only to [the FCC's] 'ancillary jurisdiction'"); cf. Cheryl A. Tritt, *Telecommunications Future*, in 25TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS POLICY AND REGULATION 133, 152-54 (PLI Intellectual Property Course Handbook Series No. 990, 2007) (describing the Internet and information services model in the context of the Commission's actions regarding Voice over Internet Protocol services).

tory agencies created during the Great Depression,²² but the formation of the FCC reflects a more complicated history dating back to the Interstate Commerce Act of 1887.²³ To understand the FCC's regulatory models fully, it is necessary to understand the history of those models and the statutes that gave rise to the regulatory agency implementing those models.

A. Pre-1934 Act Regulation

The first regulatory body of importance to communications regulation was the Interstate Commerce Commission ("ICC").²⁴ The ICC was formed because of the importance of railroad transportation in the late nineteenth century to the creation of an interconnected national economy.²⁵ The regulation of the railroads was the next chapter of common carrier laws that had governed previous transportation technologies, such as canals and stagecoaches.²⁶ Because the transportation industries had a significant impact on the public, government regulation sought to ensure reasonable prices²⁷ and non-discrimination in the

²² See Randolph J. May, *The FCC's Tumultuous Year 2003: An Essay on an Opportunity for Institutional Agency Reform*, 56 ADMIN. L. REV. 1307, 1310 (2004) (comparing the FCC with the other "independent regulatory agencies" that came out of the "somewhat idealized Progressive-era and New Deal vision of government administration").

²³ Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 3, 3 (Max D. Paglin ed., 1989) [hereinafter Robinson, *Federal Communications Origins*] (arguing that, unlike the other regulatory statutes passed from 1933–38, the Communications Act did not create a new regulatory structure because the statute had roots in the Interstate Commerce Act of 1887 and the Mann-Elkins Act of 1910). Furthermore, the FCC was not a completely new government agency, but instead was "a reorganization of the Federal Radio Commission with the addition of the [Interstate Commerce Commission]'s jurisdiction over telecommunications carriers." *Id.*; see Harry M. Shooshan III, *A Modest Proposal for Restructuring the Federal Communications Commission*, 50 FED. COMM. L.J. 637, 641 (1998) (calling "[t]he new statute . . . largely a recodification of the 1927 Radio Act and the Interstate Commerce Act").

²⁴ Charles J. Cooper & Brian Stuart Koukoutchos, *Federalism and the Telephone: The Case for Preemptive Federal Deregulation in the New World of Intermodal Competition*, 6 J. TELECOMM. & HIGH TECH. L. 293, 307 (2008) (describing the ICC as "the first federal regulatory commission" and noting its role in the regulation of "common carriers engaged in interstate transportation").

²⁵ Read & Weiner, *supra* note 2, at 307–08.

²⁶ Kenneth A. Cox & William J. Byrnes, *The Common Carrier Provisions—A Product of Evolutionary Development*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 26 (Max D. Paglin ed., 1989) (describing the underlying theory behind common carrier law as a prohibition against discrimination of individuals and locations).

²⁷ See William J. Byrnes, *Telecommunications Regulation: Something Old and Something New*, in THE COMMUNICATIONS ACT: A LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS, 1934–1996, at 32 (Max D. Paglin ed., 1999) [hereinafter Byrnes, *Something New*] (discussing the development of "reasonable" rates being based upon carrier costs as a product of the common law); *cf.* Read & Weiner, *supra* note 2, at 305.

form of universal service.²⁸ In addition, the ICC's statutory power to prevent antitrust review of proposed railroad mergers that were in the interest of the public provided the first glimpse of the natural monopoly theory that would later form a key plank in communications regulations.²⁹

Consistent with the goal of creating interconnected networks, Congress passed the Mann-Elkins Act in 1910, which presented perhaps the first legislative recognition of the need for widespread access to interconnected telephone and telegraph technologies.³⁰ The Mann-Elkins Act defined telephone companies as common carriers for the first time,³¹ subjecting them to ICC regulatory oversight and the common carrier obligations of non-discrimination and rate regulation that were applied to the railroad industry.³² The Mann-Elkins Act also granted the ICC enforcement powers over interstate telecommunications, including preemption over intrastate regulation.³³ This is a marked difference from the Communications Act of 1934, which granted regulatory powers to both the FCC and the individual states.³⁴ This distinction proved to have major implications for the FCC's regulatory powers. However, prior to the Communications Act of 1934, intervening events led to incremental regulatory changes.

In the wake of the Titanic disaster, Congress passed the Radio Act of 1912,³⁵

²⁸ Read & Weiner, *supra* note 2, at 307–08.

²⁹ *Id.*

³⁰ See Mann-Elkins Act, ch. 309, sec. 7, § 1, 36 Stat. 539, 544–47 (1910).

³¹ *Id.* (establishing that the provisions of the Mann-Elkins Act apply to “telegraph, telephone, and cable companies[, and they] . . . shall be considered and held to be common carriers); see Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835, 838–39 (1997).

³² See Cox & Byrnes, *supra* note 26, at 28–29; Michael Zarkin, *The Evolution of Bureaucratic Design: The Federal Communications Regulatory Bureaucracy, 1910–1952*, at 7 (Mar. 17, 2006) (unpublished manuscript) [hereinafter Zarkin, *Evolution of Bureaucratic Design*], available at http://www.allacademic.com/meta/p97330_index.html. The ICC was given authority over the telephone lines partially because telegraph and telephone companies “had deployed their lines heavily along rail rights-of-way, [thus] the Interstate Commerce Commission . . . regulated them for years as a sort of adjunct.” Rosemary C. Harold, *Cable Open Access: Exorcising the Ghosts of “Legacy” Regulation*, 28 N. KY. L. REV. 721, 730 (2001).

³³ Cooper & Koukoutchos, *supra* note 24, at 314–15; see also *Houston, E. & W. Tex. Ry. Co. v. United States (The Shreveport Rate Case)*, 234 U.S. 342, 351–52 (1914) (recognizing that in network-based industries, the setting of interstate rates and intrastate rates are too intertwined for the government to be able to regulate one, but not the other).

³⁴ Barbara S. Esbin & Gary S. Lutzker, *Poles, Holes and Cable Open Access: Where the Global Information Superhighway Meets the Local Right-of-Way*, 10 COMM.LAW CONSPICUOUS 23, 29 (2001) (citing 47 U.S.C. § 152(b) (2000)).

³⁵ Read & Weiner, *supra* note 2, at 294; Radio Act of 1912, ch. 287, 37 Stat. 302 (repealed by Radio Act of 1927, ch. 169, § 39, 44 Stat. 1162, 1174). For a brief discussion of the role of the Titanic's sinking in the passage of the Radio Act of 1912, see John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and The Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1097 n.98 (2000).

giving authority to the Secretary of Commerce and Labor to issue broadcast licenses.³⁶ The federal government's first foray into regulation of radio spectrum, the Radio Act of 1912 did not give any "independent discretion or rule-making power" to the Secretary of Commerce and Labor, forcing a "first-come, first-served" system for the licensing of radio frequencies without "discretion to deny or revoke a license."³⁷ Despite the lack of authority to deny licenses, this regulatory regime worked fairly well prior to the explosive growth in the number of radio stations during World War I.³⁸ This growth created significant interference problems between broadcast licensees.³⁹

With the growth of commercial broadcasting after World War I,⁴⁰ numerous concerns about the licensing system arose, including a fear that placing authority in the executive branch would lead to politicization of licensing distribution.⁴¹ However, Congress did not act to allay these concerns until a federal district court found that the Radio Act of 1912 did not provide the Secretary of Commerce and Labor the power to issue regulations regarding exclusive distribution of frequencies.⁴² This decision prompted widespread chaos in the

³⁶ Radio Act of 1912, 37 Stat. at 302–03; see Duffy, *supra* note 35, at 1097; Zarkin, *Evolution of Bureaucratic Design*, *supra* note 32, at 7.

³⁷ Zarkin, *Evolution of Bureaucratic Design*, *supra* note 32, at 7–8.

³⁸ *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 210 (1943); Judith C. Aarons, Note, *Cross-Ownership's Last Stand? The Federal Communication Commission's Proposal Concerning the Repeal of the Newspaper/Broadcast Cross-Ownership Rule*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 317, 322 (2002). *But see* Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 912, 917–18, 922, (1997) [hereinafter Hazlett, *Physical Scarcity*] (arguing that then Secretary of Commerce Herbert Hoover sought to exert greater control over radio licensees as a tool for political gain, and that courts were already beginning to solve the interference problem through issuance of property rights for portions of the spectrum).

³⁹ *Nat'l Broad. Co.*, 319 U.S. at 211.

⁴⁰ See Zarkin, *Evolution of Bureaucratic Design*, *supra* note 32, at 8. While the initial impetus for the Radio Act was concern over confusion and interference regarding the spectrum, the rise of commercial broadcasting in the 1920s brought new pressures on the regulatory framework. *Id.* The key differences in commercial broadcasting as compared to "navigational operators" were that the audiences for commercial broadcasters were the public at large and that the scarcity of radio frequencies meant that the "range of perspectives and ideas broadcast over the airwaves might be limited in scope." *Id.*

⁴¹ See Hazlett, *Physical Scarcity*, *supra* note 38, at 920; May, *supra* note 22, at 1311. Congress foresaw political implications in allowing the executive branch control of the new medium. May, *supra* note 22, at 1311.

⁴² Robinson, *Federal Communications Origins*, *supra* note 23, at 9; Duffy, *supra* note 35, at 1100–01; see also *United States v. Zenith Radio Corp.*, 12 F.2d 614, 617–18 (N.D. Ill. 1926) (finding that the Secretary of Commerce had no power to regulate the airwaves). The *Zenith* case was brought with the encouragement of the Secretary of Commerce Herbert Hoover, who had pushed Congress to grant the Department of Commerce greater authority in the regulation of the broadcast industry. Zarkin, *Evolution of Bureaucratic Design*, *supra* note 32, at 9; see also Hazlett, *Physical Scarcity*, *supra* note 38, at 917. Faced with congressional inaction, Hoover "encouraged the Zenith Corporation to bring a test case in the fed-

broadcast industry, and Congress responded by creating the Federal Radio Commission (“FRC”) through the Radio Act of 1927 (“Radio Act”).⁴³

Three beliefs converged to create a multi-member, independent commission to oversee the licensing of the public airwaves. First, only experts in the radio industry and technically skilled personnel could handle regulating the complexities of the electromagnetic spectrum.⁴⁴ Second, broadcasting was a medium capable of vast political influence, necessitating regulation independent of a political executive branch.⁴⁵ Third, a belief by members of the broadcast industry that a single executive branch appointee would lead to increased censorship.⁴⁶ The Radio Act replaced the “first-come, first-served”⁴⁷ license process with a grant of authority to the FRC to issue licenses when “the public interest, convenience, or necessity would be served.”⁴⁸ However, unresolved concerns regarding the power that broadcasters had in controlling the airwaves prompted Congress to implement new laws to assure a diversity of voices, including rules requiring equal time for political candidates.⁴⁹

The justification for the public interest standard was that radio spectrum was scarce and belonged to the public, but was licensed by the government to private companies for profit.⁵⁰ Within the public interest standard, the FRC developed public policy principles that included localism, diversity of broadcasting programming, the ability to broadcast without interference, and the clean character of licensees.⁵¹ However, with little justification, the Radio Act was superseded by another, broader communications act, which created a new regulatory agency.

B. The 1934 Act to the 1996 Act—Technological Innovation and Regulatory

eral courts challenging his broad interpretation of the Radio Act.” Zarkin, *Evolution of Bureaucratic Design*, *supra* note 32, at 9. *Contra* Duffy, *supra* note 35, at 1102 (noting “no hard evidence” supports the contention that Hoover sought the decision in *Zenith*).

⁴³ See Duffy, *supra* note 35, at 1102; Radio Act of 1927, ch. 169 § 3, 44 Stat. 1162, 1162–63 (repealed 1934).

⁴⁴ See S. REP. NO. 69-772, at 2 (1926).

⁴⁵ Zarkin, *Evolution of Bureaucratic Design*, *supra* note 32, at 11; see S. REP. NO. 69-772, at 2.

⁴⁶ Zarkin, *Evolution of Bureaucratic Design*, *supra* note 32, at 10–11.

⁴⁷ See Duffy, *supra* note 35, at 1100–01; Hazlett, *Physical Scarcity*, *supra* note 38, at 913.

⁴⁸ Radio Act of 1927, ch. 169 § 11, 44 Stat. 1162, 1167 (repealed 1934); see Duffy, *supra* note 35, at 1100–01.

⁴⁹ Andrea L. Johnson, *Redefining Diversity in Telecommunications: Uniform Regulatory Framework for Mass Communications*, 26 U.C. DAVIS. L. REV. 87, 95 (1992); see 67 CONG. REC. 5558 (1926).

⁵⁰ See Read & Weiner, *supra* note 2, at 293–95.

⁵¹ NAPOLI, *supra* note 21, at 83.

Divergence

The Communications Act of 1934 (“Communications Act” or “1934 Act”) took the regulation of radio communications from the FRC and telephone-telegraph service from the ICC and placed them under the same regulatory umbrella.⁵² Evidence of Congress’s rationale for combining these regulatory models is scant;⁵³ President Franklin Roosevelt’s message to Congress accompanying the proposed legislation simply referred to the “clarity and effectiveness” of merging these disparate regulatory functions into one agency.⁵⁴

The new communications scheme of the 1934 Act had three primary sections, or Titles, each of which corresponded to different types of technology or regulatory objectives. Title I created the FCC, the purpose of which was to regulate interstate communication by wire and radio in an effort to extend the technologies to all Americans and create a nation-wide communication apparatus.⁵⁵

Title II of the Communications Act addressed the regulation of the telephone and telegraph common carriers, incorporating the regulatory structure of the Mann-Elkins Act.⁵⁶ The common carrier regulatory model was borne out of the natural monopoly theory of public utilities: some industries function better without competition, especially those industries that are so critical to society as a whole that government regulation is necessary to ensure reasonable price points and widespread deployment.⁵⁷

⁵² Robinson, *Federal Communications Origins*, *supra* note 23, at 3–4.

⁵³ *Id.* at 4 (explaining that the legislative history of the 1934 Act does not explain why the regulatory portfolios were combined). Robinson suggests the assumed goals of the 1934 Act were an increase in administrative efficiency, a clearer regulatory policy, and a more active regulatory body. *Id.* In contrast, the ICC presided over a mere fourteen cases involving telephone-telegraph rates in the twenty-four years the agency had jurisdiction. *Id.* at 7; see also Michael J. Hirrel, *Oil and Vinegar: The FCC and the D.C. Circuit*, 3 COMMLAW CONSPECTUS 121, 122 (1995) (suggesting another rationale for creating a central regulatory body for communications was the ICC’s disinterest in using the authority granted to it by the Mann-Elkins Act).

⁵⁴ Zarkin, *Evolution of Bureaucratic Design*, *supra* note 32, at 14.

⁵⁵ Communications Act of 1934, ch. 652 § 1, 48 Stat. 1064, 1064 (codified as amended at 47 U.S.C. § 151 (2000)).

⁵⁶ See Robinson, *Federal Communications Origins*, *supra* note 23, at 5 (noting that the obligations imposed on common carriers in the 1934 Act “are largely transplants” from railroad regulation).

⁵⁷ KIMBERLY A. ZARKIN & MICHAEL J. ZARKIN, *THE FEDERAL COMMUNICATIONS COMMISSION: FRONT LINE IN THE CULTURE AND REGULATION WARS* 2–3 (2006) [hereinafter ZARKIN & ZARKIN, *REGULATION WARS*]; Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 548 (1969).

The term [natural monopoly] does not refer to the actual number of sellers in a market but to the relationship between demand and the technology of supply. If the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly, whatever the actual number of firms in

Finally, Title III of the 1934 Act addressed radio communication regulation.⁵⁸ This Title borrowed the licensing system standard of “public convenience, interest, or necessity” from the Radio Act and charged the administration of licenses under this standard to the newly created FCC.⁵⁹ The Communications Act provided the primary statutory authority for FCC regulation for the next sixty years.⁶⁰ However, as innovation constantly reshaped the telecommunications industry in the later half of the twentieth century, the FCC often struggled to keep up with the shifting industry it oversaw.⁶¹

With only landline telephone service, television and radio network broadcast, and Western Union under its jurisdiction, the FCC was considered a “sleepy backwater government agency”⁶² until the 1960s. While many commentators point to the FCC’s deregulation trend beginning in President Ronald Reagan’s administration,⁶³ the actual roots of deregulation and the move toward competition policy began in the 1950s.⁶⁴ The evolution was born from technological advances, aided by a growing ideological fervor for deregulation,⁶⁵ and achieved through the development of institutional policy analysis.⁶⁶

it.

Id.

⁵⁸ See Communications Act of 1934, ch. 652, § 301, 48 Stat. 1064, 1081 (codified as amended at 47 U.S.C. § 301 (2000)).

⁵⁹ Compare Radio Act of 1927, ch. 169, § 11, 44 Stat. 1162, 1167 (repealed 1934), with Communications Act 1934, ch. 652, § 303, 48 Stat. 1064, 1082. See also Hirrel, *supra* note 53, at 123.

⁶⁰ May, *supra* note 22, at 1307.

⁶¹ *Id.* at 1318.

⁶² *Id.* at 1307.

⁶³ Susan Low Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 GEO. L.J. 59, 60 n.4 (1987) (“The movement to deregulate communications began in the 1970s during the Carter Administration and ‘accelerated to a gallop’ with President Reagan’s election and subsequent appointment of Mark Fowler as FCC Chairman.” (citing JEREMY TUNSTALL, COMMUNICATIONS DEREGULATION: THE UNLEASHING OF AMERICA’S COMMUNICATIONS INDUSTRY 30 (1986)). Reagan’s deregulation efforts were not confined to the micro-policy level, but were part of a concerted effort to exert greater presidential control over regulatory agencies. See, e.g., James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 858–60 (2001) (explaining that while previous administrations had “attempt[ed] to expand presidential influence over . . . federal agencies,” no attempt was as drastic as President Reagan’s); see also Chad Raphael, *The FCC’s Broadcast News Distortion Rules: Regulation by Drooping Eyelid*, 6 COMM. L. & POL’Y 485, 501 (2001) (describing a sharp decline in the FCC’s findings of news distortion, particularly after 1982, “when the . . . FCC began to remove content regulations on broadcast news”).

⁶⁴ Charles G. Moerdler, *Deregulation—The United States Experience*, 6 HOFSTRA LAB. & EMP. L.J. 177, 177–78 (1989) (suggesting the deregulation movement began in academic circles in the late 1950s).

⁶⁵ See ZARKIN & ZARKIN, REGULATION WARS, *supra* note 57, at 6 (“Ultimately, however, new technological innovations combined with political pressure for policy change

Deregulation initiated by the FCC began in the 1950s with ruling on the use of two communications devices, the Hush-a-Phone and the Carterfone.⁶⁷

Both the Hush-a-Phone and the Carterfone devices challenged AT&T's long-imposed prohibition against foreign attachments to its telephone network.⁶⁸ Initially, the Commission refused to authorize the attachment of either device, relying on AT&T's ban on foreign attachments as their justification.⁶⁹ After the inventor of the Hush-a-Phone brought a suit contesting the decision, the Court of Appeals for the D.C. Circuit forced the Commission to allow connection of the device.⁷⁰ Following its experience with Hush-a-Phone, the FCC promised to examine AT&T's ban on network attachments more closely.⁷¹ The *Carterfone Decision*, which only prohibited the attachment of equipment that caused actual harm,⁷² opened up the telephone equipment market to non-AT&T owned companies for the first time.⁷³ This, in turn, sparked a burst of techno-

forced the FCC to fully confront the issue of competition by the end of the 1970s.”) See generally Andrew Downer Crain, *Ford, Carter, and Deregulation in the 1970s*, 5 J. TELECOMM. & HIGH TECH. L. 413, 415–37 (2007) (providing a comprehensive overview of President Ford's and President Carter's efforts to deregulate the transportation industry and noting the growing consensus at the time that both the industry and consumers would benefit from deregulation).

⁶⁶ See NAPOLI, *supra* note 21, at 265–66 (suggesting that prior to the Kennedy administration, regulatory bodies relied on “intuition and experience, as opposed to empirical analysis” and arguing that the rise of empirical analysis in regulatory agencies brought about a cost-benefit approach to the development of new regulations). President Reagan formally mandated a cost-benefit analysis of agency rulemaking through the President's Office of Management and Budget (“OMB”). David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1108–09 (2008).

⁶⁷ See ZARKIN & ZARKIN, REGULATION WARS, *supra* note 57, at 61.

⁶⁸ *Id.* at 61–62; see *In re Hush-A-Phone Corporation and Harry C. Tuttle, Complainants; American Telephone and Telegraph Company, et al., Defendants, Decision*, 20 F.C.C. 391, ¶¶ 1–2 (Dec. 21, 1955) [hereinafter *Hush-A-Phone Decision*]; *In re Use of the Carterfone Device in Message Toll Telephone Service; In re Thomas F. Carter and Carter Electronics Corp., Dallas, Tex. (Complainants), v. American Telephone and Telegraph Co., Associated Bell System Companies, Southwestern Bell Telephone Co., and General Telephone Co. of the Southwest (Defendants), Decision*, 13 F.C.C.2d 420, 420–21 (June 26, 1968) [hereinafter *Carterfone Decision*].

⁶⁹ ZARKIN & ZARKIN, REGULATION WARS, *supra* note 57, at 61–62 (explaining that with regard to the earlier *Hush-A-Phone Decision*, the FCC staff recognized that the device posed little threat to the network, but rather feared that one exception would lead to many changes, and with regard to the *Carterfone Decision* that the FCC staff acted under pressure from AT&T); see also *Hush-A-Phone Decision*, *supra* note 68, ¶¶ 1–3, 19; *Carterfone Decision*, *supra* note 68, at 420–23.

⁷⁰ See *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 268–69 (D.C. Cir. 1956).

⁷¹ Chen, *supra* note 31, at 844.

⁷² *Carterfone Decision*, *supra* note 68, at 423–24.

⁷³ See ZARKIN & ZARKIN, REGULATION WARS, *supra* note 57, at 62.

logical innovation⁷⁴ including a boom in computer processing and related services.⁷⁵

In response to the convergence of computer data processing services and traditional telecommunication services, the FCC instituted what would become known as *Computer Inquiries*.⁷⁶ These inquiries spanned several decades and generated numerous offspring, but resulted in three major decisions: *Computer I*, *Computer II*, and *Computer III*.⁷⁷ In its *Computer I* decision, the FCC issued two major rules.⁷⁸ First, the Commission found that since the market for data processing services was competitive, those services would not be subject to Title II common carrier regulation.⁷⁹ Second, the FCC encouraged traditional telephone service providers to enter the data processing services market, known as enhanced services, but only if they established a separate business entity with its own personnel and facilities.⁸⁰ The FCC believed that local tele-

⁷⁴ See H. James Nelson, *The Telecommunications Act of 1996: How It Failed, and How It Succeeded (But Not As Expected)*, 31 S. ILL. U. L.J. 1, 2 (2006) (noting the development of answering machines and computer modems as a result of the *Carterfone Decision*).

⁷⁵ See Kevin Werbach, *The Federal Computer Commission*, 84 N.C. L. REV. 1, 21 (2005) (arguing that the *Carterfone Decision* was the initial step by the FCC that “paved the way” for computer communications).

⁷⁶ *In re* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, *Notice of Inquiry*, 7 F.C.C.2d 11 ¶¶ 1–2 (Nov. 9, 1966) [hereinafter *Computer I Inquiry*]. The FCC called traditional telecommunications service “basic service,” which encompassed “the common carrier offering of transmission capacity for the movement of information” and defined “enhanced services” as “service combin[ing] basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.” *In re* Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384, ¶ 5 (Apr. 7, 1980) [hereinafter *Computer II Decision*]; see Harold, *supra* note 32, at 732; James B. Speta, *Deregulating Telecommunications in Internet Time*, 61 WASH. & LEE L. REV. 1063, 1083–84 (2004) [hereinafter Speta, *Internet Time*]; ZARKIN & ZARKIN, *REGULATION WARS*, *supra* note 57, at 69–72.

⁷⁷ Harold, *supra* note 32, at 732.

⁷⁸ See *In re* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, *Final Decision and Order*, 28 F.C.C.2d 267, 285–86 (Mar. 10, 1971) [hereinafter *Computer I Decision*].

⁷⁹ *Id.* ¶ 11; see *In re* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, *Tentative Decision*, 28 F.C.C.2d 290, ¶¶ 20–23 (Apr. 3, 1970) [hereinafter *Computer I Tentative Decision*]; see also Harold, *supra* note 32, at 733.

⁸⁰ *Computer I Decision*, *supra* note 78, ¶¶ 11–20; *Computer I Tentative Decision*, *supra* note 79, ¶ 36; see Herbert E. Marks, *The Computer Inquiry Trilogy*, in TELECOMMUNICATIONS: LAW, REGULATION, AND POLICY 187, 189 (Walt Saprnov & William H. Read, eds., 1998) (summarizing *Computer I* and noting it only applied to non-Bell System telephone companies, because under the terms of the 1956 Consent Decree that was in effect at the time, the Bell System was prohibited from offering non common carrier communication services).

phone companies would leverage their monopoly power to discriminate against rival providers of data services and increase rates for consumers.⁸¹ Thus, while local telecommunications providers could offer data processing services through separate affiliates, AT&T was prohibited from offering data processing services, even through an affiliate.⁸²

However, the distinction between data processing devices and traditional telecommunications service proved to be difficult to utilize and apply.⁸³ As data processing technologies and telephone services continued to merge throughout the 1970s and AT&T sought to expand its services offerings to include data processing,⁸⁴ the FCC initiated an inquiry in 1976 to reconsider the *Computer I* decision.⁸⁵ Four years later, the FCC released the *Computer II* decision.⁸⁶

Under *Computer II*, the Commission allowed the Bell System to operate in both the growing data telecommunications business and the landline telephone business, but only through the creation of a different business affiliate.⁸⁷ Non-Bell telephone service providers no longer needed to maintain separate business entities to offer data processing services.⁸⁸ Furthermore, the FCC redefined computer-based services that utilized a telecommunications connection as not subject to the common carrier regulatory system of Title II.⁸⁹ The Commission distinguished between basic service—regular phone service subject to Title II—and enhanced communications services—computer-based applications that utilize the common carrier network not subject to Title II.⁹⁰ The dis-

⁸¹ Philip J. Weiser, *The Next Frontier for Network Neutrality*, 60 ADMIN. L. REV. 273, 311 (2008) [hereinafter Weiser, *Next Frontier*]; see Harold, *supra* note 32, at 733.

⁸² See Weiser, *Next Frontier*, *supra* note 81, at 311.

⁸³ See Marks, *supra* note 80, at 190. The key distinction in the FCC's classification system was to determine if "the communications component predominates and the data processing component is incidental thereto," in which case, common carrier regulations applied, or if the "data processing component predominates and the communications component is incidental thereto," in which case the service is left unregulated. *Id.* at 189.

⁸⁴ *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Notice of Inquiry and Proposed Rulemaking*, 61 F.C.C.2d 103, ¶¶ 7–9 (July 29, 1976) [hereinafter *Computer II Inquiry*]; *Computer II Decision*, *supra* note 76, ¶¶ 19–24; see Marks, *supra* note 80, at 190.

⁸⁵ See *Computer II Inquiry*, *supra* note 84, ¶ 7; *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer Inquiry), *Supplemental Notice of Inquiry and Enlargement of Proposed Rulemaking*, 64 F.C.C.2d 771, ¶¶ 1–2 (Mar. 1, 1977).

⁸⁶ *Computer II Decision*, *supra* note 76, at 384.

⁸⁷ See *Computer II Decision*, *supra* note 76, ¶ 229; Marks, *supra* note 80, at 191; see also ZARKIN & ZARKIN, *REGULATION WARS*, *supra* note 57, at 70–71.

⁸⁸ Marks, *supra* note 80, at 191.

⁸⁹ Speta, *Internet Time*, *supra* note 76, at 1083.

⁹⁰ Marks, *supra* note 80, at 191. Enhanced communications services are defined as services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that [i] act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information;

inction allowed the FCC to encourage competition in the enhanced communications service market by mandating interconnection principles to prevent the local phone companies that controlled the networks from gaining a competitive advantage over enhanced service providers.⁹¹

While the *Computer Inquiries* were ongoing, the Court of Appeals for the D.C. Circuit overturned the FCC's decision to prohibit MCI from offering its Execunet service,⁹² a long-distance telephone service provided via microwave technology.⁹³ The court found that because "the FCC had never ruled in any formal proceeding that a monopoly in long distance telephony was in the public interest, it could not simply restrict competition without a more systematic justification."⁹⁴ The Commission discovered it could not justify its protection of AT&T's monopoly control over telephone service, setting the stage for the 1982 Modification of Final Judgment ("MFJ") that resulted in the FCC finally giving up the ghost of the natural monopoly regulatory protection.⁹⁵

[ii] provide the subscriber additional, different, or restructured information; or [iii] involve subscriber interaction with stored information.

47 C.F.R. § 64.702(a) (2008).

⁹¹ See Werbach, *Digital Tornado*, *supra* note 9, at 31–32; Harold, *supra* note 32, at 734. Accordingly, the *Computer II* regime has required all carriers owning common carrier transmission facilities and providing enhanced services to (1) "unbundle" the basic from the enhanced components of their services, and (2) offer the unbundled transmission capacity to other enhanced service providers on the same tariffed terms and conditions through which they provided that capacity to their own enhanced service operations.

Id. *Computer II* also mandated that common carrier service providers could not withhold technical specifications regarding interconnection from non-affiliated enhanced service providers. Marks, *supra* note 80, at 191.

⁹² *MCI Telecomm. Corp. v. FCC*, 561 F.2d 365, 367 (D.C. Cir. 1977); see also *MCI Telecomm. Corp. v. FCC*, 580 F.2d 590, 591 (D.C. Cir. 1978); Speta, *Thinkable Reform*, *supra* note 2, at 201 ("In the famous *Execunet* decisions, the D.C. Circuit forced the FCC to justify its restrictions on MCI's provision of basic long-distance services, which led, in due course, to the opening of those markets."); Speta, *Internet Time*, *supra* note 76, at 1085–86.

At issue was MCI's attempt to provide regular long-distance services by combining certain retail services it purchased from AT&T with its own long-distance networks. . . . But after MCI demonstrated that it was technically feasible, the courts forced the agency to supply a *reason*—and, importantly, a reason grounded in economics—that MCI should not then have been permitted to provide these services."

Id.

⁹³ *MCI Telecomm. Corp.*, 561 F.2d at 367–68 & n.3; see ZARKIN & ZARKIN, *REGULATION WARS*, *supra* note 57, at 64.

⁹⁴ ZARKIN & ZARKIN, *REGULATION WARS*, *supra* note 57, at 64.; see *MCI Telecomm. Corp.*, 561 F.2d at 379–80; see also Byrnes, *Something New*, *supra* note 27, at 40 ("Bell was unable to respond to MCI's challenge by citing any authority for its claim of a *de jure* interstate monopoly.")

⁹⁵ Marks, *supra* note 80, at 191 (noting that the FCC "ignored the limitations of the 1956 Consent Decree" which prohibited AT&T from providing certain services, and "[t]he FCC clearly contemplated that the Bell System would offer unregulated CPE and enhanced

The MFJ, which broke up AT&T into a long-distance service provider and seven Regional Bell Operating Companies (“RBOCs”) responsible for local telephone service, was the death knell of the previous regulatory philosophy of common carriers.⁹⁶ The RBOCs were prohibited from offering information services or long distance services and were also forced to provide access to their networks without discrimination.⁹⁷ The restrictions were imposed on the RBOCs because they “possess[ed] bottleneck control over the local exchange facilities, and these are the facilities upon which competitive information providers, like the Regional Companies’ competitors in the interexchange and the manufacturing markets, depend.”⁹⁸ Ironically, the same rationale of “productive efficiency” that led the federal government to sanction AT&T’s natural monopoly for fifty years was used to justify its breakup.⁹⁹ While AT&T was being dismantled, the nascent cable television industry continued to expand, garnering increased regulatory attention.¹⁰⁰ However, before turning its focus on the cable television industry, the FCC had to determine how the MFJ affected the *Computer Inquiry* rules applied to the newly divested AT&T and the RBOCs.

In 1985, the Commission began the *Computer III* inquiry.¹⁰¹ In the proposed rules, the FCC determined that if RBOCs complied with an Open Network

services.”). The tension between the Commission’s action and the 1956 Consent Decree became moot with the 1982 MFJ. *See id.* at 191–92.

⁹⁶ See Robert B. Friedrich, *Regulatory and Antitrust Implications of Emerging Competition in Local Access Telecommunications: How Congress and the FCC Can Encourage Competition and Technological Progress in Telecommunications*, 80 CORNELL L. REV. 646, 658–59 (1995) (describing the MFJ as “accomplish[ing] precisely what [earlier efforts] had failed to do—impose structural changes in the Bell System that impaired AT&T’s ability to stifle competition”).

⁹⁷ *United States v. AT&T Co.*, 552 F. Supp. 131, 227–28 (1982); see Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 123, 137 (1996) (explaining under the logic of the MFJ, “AT&T’s power came from the [Local Exchange Carriers/R]BOCs; now that the [R]BOCs were divorced from AT&T, AT&T could not find its old predatory tactics profitable, but the [R]BOCs might adopt those tactics for the same reasons (and with the same successes) as had AT&T.”).

⁹⁸ *United States v. W. Elec. Co.*, 673 F. Supp. 525, 564 (D.D.C. 1987); see also Krattenmaker, *supra* note 97, at 137.

The consent decree (or modification of final judgment or “MFJ”) rested on the premise that the Bell System had used the power of its monopoly local exchange carriers (“LECs”) to gain power in markets that could have been competitive, such as providing long distance services or manufacturing phones, switches, and wires.

Id. (citations omitted).

⁹⁹ See Nelson, *supra* note 74, at 2.

¹⁰⁰ See ZARKIN & ZARKIN, *REGULATION WARS*, *supra* note 57, at 65–66, 87–91 (discussing the fall of AT&T and the rise of cable and the early regulations on it).

¹⁰¹ *In re* Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry), *Notice of Proposed Rulemaking*, 50 Fed. Reg. 33,581 (Aug. 20, 1985).

Architecture¹⁰² and comparably efficient interconnection standards, they could offer information services.¹⁰³ The Commission retains the distinction between information services and basic telephone service today.¹⁰⁴

As cable television technology rolled out in the 1970s, the general consensus considered the service a natural monopoly, prompting regulators and legislators to attempt to shoehorn it into the existing common carrier regulatory structure.¹⁰⁵ In 1970, the Commission determined that telephone service providers were prohibited from offering video services.¹⁰⁶ The Cable Communications Policy Act of 1984 (“Cable Act of 1984”) continued this ban on local phone companies providing video service and allowed the FCC to preempt regulations imposed by local franchising authorities if the cable television operator faced “effective competition.”¹⁰⁷ Under this law, however, cable companies often became de facto monopolies with exclusive franchise agreements to provide video service in a particular market.¹⁰⁸ Despite having control over the franchise agreements, the local franchising authorities were limited in their regulatory powers by the Cable Act of 1984.¹⁰⁹ This lack of local authority and

¹⁰² “Open Network Architecture is supposed to unbundle the various features available over telephone lines, in theory providing independent information service providers with more complete information about network features and allowing them to pick and choose the specific features they need.” *United States v. W. Elec. Co.*, 767 F. Supp. 308, 319 (D.D.C. 1991).

¹⁰³ Harold, *supra* note 32, at 733 n.53 (citing *In re* Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof; Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations, *Report and Order*, 104 F.C.C.2d 958 (May 15, 1986)).

¹⁰⁴ *See Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 975–77 (2005) (describing the distinction between telecommunications service, the “analog to basic service,” and information services); *see also* 47 U.S.C. § 151(20), (46) (2000).

¹⁰⁵ *See Speta, Internet Time, supra* note 76, at 1089; *see also* Jonathan E. Samon, Comment, *When “Yes” Means No: The Subjugation of Competition and Consumer Choice by Exclusive Municipal Cable Franchises*, 34 SETON HALL L. REV. 747, 747–48 (2004).

¹⁰⁶ *See Speta, Internet Time, supra* note 76, at 1090 (*In re* Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, *Memorandum Opinion and Order*, 22 F.C.C.2d 746, 752 (Apr. 22, 1970)).

¹⁰⁷ Cable Communications Policy Act of 1984, Pub. L. No. 98-549 sec. 2, § 623, 98 Stat. 2779, 2788 (codified at 47 U.S.C. § 543).

¹⁰⁸ *See Speta, Internet Time, supra* note 76, at 1089–90.

¹⁰⁹ *See id.* (noting that local franchising authorities had limited ability to deny a cable operator’s request for renewal and that the Cable Act of 1984 established a ceiling of five percent of a cable operator’s revenues for the local franchise fee); CONSUMER FEDERATION OF AMERICA & CONSUMERS UNION, LESSONS FROM 1996 TELECOMMUNICATIONS ACT: DEREGULATION BEFORE MEANINGFUL COMPETITION SPELLS CONSUMER DISASTER 8 (2000) [hereinafter CONSUMER DISASTER] (noting that the Cable Act of 1984 abolished the ability of local authorities to impose customer price increase caps).

the monopolistic power of the cable operators led to rising cable prices¹¹⁰ and consumer complaints.¹¹¹

In response to growing complaints and lack of competition, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”).¹¹² The legislation sought to foster more competition in the cable industry¹¹³ and achieve a greater diversity of viewpoints,¹¹⁴ while subjecting basic cable services to enhanced regulation by the FCC, state governments, and local municipalities.¹¹⁵ The 1992 Cable Act continued the prohibition of rate regulation if the cable system had effective competition, but provided additional tests to determine whether or not effective competition was present in a given market.¹¹⁶ Additionally, the 1992 Cable Act prohibited exclusive franchise agreements in order to prevent cable companies from exercising monopoly power.¹¹⁷ This began the deregulatory trend that continued with the 1996 Telecommunications Act.

C. The 1996 Telecommunications Act and the Internet Age

The passage of the Telecommunications Act of 1996 (“1996 Telecom Act”)

¹¹⁰ CONSUMER DISASTER, *supra* note 109, at 8 (“Once rates were completely deregulated they sky rocketed. Between 1986 and 1993, cable rates increased by 71 percent, approximately 2.5 times the rate of inflation.”).

¹¹¹ Johnson, *supra* note 49, at 127–28 & n.240 (“The cross-ownership restrictions and the practice of granting exclusive franchise licenses effectively left the cable industry without competition, much in the same way as the telephone industry. Left unregulated and without competition, the cable industry eventually employed some of the same anti-competitive practices that the telephone companies used.”).

¹¹² See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a), 106 Stat. 1460, 1460–63 (1992) (codified as amended in scattered sections of 47 U.S.C.).

¹¹³ *Id.* § 2(b)(1), (2), (4); see Cooper & Koukoutchos, *supra* note 24, at 365 (“The 1992 Cable Act amendments were intended to remove the barriers to entry into the MVPD market, but, as the market-concentration statistics . . . reveal, that legislation has yet to generate much improvement.”).

¹¹⁴ *In re* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management,” *Memorandum Opinion and Order*, 23 F.C.C.R. 13,028, ¶ 21 (Aug. 1, 2008) [hereinafter *Comcast Order*] (“Indeed, in amending Title VI, Congress recognized the substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.”)

¹¹⁵ See Robert W. Crandall, J. Gregory Sidak & Hal J. Singer, *Does Video Delivered Over a Telephone Network Require A Cable Franchise*, 59 FED. COMM. L.J. 251, 272 (2007).

¹¹⁶ See Alexander C. Larson, *An Economic Guide to Competitive Standards in Telecommunications Regulation*, 1 COMMLAW CONSPECTUS 31, 42 (1993).

¹¹⁷ Crandall, Sidak & Singer, *supra* note 115, at 272.

marked the first substantial update of the country's communications policy in sixty years.¹¹⁸ Congress's intent in passing the 1996 Telecom Act was to put in place a regulatory structure that shifted away from the viewpoint of communications as a natural monopoly market to a view of market-based competition and deregulation.¹¹⁹ This altered the regulatory scheme that had been in operation since the nineteenth century.¹²⁰ Specifically, Congress wanted to encourage RBOCs and long-distance telephone service providers to compete against one another.¹²¹ In this respect, the 1996 Telecom Act codified the ruling in *United States v. Western Electric Company, Inc.*, where Judge Greene of the District Court for the D.C. Circuit reluctantly removed the restriction preventing the RBOCs from engaging in the information services business.¹²² Furthermore, the 1996 Telecom Act marked the formal legislative embrace of the principle of regulatory forbearance.¹²³ Regarding cable television, the 1996 Telecom Act removed the restrictions on local telephone companies from providing video services and implemented a sunset provision on cable television rate regulation with the exception of the basic tier of channels.¹²⁴ With broadcast media, the 1996 Telecom Act repealed the cross-ownership rules between telephone and cable providers as well as those between cable providers and broadcasters.¹²⁵ It also removed the remaining regulatory limits on cross ownership between cable systems and network broadcast stations and increased the percentage of

¹¹⁸ Daniel E. Troy, *Advice to the New President on the FCC and Communications Policy*, 24 HARV. J.L. & PUB. POL'Y 503, 503 (2001).

¹¹⁹ See JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 69–71 (2005). Congress withdrew approval of the RBOC's monopolies through the 1996 Telecom Act, which “fundamentally restructure[d] local telephone markets” and “subject[ed] [RBOCs] to a host of duties intended to facilitate market entry.” *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

¹²⁰ *AT&T Corp.*, 525 U.S. at 402 (Thomas, J., dissenting) (“Since Alexander Graham Bell invented the telephone in 1876, the States have been, for all practical purposes, exclusively responsible for regulating intrastate telephone service. . . . [T]he Telecommunications Act of 1996 altered that more than century-old tradition . . .”).

¹²¹ Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications under Judge Greene*, 50 HASTINGS L.J. 1395, 1457–59 (1999).

¹²² *United States v. W. Elec. Co.*, 767 F. Supp. 308, 333 (D.D.C. 1991).

¹²³ See ZARKIN & ZARKIN, REGULATION WARS, *supra* note 57, at 9 (noting that section 10 of the 1996 Telecom Act “specifies that the FCC shall forebear from applying any regulation or any provision of this Act if it determines that it is not necessary to ensure that the charges and practices of telecommunications carriers are just and reasonable, protect consumers, or otherwise serve the public interest.”).

¹²⁴ 47 U.S.C. § 543(c)(4), 571; Crandall, Sidak & Singer, *supra* note 115, at 274.

¹²⁵ *Fox Television Stations v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. Feb. 9, 2002); *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 202(i), 302(b)(1), 110 Stat. 56, 12, 118.

households an individual broadcaster can reach with its programming.¹²⁶

Criticism of the 1996 Telecom Act was almost immediate.¹²⁷ New market entrants needed a base level of competition in the market to help overcome incumbent providers' monopolistic market power.¹²⁸ The industry argued that service providers did not have an opportunity to bring offerings in the new deregulated market before litigation ensued and that the FCC began to implement the 1996 Telecom Act in a way that ran counter to the policy of promoting competition at the heart of the 1996 Telecom Act.¹²⁹ Furthermore, while the Internet had made its commercial entry into the American marketplace by 1996, the drafters of the legislation did not foresee the massive upheaval and restructuring of the telecommunications marketplace that would soon ensue with the wide scale adoption and use of the Internet.¹³⁰ Due to this lack of foresight regarding the Internet, the Commission and its outdated regulatory model struggles to address the converged nature of the communications industry today.¹³¹ The Commission's decision-making regarding Voice over Internet Protocol ("VoIP") services¹³² provides the best example of the Commission's dif-

¹²⁶ *Fox Television Stations*, 280 F.3d at 1033; Telecommunications Act of 1996, § 202(c)(1)(B), (f)(1).

¹²⁷ *E.g.*, Mark Landler, *After a Year of Law, Scant Competition*, N.Y. TIMES, Dec. 23, 1996, at D1 ("Since the Telecommunications Act of 1996 became law, the cable television industry has largely abandoned its foray into the telephone business. The regional phone companies have shelved their efforts to get into television. And the three big long-distance carriers have put through their steepest rate increases in several years.").

¹²⁸ *See* CONSUMER DISASTER, *supra* note 109, at 1–2; George S. Ford & Lawrence J. Spiwak, *Set It and Forget It? Market Power and the Consequences of Premature Deregulation in Telecommunications Markets*, 1 N.Y.U. J. L. & BUS. 675, 676–80 (2005) ("[D]eregulation is appropriate only when competitive entry is sufficient to substantially attenuate the exercise of market power by incumbent firms."). *But see* Byrnes, *Something New*, *supra* note 27, at 103 (arguing that the short term effect of the deregulation is insignificant as compared to the long term lasting effects).

¹²⁹ Seth Schiesel, *All Too Soon, New F.C.C. Chief Finds Warm Welcome is Cooling*, N.Y. TIMES, Mar. 23, 1998, at D1 ("The telecom act never made it to the consumer. . . . [It] went from an agreement by the industry participants, to national legislation, to regulation to litigation. And never once did it stop off in the market to get tested." (quoting Michael Armstrong, AT&T's former chairman)). Furthermore, Rep. John Dingell, from Michigan, stated, "The implementation of the 1996 Telecommunications Act is a shambles. . . . The commission has chosen to not only perpetuate but actually increase bureaucracy in virtually every area the Congress had intended to eliminate it." *Id.*

¹³⁰ *See* NUCHESTERLEIN & WEISER, *supra* note 119, at 69. In fact, Congress directed the FCC to adopt a hands-off approach regarding regulation of the Internet; *see* Duffy, *supra* note 35, at 1072 ("[A] policy barring the Commission from assuming substantial regulatory control over the internet was included in the Telecommunications Act of 1996 . . .").

¹³¹ Roberts, *supra* note 3, at 149 ("Indeed, since the 1996 Act was developed by House and Senate committees in 1994 and 1995, it almost completely failed to anticipate the Internet and the impact that Internet-based telecommunications services would have on this complex web of technological and industrial development.").

¹³² According to the FCC, VoIP is a "technology that allows you to make voice calls

difficulties with addressing a new technology that does not fit the existing regulatory paradigm.

The FCC's regulatory actions regarding VoIP have been marked by a sense of concern that the roots of its regulatory structure are indeed being threatened.¹³³ Trying to fit technologies like VoIP into the traditional regulatory structures—Title I or Title II—has numerous policy implications. For instance, VoIP providers have a possible cost advantage depending on whether the service is classified as an Internet information service regulated at the national level or as a telecommunications service regulated by state and local governments.¹³⁴

After initiating a rulemaking in 2004 to determine if interconnected VoIP services would fall under Title II's common carrier regulatory structure or Title I's ancillary jurisdiction structure,¹³⁵ the FCC has since preempted state regulation of interconnected VoIP¹³⁶ and subjected interconnected VoIP providers to the E911 rules,¹³⁷ the Communications Assistance for Law Enforcement Act,¹³⁸ contribution to the Universal Service Fund,¹³⁹ relay services for individuals

using a broadband Internet connection instead of a regular (or analog) phone line.” FCC, Voice over Internet Protocol, <http://www.fcc.gov/voip/> (last visited Mar. 24, 2009).

¹³³ See Tritt, *supra* note 21, at 153–54 (describing the disjointed regulatory approach the FCC has taken with VoIP, imposing some Title II requirements of traditional common carriers, but not others).

¹³⁴ Speta, *Internet Time*, *supra* note 76, at 1141–48 (using VoIP service as a case study for the challenges to the existing regulatory framework that new communications services pose for the FCC).

¹³⁵ See *In re IP-Enabled Services*, *Notice of Proposed Rulemaking*, 19 F.C.C.R. 4863, ¶¶ 23–27, 43 (Feb. 12, 2004).

¹³⁶ See *In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, *Memorandum Opinion and Order*, 19 F.C.C.R. 22,404, ¶ 1 (Nov. 9, 2004). Interconnected VoIP providers are those with “the ability of the end user generally to receive calls from and terminate calls to the public switched telephone network . . . including commercial mobile radio service . . . networks.” *In re IP-Enabled Services*; E911 Requirements for IP-Enabled Service Providers, *First Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 10,245, ¶ 1 (May 19, 2005) [hereinafter *VoIP E911 Order*].

¹³⁷ *VoIP E911 Order*, *supra* note 136, ¶ 1.

¹³⁸ *In re Communications Assistance for Law Enforcement Act and Broadband Access and Services*, *First Report and Order and Further Notice of Proposed Rulemaking*, 20 F.C.C.R. 14,989, ¶ 1 (Aug. 5, 2005).

¹³⁹ *In re Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review—Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format; IP-Enabled Services*, *Report and Order and Notice of*

with disabilities,¹⁴⁰ and yearly regulatory fees.¹⁴¹ The FCC's continued refusal to classify interconnected VoIP as a telecommunications service or an information service illustrates that the Commission's existing regulatory frameworks fail to address communications technology today. With a basic understanding of the history of the regulatory scheme governing the communications industry, the current market structure and regulatory model can be examined.

III. THE FCC IN 2009: STRUCTURE AND REGULATORY MODELS

A. Current Structure

The FCC's regulatory jurisdiction remains guided by the 1934 Act. Under Title II of the 1934 Act, the FCC regulates common carriers, primarily traditional landline telephone service and to a lesser extent wireless services.¹⁴² Under Title III of the 1934 Act, the FCC has regulatory jurisdiction over radio and wireless services, including radio, television, and satellite operators.¹⁴³ Finally, under Title VI, the FCC has regulatory authority over cable television.¹⁴⁴

Additionally, under Title I of the 1934 Act, the FCC has ancillary jurisdiction over information services, including cable modem service and Digital Subscriber Line ("DSL") service.¹⁴⁵ Ancillary jurisdiction entered the FCC

Proposed Rulemaking, 21 F.C.C.R. 7518, ¶ 2 (June 21, 2006).

¹⁴⁰ *In re* IP-Enabled Services; Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements, *Report and Order*, 20 F.C.C.R. 11,275, ¶ 1 (May 31, 2007).

¹⁴¹ *In re* Assessment and Collection of Regulatory Fees for Fiscal Year 2007, *Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 15,712, ¶ 2 (Aug. 2, 2007).

¹⁴² See 47 U.S.C. §§ 151, 201 (2000).

¹⁴³ 47 U.S.C. §§ 301–03; see also ZARKIN & ZARKIN, *REGULATION WARS*, *supra* note 57, at 13.

¹⁴⁴ See 47 U.S.C. § 521.

¹⁴⁵ *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 977–78, 1000 (2005) (upholding the FCC's decision to classify cable modem service as an information service thereby shifting it from a regulated common carrier service under Title II, to a largely unregulated service under Title I); see *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for De-

lexicon in 1968 when Midwest Television, a cable television provider, unsuccessfully challenged the FCC's authority to regulate cable television.¹⁴⁶ Holding that the Commission had sufficient authority under Title I, the Supreme Court rationalized that the FCC's authority is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."¹⁴⁷

The FCC organized itself around different sectors and technologies of the telecommunications industry, and the differences in these disparate sectors and technologies often led to different forms of regulation.¹⁴⁸ Section 5 of the 1934 Act created a structure of bureaus that reflected the FCC's "principle work load operations."¹⁴⁹ Until 1949, the FCC organized itself by profession: accountants, engineers, and lawyers each had their own separate offices.¹⁵⁰ Because those professional offices examined policy issues differently, the Commission found it difficult to reach a consensus internally, and decided to reorganize staff into bureaus that are today delineated by the major sectors of the communications industry.¹⁵¹ The FCC's bureau system in 2009 largely reflects this sector-based idea of regulation,¹⁵² with the International, Media (broadcast), Wireless Telecommunications, Homeland Security, and Wireline Competition (traditional common carrier) Bureaus.¹⁵³

claratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era, *Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 14,853, ¶ 5 (Aug. 5, 2005) (reclassifying "facilities-based wireline broadband Internet access service" as "information service").

¹⁴⁶ *United States v. Sw. Cable Co.*, 392 U.S. 157, 159–61 (1968).

¹⁴⁷ *See id.* at 178.

¹⁴⁸ *See* ZARKIN & ZARKIN, REGULATION WARS, *supra* note 57, at xv (noting that even at the formation of the FCC, the communications industry was not a "single, unified industry, but rather a series of 'niches' organized around different technologies," each necessitating different regulatory schemes); *see* NAPOLI, *supra* note 21, at 1–2 (discussing the regulation of communications in the United States as "technologically particularistic," meaning that regulators devise policy on a particular technology's characteristics).

¹⁴⁹ ZARKIN & ZARKIN, *supra* note 57, at 9.

¹⁵⁰ *Id.* at 31.

¹⁵¹ *Id.* For instance, the Wireline Competition Bureau oversees the traditional landline telephone services, while the Media Bureau oversees the broadcast industry. Wireline Competition Bureau, <http://www.fcc.gov/web/> (last visited Apr. 8, 2009); Media Bureau, <http://www.fcc.gov/mb/> (last visited Apr. 8, 2009).

¹⁵² ZARKIN & ZARKIN, *supra* note 57, at 31 ("A major component of the bureau system of organization today is the maintenance of a bureau for each main sector of the telecommunications industry.").

¹⁵³ FCC, <http://www.fcc.gov> (last visited Jan. 15, 2009). The Commission has other, non-sector based bureaus as well, including Consumer & Governmental Affairs, Enforcement, and Public Safety & Homeland Security. Congress has made periodic efforts to force a reorganization of the FCC. *See, e.g.*, FCC Reorganization Act, H.R. 2982, 109th Cong. §§ 2, 3 (2005) (directing the FCC to establish the following bureaus: Spectrum Management,

B. The Importance of Regulatory Models and Public Policies

As digital convergence continues to accelerate, understanding the need for FCC reform requires an analysis of the regulatory models utilized by the Commission. The impact of these regulatory models as they apply to specific technologies is made clear by Kevin Werbach, who wrote in the context of the debate of the Communications Decency Act, “[b]ecause telephone carriers are generally not legally responsible for the content routed over their networks, but broadcasters may be subject to fines for transmitting inappropriate material, the choice of analogy can predetermine the legal outcome.”¹⁵⁴ In other words, the classification of a communications service into a particular regulatory model dictates the obligations and regulations a given service provider will face: from the broadcast model’s localism and diversity requirements to the common carrier model’s interconnection requirements. Furthermore, those stakeholders who seek to influence the Commission’s decision-making frame their desired outcomes under the policy justifications of the FCC’s regulatory models.¹⁵⁵

The theory underlying the Commission’s regulatory models has been an exchange between the FCC and the particular industry sectors: what can the Commission receive in return for granting monopoly status (telephone, satellite, telegraph), allowing licensees to use the public airwaves and spectrum (broadcast radio and television),¹⁵⁶ or allowing services with a sufficient impact on the Commission’s statutory jurisdiction (cable television). From this regulatory exchange, different policy goals emerged that the FCC was able to extract: localism; diversity and competition; and universal service, interconnection, and

Government Affairs and Consumer Education, Economic Regulations, Public Interest, Broadcast Content, Licensing, Enforcement, and International).

¹⁵⁴ Werbach, *supra* note 9, at 13.

¹⁵⁵ NAPOLI, *supra* note 21, at 250 (“Thus, each stakeholder in the process typically attempts to cloak its interests in the guise of the broader public interest (and its subcomponents). As a result, the foundation principles are used to justify a range of different, and possibly contradictory, policy options and strategies.”).

¹⁵⁶ Hirrel, *supra* note 53, at 124 (arguing that the FCC originally was “expected to, and did, balance private interests solely against the public interest” compared to today, where “we think of the FCC largely as an arbiter of competing private interests.”). This conceptual shift is indicative of the FCC’s embrace of deregulation and competition in the marketplace. *Contra* Byrnes, *Something New*, *supra* note 27, at 36 (arguing that “[t]he notion that the regulatory scheme was merely a price paid in exchange for grant of monopoly status was historically false” since “[t]he regulatory scheme was initially adopted with respect to other industries in which there was substantially more competition than in the Vail era of telephone monopoly.”). While this may be true, by 1910, Theodore Vail, then chairman of AT&T, said, “If there is to be state control and regulation, there should also be state protection—protection to a corporation striving to serve the whole community . . . from aggressive competition which covers only that part which is profitable.” GERALD W. BROCK, *THE TELECOMMUNICATIONS INDUSTRY: THE DYNAMICS OF MARKET STRUCTURE* 103, 159 (1981).

rate regulation.¹⁵⁷ This exchange is still present in the FCC's operations today, even as the Commission's stated goals are now deregulation and competition, and the FCC no longer grants protection of natural monopolies. The specific regulatory models are described in turn below.

C. The Commission's Regulatory Models

The FCC currently uses five regulatory models: (1) the no-regulation model for print medium; (2) the common carrier model for telegraph and telephone services, and to some extent wireless voice services;¹⁵⁸ (3) the public trustee model for broadcast services, including radio and television; (4) the cable model for cable television, which is a combination of the common carrier and public trustee models;¹⁵⁹ and (5) the Internet and information services model.¹⁶⁰

1. No-Regulation Model

The Commission does not regulate the newspaper industry; any such attempts would most likely be struck down as violative of the First Amendment's guarantee of freedom of the press.¹⁶¹ One commentator noted, "the print media enjoys almost complete freedom from government regulation. A privately owned newspaper can 'advance its own political, social, and economic views' as long as it has the economic support of advertisers to enable it to continue operation and 'the journalistic integrity of its editors and publishers.'"¹⁶² Most modes of the distribution of information, however, are subject to FCC

¹⁵⁷ NAPOLI, *supra* note 21, at 22.

¹⁵⁸ The Commission considers Commercial Mobile Radio Service ("CMRS") providers to be common carriers and, accordingly, imposes some aspects of Title II's common carrier regulations on the wireless service providers. 47 U.S.C. § 332(c)(1) (2000).

¹⁵⁹ NAPOLI, *supra* note 21, at 2 (citing P.M. GARRY, SCRAMBLING FOR PROTECTION: THE NEW MEDIA AND THE FIRST AMENDMENT (1994)).

¹⁶⁰ See NAPOLI, *supra* note 21, at 2; ESBIN, SCALPEL OR STEAMROLLER, *supra* note 21, at 5.

¹⁶¹ See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating a state statute that required newspapers to provide the opportunity for public officials to respond to personal attacks on the grounds that it was violative of the First Amendment; John W. Berresford, *The Future of the FCC: Promote Competition, Then Relax*, 50 ADMIN. L. REV. 731, 751 (1998) (noting that "[u]nder different rationales over the years, the Commission has imposed requirements that, if imposed by Congress on books and newspapers, would be laughed out of any court as an unconstitutional restraint on Freedom of the Press.").

¹⁶² Aarons, *supra* note 38, at 327 (quoting *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973); see also Krattenmaker, *supra* note 97, at 124 ("No other medium of communication in this country is regulated in this fashion [like the telecommunications industry]; we have no Federal Computer Commission or Federal Newspaper Commission, no Federal Internet Agency or National Institute of Theatrical Productions.").

oversight, so long as they are transmitted electronically over wire or through the airwaves.¹⁶³

2. *Common Carrier Regulatory Model*

The need for interconnection and non-discrimination in the telephone network led to the regulation of service price points and the encouragement of widespread deployment.¹⁶⁴ As AT&T became a monopolist in the provision of telephone service,¹⁶⁵ protection of its natural monopoly in the name of the public interest became the justification for the regulatory model.¹⁶⁶ The common carrier regulatory framework took shape in the form of: (a) price controls;¹⁶⁷ (b) interconnection requirements;¹⁶⁸ (c) prohibition against provider control of the content of the communications;¹⁶⁹ and (d) regulation of entry and exit from the interstate communications market.¹⁷⁰ The underlying goal of this framework was to achieve universal access to telecommunications; a goal that previously was achieved through cross subsidization by AT&T, and is now largely sustained through subsidies provided through the Universal Service Fund.¹⁷¹ This

¹⁶³ See 47 U.S.C. § 201 (2000).

¹⁶⁴ See Roberts, *supra* note 3, at 152.

¹⁶⁵ See *id.* at 150 n.28 (“In sum, the Bell System served over 80% of U.S. telephone customers.”)

¹⁶⁶ See LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 776 (2000).

AT&T’s case against divestiture was straightforward: true, AT&T is not faced with rivalry as a telephone carrier because its markets are natural monopolies. Scale economies limit entry; there are no artificial barriers. . . . Antitrust intervention would be not just superfluous but disruptive. The real test of the public interest is service quality and customer satisfaction. The U.S. has both the best and the least expensive phone service in the world.

Id.

¹⁶⁷ See 47 U.S.C. §§ 201–09.

¹⁶⁸ The 1934 Act “did not . . . mandate broad rights of interconnection (even though that issue had been at the center of the government’s first of three major antitrust actions against AT&T during the [twentieth] century.” Harold, *supra* note 32, at 731. However, the 1996 Telecom Act added this obligation for common carriers. 47 U.S.C. § 251.

¹⁶⁹ See Harold, *supra* note 32, at 730–31 (noting that a common feature shared by telephone systems and railroads was the perception of those networks as mere “passive carriers of traffic” that were “neutral conduit[s] to all users”; accordingly the telephone and railroad networks were prohibited from discrimination regarding the content traveling over the networks).

¹⁷⁰ Joseph D. Kearney, *Will the FCC Go the Way of the ICC?*, 71 U. COLO. L. REV. 1153, 1170–71 (2000) [hereinafter Kearney, *FCC Go the Way*] (noting that the Commission has statutory authority to regulate entry and exit from the interstate communications market, but the FCC has chosen not to exercise that power in any meaningful way since the *Execunet* decision).

¹⁷¹ See *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (explaining that the FCC was originally created to make available telecommunications services to all

model is still imposed on traditional wireline telephone companies as well as on wireless providers, save for price controls.

3. *Spectrum Scarcity and Public Trustee Regulatory Model*

The broadcasters' use of the publicly owned spectrum, the scarcity of spectrum, the potential for interference, and the ubiquitous nature of the broadcast medium, justified its regulation.¹⁷² The public trustee regulatory model had two main functions governed by the public interest standard. First, spectrum scarcity and the public trust of using public airwaves for private gain prompted regulations seeking to encourage diversity and localism on the airwaves, while also requiring spectrum licensing to control interference.¹⁷³ In addition, concerns about larger corporations having control over many broadcast channels prompted the first multiple-ownership rules.¹⁷⁴ Second, the ubiquitous and intrusive nature of broadcast radio and television prompted the regulation of broadcast programming content.¹⁷⁵

In summary, the FCC regulates broadcast television and radio with rationales ranging from public trustee obligations, spectrum scarcity concerns, and the intrusive and ubiquitous nature of the broadcast medium. Through the public trustee model of free exclusive use of spectrum in exchange for broadcasting obligations, the FCC imposes public interest obligations on broadcasters, encourages diversity to foster a marketplace of ideas, and promotes localism through broadcasts that serve the needs and wants of the local community.¹⁷⁶ From the spectrum scarcity justification, the FCC imposes its licensing structure on the public airwaves and manages spectrum allocation and assignment.¹⁷⁷ From the perspective of broadcasting's inherent intrusiveness, the FCC

areas of the country at reasonable rates); Kearney, *FCC Go the Way*, *supra* note 170, at 1178–79 (discussing the role of cross-subsidies in achieving the goal of universal service); 47 U.S.C. § 254 (mandating the creation of the Universal Service Fund).

¹⁷² Read & Weiner, *supra* note 2, at 294–95; see Harold, *supra* note 32, at 737.

It is hard to overstate the importance of the broadcast model—the notion of a provider who chooses what content it transmits over its own facility to a passive audience The FCC . . . distinguished between cable operators, who determined the signals they offered to the public, from common carriers who had no control over the intelligence they transmitted.

Id.; see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375–77 (1969) (noting the scarcity and the potential for interference in broadcast frequencies).

¹⁷³ See Johnson, *supra* note 49, at 90, 95–96.

¹⁷⁴ See Stephen R. Barnett, *Cable Television and Media Concentration, Part I: Control of Cable Systems by Local Broadcasters*, 22 STAN. L. REV. 221, 251–52 (1970).

¹⁷⁵ *FCC v. Pacifica Found.*, 438 U.S. 726, 748–50 (1978).

¹⁷⁶ See NAPOLI, *supra* note 21, at 22 & fig.2.1, 24–27.

¹⁷⁷ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375–377, 388 (1969); see also *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 & n.11 (1984).

justifies its content regulation of obscene and indecent broadcasts through television and radio.¹⁷⁸

4. *Hybrid of the Common Carrier and Public Trustee Regulatory Model*

The hybrid model is best exemplified through the regulation of the cable television industry. Originally, the Commission appeared to not have the necessary jurisdiction to regulate the cable industry because it did not use spectrum as its means of transmission and was not a common carrier.¹⁷⁹ Nonetheless, the Commission justified regulation of cable television based on its ancillary jurisdiction in Title I—the regulation of cable television was ancillary to broadcast regulation.¹⁸⁰ The Supreme Court ultimately upheld the FCC’s jurisdiction over cable based on its Title I ancillary jurisdiction.¹⁸¹ The regulation of the cable industry mixed the price setting aspect¹⁸² and local control aspect of the common carrier regulatory model with the diversity public policy goal¹⁸³ and content regulation of the public trustee regulatory model.¹⁸⁴

5. *Internet and Information Services Regulatory Model*

Faced with technology utilizing Internet Protocol (“IP”), which allows transmission of content over a variety of networks and devices,¹⁸⁵ the FCC has continuously deferred the question of whether its regulatory models are outdated; instead, the Commission has determined that IP-based broadband services are subject to its Title I ancillary jurisdiction.¹⁸⁶ In doing so, the Commission has

¹⁷⁸ John C. Quale & Malcolm J. Tuesley, *Space, The Final Frontier—Expanding FCC Regulation of Indecent Content onto Direct Broadcast Satellite*, 60 FED. COMM. L.J. 37, 38 (2007).

¹⁷⁹ See *United States v. Sw. Cable Co.*, 392 U.S. 157, 164 (1968); Quale & Tuesley, *supra* note 178, at 38 & n.2 (noting that cable companies do use spectrum, but not to deliver content to subscribers).

¹⁸⁰ *Sw. Cable Co.*, 392 U.S. at 178.

¹⁸¹ *Id.*

¹⁸² Krattenmaker, *supra* note 97, at 135–36; see notes 105–117 and accompanying text.

¹⁸³ See 47 U.S.C. § 521(2), (4) (2000); see Dan G. Barry, Note, *The Effect of Video Franchising Reform on Net Neutrality: Does the Beginning of IP Convergence Mean That It Is Time for Net Neutrality Regulation?*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 421, 442 (2008).

¹⁸⁴ Maurita Coley et al., FCC Content Regulation of Cable Programming, 818 PLI/Pat 377, 379–93 (PLI Order Number 6061, 2005) (discussing cable programming networks’ obligations regarding content, which include voluntary ratings guidelines, indecency agreements with program distributors, and advertising limitations on children’s programming).

¹⁸⁵ *ESBIN, SCALPEL OR STEAMROLLER*, *supra* note 21, at 5.

¹⁸⁶ *Id.* at 4–5. The Supreme Court upheld the Commission’s decision to classify cable modem broadband Internet service as an information service subject to regulation under Title I. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 987–88,

hand-selected the regulatory obligations it imposes on IP-based services.¹⁸⁷ With the 1996 Telecom Act's continuation of the division of telecommunications services into Title II's common carriers and non-Title II information services, Congress essentially evaded deciding that difficult question of how the telecommunications industry should be regulated.¹⁸⁸

These decisions raise the critical question of what ancillary jurisdiction under Title I entails. What is the regulatory model and what are the associated public policies under the FCC's ancillary jurisdiction? No historical record exists to look to for guidance. No real legislative guidance exists when compared to Title II, Title III, or Title VI; only post-hoc judicial decisions impose limits on the FCC's ancillary jurisdiction. The result is that the FCC is regulating the most important communications technology of the twenty-first century in an ad-hoc manner, lurching from decision to decision with no legal, regulatory, or guiding principles. This approach only perpetuates criticism and must be modified to ensure the United States remains competitive in the global marketplace.

IV. WHY REFORM IS NEEDED AND WHAT REFORMS SHOULD BE ENACTED

A. Survey of Criticisms Leveled Against the FCC

The FCC is the subject of much criticism from different branches of the government, the communications industry, and public interest groups. A brief outline of some of the criticism will provide more rationale for the need to reform the Commission. Such criticisms inevitably focus on a number of different areas, including the FCC's processes, politics, legal decision-making, regulatory capture, the FCC's revolving door between government service and private sector jobs, and the concentration of power in the Chairman's office.

The FCC, like many administrative agencies, was created so that government regulation could take place in a flexible and quick moving setting, allow-

996–97 (2005).

¹⁸⁷ See *supra* notes 133–141 and accompanying text.

¹⁸⁸ Wiley, *supra* note 3, at 23–24.

[E]ven though the [1996 Telecom Act] paid lip service to convergence, it still presumed that historically distinct market segments would remain separate, operating under their own unique rules even when providing services that compete with one another [T]he Act perpetuated a distinction between “telecommunications services,” which are subject to traditional common carrier regulation, and “information services,” which are not so regulated.

Id. (citations omitted).

ing for adaptation to industry changes.¹⁸⁹ Time and experience, however, have shown that the FCC has grown to be a cumbersome and slow-moving body.¹⁹⁰ Part of the FCC's reputation for glacial-like speeds is the rulemaking process that the Commission is bound to by the Administrative Procedure Act.¹⁹¹ In one notable example, the FCC waited one year to dismiss a one-page petition for forbearance from tariff regulations by OrbitCom, a competitive telephone service provider.¹⁹² Much ink has been spilled lamenting the fourteen-point FCC checklist that RBOCs must complete before the Commission allows them to enter the long-distance market.¹⁹³ And in what then-Chairman Michael Powell called an "embarrassment" for the FCC, the Commission took six months after its vote on the Triennial Review and Media Ownership rulemaking to release the official decision.¹⁹⁴ Congress, often responding to pressure from industry, has pushed the FCC to act faster.¹⁹⁵

The FCC, as with all government agencies, even "independent" agencies, has always been subject to politicization,¹⁹⁶ whether by presidents and congress-

¹⁸⁹ See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 463 (2008). Indeed, as one member of Congress pointed out in the debate over the creation of the Interstate Commerce Commission, "How much better this [the proposal for an independent commission] is than to fix in advance by inflexible law the whole body of rules to govern the most complex business known to our civilization." *Id.*

¹⁹⁰ See Michael Powell, *The Great Digital Broadband Migration*, in COMMUNICATIONS DEREGULATION AND FCC REFORM: FINISHING THE JOB 11, 18 (Jeffrey A. Eisenach & Randolph J. May eds., 2001).

¹⁹¹ See Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 585–86 (2007); see also Lisa Blumensadt, Comment, *Horizontal and Conglomerate Merger Conditions: An Interim Regulatory Approach for a Converged Environment*, 8 COMMLAW CONSPECTUS 291, 292 (2000) (citing Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–06 (1999) and 47 C.F.R. §§ 1.399–1.430 (1999)).

¹⁹² *In re* Petition of OrbitCom, Inc. for Forbearance from CLEC Access Charge Rules, *Memorandum Opinion and Order*, 23 F.C.C.R. 13,187, ¶ 2 (Aug. 27, 2008) (explaining that the petition was filed on August 27, 2007, exactly one year before the Commission took action).

¹⁹³ Rui J. P. de Figueierdo, Jr. & Pablo T. Spiller, *Strategy, Structure and Regulation: Telecommunications in the New Economy*, 2000 L. REV. M.S.U.—D.C.L. 253, 280–81 (2000) ("From the passage of the Telecommunications Act in February 1996, until December 1999, the FCC did not allow any of the RBOCs to enter long distance markets . . .").

¹⁹⁴ May, *supra* note 22, at 1313–14 (citing *Powell Sees UNE Order Released This Week*, COMM. DAILY, Aug. 19, 2003).

¹⁹⁵ See Protecting Consumers Through Proper Forbearance Procedures Act, H.R. 3914, 110th Cong. § 1 (2007). Introduced by Rep. John Dingell, "[t]he bill takes the 'deemed granted' wording out of the Telecom code and just says that the FCC has to make a decision in a year, with a ninety day extension if necessary." Matthew Lasar, *Bill Would Make It Harder for Telecoms to Skirt Competition*, ARS TECHNICA, July 23, 2008, <http://arstechnica.com/news.ars/post/20080723-bill-would-make-it-harder-for-telecoms-to-skirt-competition.html>.

¹⁹⁶ See Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on*

sional leaders through the appointment process¹⁹⁷ or through oversight and budgetary pressure exerted by Congress.¹⁹⁸ The politicization of the FCC leads to a greater partisan environment at the Commission,¹⁹⁹ especially since a deal President Bill Clinton cut with Senate Majority Leader Robert Dole in 1997, giving the minority party control over the President's selection of the minority party's commissioners on the FCC.²⁰⁰

Phillip Napoli suggests that two unreleased, and subsequently leaked, studies prepared by the Commission under Chairman Kevin Martin provide evidence that "results-driven policymaking may be operating under the guise of evidence-driven policy-making, and that policy research was being employed more for political purposes than for analytical purposes."²⁰¹ The two studies questioned the FCC's moves to ease media ownership rules, contrary to Chairman Martin's preference at the time.²⁰² Furthermore, when the Commission ultimately does make decisions, the courts often reverse them.

The FCC has suffered an embarrassing rate of reversal regarding its own decisions and procedures.²⁰³ Commentators have suggested a variety of explana-

Airwave Allocation Policy, 14 HARV. J.L. & TECH. 335, 372 (2001) ("Probably no quasi-judicial body was ever subject to so much Congressional pressure as the Federal Radio Commission." (quoting LAURENCE F. SCHMECKEBIER, *THE FEDERAL RADIO COMMISSION* 55 (1932)); see also Shooshan, *supra* note 23, at 646 & n.32.

In the 1970s, the Senate Commerce Committee commissioned an analysis of appointments to the FCC and Federal Trade Commission which found that: Partisan political considerations dominate the selection of regulators to an alarming extent. Alarming in that other factors—such as competence, experience, and even, on occasion, regulatory philosophy—are only secondary considerations.

Id.

¹⁹⁷ House Speaker Sam Rayburn said to newly appointed FCC Chairman Newton Minnow, "Just remember one thing, son. Your agency is an arm of the Congress; you belong to us. Remember that and you'll be all right." ZARKIN & ZARKIN, *REGULATION WARS*, *supra* note 57, at 50. Another example is Senators Albert Gore and Daniel Inouye forcing Al Sikes, Andrew Barrett, and Sherrie Marshall to change their minds on FCC regulation of indecency in exchange for Senate confirmation. *Id.* at 50–51.

¹⁹⁸ See ZARKIN & ZARKIN, *REGULATION WARS*, *supra* note 57, at 51.

¹⁹⁹ Devins & Lewis, *supra* note 189, at 447 (describing the rise of more politicized independent agencies beginning under President Reagan and arguing that today's independent agencies are more subject to Presidential influence than at any other point in history).

²⁰⁰ G. CALVIN MACKENZIE, *INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS* 33 (2001) (describing the relatively recent tradition of the President ceding control of the selection of minority-party nominees to the Senate in exchange for quick and smooth confirmation of the President's party nominees).

²⁰¹ Philip M. Napoli, *Paradoxes of Media Policy Analysis: Implications for Public Interest Media Regulation* 9–10 (McGannon Center Working Paper Series, Paper 17, 2008), available at http://fordham.bepress.com/mcgannon_working_papers/17 (click "download").

²⁰² See *id.* (explaining the controversy surrounding the studies); Kevin J. Martin, Editorial, *The Daily Show*, N.Y. TIMES, Nov. 13, 2007, at A29 (arguing that the FCC should relax the media cross-ownership rule to save struggling print media, including newspapers).

²⁰³ See James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting*

tions for this trend, including the ambiguous regulatory principles of the public interest, a marketplace of ideas, diversity, localism, and competition invoked to justify FCC policies.²⁰⁴ The meaning and import of these principles often shifts depending on the technology at issue, the prevailing political sentiment at large, and the ideologies of the sitting FCC commissioners.²⁰⁵

It is tempting to blame the FCC's Office of General Counsel's Administrative Law Division, which is responsible for approving regulations before enactment, or the Litigation Division, which is responsible for defending the Commission's decisions in the federal courts.²⁰⁶ Yet, there is no safeguard in place to prevent the Chairman from directing the approval of a regulation or order despite the Administrative Law Division's advice to the contrary. To address this, former Chairman Reed Hundt has proposed making the FCC's General Counsel certify that any regulation promulgated by the Commission passes legal muster,²⁰⁷ which requires both substantive legality and compliance with the Administrative Procedure Act.²⁰⁸

In addition, the FCC's position in these cases often seems driven by a thinly veiled goal of protecting existing dominant industries from new upstart technologies. In 1977, the Court of Appeals for the D.C. Circuit struck down the FCC's cable anti-siphoning rules,²⁰⁹ which were enacted to protect the dominant broadcast television industry from the nascent, but growing, cable television industry.²¹⁰ Again concerned that broadcast television would exit the marketplace, the FCC promulgated the first "must carry" rules to address the prob-

It, 35 LOY. U. CHI. L.J. 15, 27 n.65 (2003) [hereinafter Speta, *FCC Authority*] (citing thirteen major court cases starting in 2000 where a court overturned a significant FCC decision).

²⁰⁴ NAPOLI, *supra* note 21, at 3–5.

²⁰⁵ *See, e.g., id.* The Commission is specifically susceptible to political influence. *Id.* at 14 ("The communications industry's unique potential for social and political influence places communications policymakers in a position to have a powerful indirect effect—via their policy decisions—on social and political attitudes, beliefs, cognitions, and values.").

²⁰⁶ *See* ZARKIN & ZARKIN, REGULATION WARS, *supra* note 57, at 36 (explaining the function of each of the respective offices). Similarly, the U.S. Solicitor General, responsible for arguing the position of the federal government in all cases appearing before the Supreme Court in which the federal government is a party, is not to blame either. Dep't of Justice, About the Office of the Solicitor General, http://www.usdoj.gov/osg/about_us.htm (last visited Mar. 26, 2009).

²⁰⁷ Hundt & Rosston, *supra* note 12, at 33.

²⁰⁸ 5 U.S.C. §§ 551–59 (2006).

²⁰⁹ Home Box Office, Inc. v. FCC, 567 F.2d 9, 60 (D.C. Cir. 1977). The Commission's anti-siphoning rules restricted the quantity of movies and sports programming that could be shown on cable broadcasting partially because of "the Commission's fear that the revenue derived from subscription operations would be sufficient to allow subscription operators to bid away the best programs in these categories, thus reducing the quality of conventional television." *Id.* at 21.

²¹⁰ *See* ZARKIN & ZARKIN, REGULATION WARS, *supra* note 57, at 87.

lem of cable operators from importing distant broadcast signals at the expense of local broadcasters.²¹¹ The Court of Appeals for the D.C. Circuit struck down the must carry rules as unconstitutional in 1985.²¹² Seven years later, Congress gave its legislative blessing to modified must carry rules.²¹³

In another instance, seeking to protect AT&T's monopoly in long-distance telephone service, the FCC denied MCI's application to launch its Execunet service, deeming the proposed offering too similar to long-distance telephone service.²¹⁴ The U.S. Court of Appeals reversed the FCC's decision, removing the monopoly protection from AT&T's long distance service.²¹⁵

Alternatively, the FCC sometimes seeks to coddle new technologies or market entrants. Following the enactment of the Telecom Act of 1996, the FCC encouraged Competitive Local Exchange Carriers ("CLECs") to enter the local telephone service market and compete against Incumbent Local Exchange Carriers ("ILECs").²¹⁶ There were two types of CLECs: those that relied almost exclusively on the incumbent's network and facilities and essentially resold their offering by using what was called the Unbundled Network Element Platform ("UNE-P"),²¹⁷ and those that were more facilities-based CLECs but needed access to some incumbent network elements to make their service work, such as the last mile copper loops.²¹⁸ The FCC's interconnection requirements had the opposite effect, ultimately discouraging both types of CLECs and ILECs from investing in their networks. The ILECs had no motivation to invest in their networks only to be forced to share the fruits of their investment with CLECs, and the CLECs did not want to invest in independent networks because they could instead use the ILECs' networks.²¹⁹ When the FCC gave up on the unbundling rules, CLECs focused on more sustainable

²¹¹ *Id.* at 124–25 (noting that the FCC's must carry rules required cable broadcasters to carry local broadcast television stations).

²¹² *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1462–63 (D.C. Cir. 1985).

²¹³ *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(9) 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

²¹⁴ *MCI Telecomm. Corp. v. FCC*, 561 F.2d 365, 368–69 (D.C. Cir. 1977); ZARKIN & ZARKIN, *REGULATION WARS*, *supra* note 57, at 64.

²¹⁵ *MCI Telecomm. Corp.*, 561 F.2d at 380; *MCI Telecom. Corp. v. FCC*, 580 F.2d 590, 600 (D.C. Cir. 1978).

²¹⁶ *See In re* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, 11 F.C.C.R. 15,499, ¶¶ 1–3 (Aug. 1, 1996). The Commission adopted the rules under congressional mandate in the 1996 Telecom Act. *See* 47 U.S.C. § 251(c)(3), (d)(1) (2000).

²¹⁷ *See* Nelson, *supra* note 74, at 10.

²¹⁸ *See id.*; Thomas W. Hazlett, *Rivalrous Telecommunications Networks With and Without Mandatory Sharing*, 58 FED. COMM. L.J. 477, 483 (2006) [hereinafter Hazlett, *Rivalrous Telecommunications*].

²¹⁹ Hazlett, *Rivalrous Telecommunications*, *supra* note 218, at 479.

business models and emerging technologies.²²⁰

While the motive of encouraging competition and new entrants in the communications marketplace is laudable, the Commission's actions reinforce the reality that the FCC has the ability to effectively destroy or promote a particular company or a business model. Whether one views this as creating regulatory arbitrage or not,²²¹ it is implausible to deny that serious political maneuvering at the Commission is an absolutely necessary component of doing business in the communications industry. The Commission also suffers other ills of administrative agencies: the seemingly related problems of regulatory capture and the "revolving door."

The theory of regulatory capture posits that a regulatory agency, directed to serve the public interest, instead serves the needs of the industry that the agency is charged with regulating.²²² Particularly before the 1996 Telecom Act, academics, commentators, and even some FCC Commissioners claimed the Commission had fallen under the spell of regulatory capture.²²³

The impact of regulatory capture is exacerbated by the revolving door at the Commission, where high-level Commission personnel frequently depart government service to work directly for the companies they previously regulated.²²⁴ To address this issue, a former FCC Commissioner has called for

²²⁰ See *id.* at 485–86 (arguing that after the D.C. Circuit Court of Appeals rejected the FCC's network unbundling rules in 2004, CLECs such as AT&T and MCI ceased local phone service that utilized unbundled network elements).

²²¹ The Commission defined regulatory arbitrage as "businesses making decisions based on regulatory classifications rather than on customers' preferences and innovative and sustainable business plans." *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Internet over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798, ¶ 90 (Mar. 14, 2002).

²²² Dominique Custos, *The Rulemaking Power of Independent Regulatory Agencies*, 54 AM. J. COMP. L. 615, 635 (2006). The concept of regulatory capture is broader than simply doing the bidding of regulated industries. Toni Makkai and John Braithwaite, in studying the Australian nursing home industry, identified "three empirically distinct forms of capture: identification with the industry, sympathy with the particular problems that regulated firms confront in meeting standards, and absence of toughness." Toni Makkai & John Braithwaite, *In and Out of the Revolving Door: Making Sense of Regulatory Capture*, 12 J. PUB. POL'Y 61, 61 (1992).

²²³ See Thomas W. Hazlett, *Explaining the Telecommunications Act of 1996: Comment on Thomas G. Krattenmaker*, 29 CONN. L. REV. 217, 221 (1996) (describing the pre-1996 Telecom Act FCC as a "cartel-enforcement agency, one which could reliably be called on by incumbents to formulate rules which would make competitive entry economically impossible" and noting then-Chairman Reed Hundt commenting, "[t]hat old paradigm led some to say with justice that the FCC, as the erstwhile regulator of these monopolies, had come to stand for Firmly Captured by Corporations.").

²²⁴ See Jeffery E. Cohen, *The Dynamics of the "Revolving Door" on the FCC*, 30 AM. J. POL. SCI. 689, 690 (1986); Timothy Lee, *Revolving Door Undermines FCC's Watchdog Role*, TECHDIRT, Sept. 16, 2008, <http://www.techdirt.com/articles/20080831/0618342133.html> (reporting that Catherine Bohigian, the chief of the FCC's Office of Strategic Planning

Commissioners to be barred from employment with any industry regulated by the FCC.²²⁵ On the other hand, however, recruiting qualified and skilled personnel for jobs at the Commission could be more difficult with such a restriction in place. Current policy requires a one-year period before high-level officials can take some industry jobs.²²⁶ However, some commentators have criticized the enforcement of these revolving door laws on the grounds the laws are too complex and too ambiguous, they require unavailable government resources to prosecute violations and evidence supporting such a charge is difficult to find.²²⁷ Adding to the politicization of the Commission—and perhaps the problem of regulatory capture—is the continued consolidation of power within the Chairman’s office.

The consolidation of power has a direct impact on the Commission’s day-to-day operations.²²⁸ The Commission’s handling of the complaint against Comcast for violation of its Internet policies provides a common case study. When the FCC, by a vote of three-to-two, issued its order on Comcast’s network management practices, the majority, led by then Chairman Martin, worked on the order without the input of the other commissioners, redrafting the document until the evening before the vote and forcing the dissenting commissioners to vote on a document they had not fully had time to analyze.²²⁹

Earlier this year, *Television Week* listed some of the operational criticisms of Chairman Martin’s tenure: “[T]he FCC under Mr. Martin has repeatedly issued major decisions after business hours. It has sometimes started meetings hours late. It has regularly issued commission orders weeks to months after commissioners supposedly voted on final details, which critics call a strong indication that the vote wasn’t in fact final.”²³⁰ With the existing regulatory models and

and Policy Analysis, left that position to take a job with the cable television company Cablevision). *But see* 18 U.S.C. § 207 (2006) (mandating a one-year cooling-off period for high level employees).

²²⁵ ZARKIN & ZARKIN, *REGULATION WARS*, *supra* note 57, at 161–62.

²²⁶ *See* 18 U.S.C. § 207(b) (2006).

²²⁷ *E.g.*, PROJECT ON GOVERNMENT OVERSIGHT, *THE POLITICS OF CONTRACTING* (2004), <http://www.pogo.org/pogo-files/reports/government-corruption/the-politics-of-contracting/gc-rd-20040629.html>.

²²⁸ *See* COMMITTEE ON ENERGY AND COMMERCE, U.S. HOUSE OF REPRESENTATIVES, *DECEPTION AND DISTRUST: THE FEDERAL COMMUNICATIONS COMMISSION UNDER CHAIRMAN KEVIN J. MARTIN 2–3* (2008), *available at* <http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc%20majority%20staff%20report%20081209.pdf>.

²²⁹ *Comcast Order*, *supra* note 114, at 61 (Comm’r McDowell, dissenting) (“Accordingly, we are compelled by statute to examine the procedural issues before us as well as to weigh the facts against the current state of the law. Commissioner Tate and I received the current version of the order at 7 p.m. last night, with about half of its content added or modified. As a result, even after my office reviewed this new draft into the wee hours of the morning, I can only render a partial analysis.”).

²³⁰ Ira Teinowitz, *Martin to Leave Mixed Legacy*, *TV Wk.*, Apr. 14, 2008 at 13. In 2007,

the most common criticisms of the FCC identified, the possible reforms can next be examined.

B. Survey of Possible Reforms to the FCC

The Commission should not return to the traditional regulatory models to deal with the communications industry in the twenty-first century. Commenters and policymakers have crafted numerous reform proposals,²³¹ however, they tend to merely tinker around the edges.²³² John Duffy noted,

[Former FCC Chairman] Newton Minow, for example, came to recognize that “the reforms of the 1960s, however just or well intentioned, had done very little to clarify the meaning and application of the public-interest standard in the Communications Act. In some respects, they had made matters worse.” The fundamental problem, as Minow perceived, was the public interest standard in the Communications Act, which stands as a monument to the mistake of writing into law vaguely worded *quid pro quos*.²³³

There have been prior calls for the reform of the FCC in light of convergence pressures, even coming from the Commission itself.²³⁴ It is useful to briefly examine some of the suggested possible reforms, including wholesale elimination of the Commission, streamlining the Commission’s bureaucracy, and procedural reforms.

Robert Bartley and Glen Robinson are two former FCC Commissioners who have called for an abolishment or radical restructuring of the FCC in light of the rapid pace of technological change.²³⁵ While there is precedent for the com-

the House Commerce and Energy Committee launched an investigation into the manner that Martin had run the Commission, and initial reports from the investigation blamed Martin for his mismanagement. See Cecilia Kang, *As Congress Examines FCC, Chairman May Be Asked to Defend His Leadership*, WASH. POST, Apr. 30, 2008, at D7.

²³¹ Kearney, *FCC Go the Way*, *supra* note 170, at 1191–92 (noting a number of commentators who have proposed abolishing the FCC, including the Heritage Foundation); PETER HUBER, *LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM* 6–9 (1997); GEORGE A. KEYWORTH II, JEFFREY EISENACH, THOMAS LENARD & DAVID E. COLTON, *THE TELECOM REVOLUTION—AN AMERICAN OPPORTUNITY 2–3* (1995), available at <http://www.pff.org/issues-pubs/books/0595telecomrevolution.pdf>; Alan Pearce, *Telecom Reform on the Money for GOP Backers*, NETWORK WORLD, Feb. 20, 1995, at 1, 56 (noting that then-Speaker of the House Newt Gingrich considered abolishing the FCC).

²³² See, e.g., *FCC Strategic Plan*, *supra* note 18, at 1–2 (refocusing the current goals of the FCC); FCC Reorganization Act, H.R. 2982, 109th Cong. § 3 (2005) (reorganizing the FCC’s bureau and office structure).

²³³ Duffy, *supra* note 35, at 1121–22 (citations omitted).

²³⁴ See, e.g., *FCC Strategic Plan*, *supra* note 18, at 3 (arguing that the FCC should be restructured to focus on “core functions” that include spectrum management, universal service, consumer protection, and enforcement of competitive markets).

²³⁵ ZARKIN & ZARKIN, *REGULATION WARS*, *supra* note 57, at 158, 161–62; Robinson, *FCC 2000*, *supra* note 18, at 155–58.

plete abolition of regulatory agencies,²³⁶ and in the past fifteen years, commentators and academics have periodically issued calls for the Commission's abolition,²³⁷ such a drastic step would ignore both the current political environment and fail to recognize areas where the FCC can still play an important role.²³⁸ A total abolishment disregards the current political environment; broadband and communications infrastructure development had a major role in economic stimulus legislation in the 111th Congress,²³⁹ and President Barack Obama's efficiency-enhancing measures appear to be focused on using a scalpel, not a hatchet in reforming government operations and expenditures.²⁴⁰

Numerous commentators have argued that the FCC, as an expansive, independent agency with wide-ranging jurisdiction, should be scaled back to only focus on critical regulatory needs, like interference, international issues, and to ensure interconnection.²⁴¹ Other commentators suggest a single administrator or commissioner should replace the FCC's current five-member body.²⁴² Martha Garcia-Murillo and Ian MacInnes argue that the FCC should be organized not by traditional industry division, but by function, including rate oversight, universal service, and spectrum allocation.²⁴³ While an efficient agency structure is clearly important, its positive impacts will generally be limited to procedural and process systems, not to the underlying policy positions and regulatory re-

²³⁶ Kearney, *FCC Go the Way*, *supra* note 170, at 1156, 1191–92 (noting that both the Civil Aeronautics Board and the Interstate Commerce Commission were abolished).

²³⁷ *See supra* note 231 and accompanying text.

²³⁸ Kearney, *FCC Go the Way*, *supra* note 170, at 1193 (suggesting that by reinventing itself, “the FCC would continue to exist and indeed to possess the same formal authority as previously, but its focus would not be the traditional regulation of entry, rates, and service that long characterized [it] . . .”).

²³⁹ American Recovery and Reinvestment Act, H.R. 1, § 6001(j) (2009).

²⁴⁰ *See, e.g.*, Stephanie Condon, *GOP, Dems Spar over Broadband “Stimulus” and FCC Powers*, CNET NEWS, Jan. 22, 2009, http://news.cnet.com/8301-13578_3-10148578-38.html; Russ Britt, *McCain Proposes Spending Freeze; Obama Says “Scalpel Is Needed,”* FOX BUSINESS, Sept. 26, 2008, <http://www.foxbusiness.com/story/mccain-proposes-spending-freeze-obama-says-scalpel-needed/>.

²⁴¹ Krattenmaker, *supra* note 97, at 172–73 (arguing that there is simply not a need for a federal agency with sweeping and broad jurisdiction over the communications industry, and instead calling for more limited—in size and in scope—federal agencies dedicated to specific areas, such as a “Federal Spectrum Commission”); *see* Kearney, *FCC Go the Way*, *supra* note 170, at 1192–93 (discussing a reduction in the scope of the FCC's authority, where it “would be reduced to situations in which there is some reason to think that reliance on the market, though desirable, is not feasible.”).

²⁴² Shooshan, *supra* note 23, at 639–40, 651–52 (arguing in favor of a single administrator at the FCC, but recognizing that serious concerns with such a proposal include a less independent agency, a more corruptible agency, and an administrator more prone to following the wishes of the President or Congress); May, *supra* note 22, at 1321 (arguing that when reforming the FCC, the option of reducing the number of commissioners or installing a unitary head must be considered).

²⁴³ Martha A. Garcia-Murillo & Ian MacInnes, *FCC Organizational Structure and Regulatory Convergence*, 25 TELECOMM. POL'Y 431, 450–51 (2001).

gimes the FCC currently operates.

As noted, Rep. Barton's draft bill, "FCC PROCESS" is a step in the direction of reform of the processes at the FCC. The bill's stated goal is to "improve public participation and overall decision-making at the [FCC]."²⁴⁴ While part of the impetus of the bill could be related to the management style of former Chairman Kevin Martin,²⁴⁵ the legislation does address concerns regarding the FCC's bureaucracy. Specifically, the bill proposes, among other things,²⁴⁶ to allow all members of the FCC enough time to analyze proposed decisions before a vote,²⁴⁷ while also limiting the amount of time the FCC has in addressing "petitions, applications, complaints, and other filings seeking Commission action."²⁴⁸

However, while proposing some much-needed reform of FCC processes, the limited goals of the legislation mean that the bill is just tinkering around the edges of the greater need for institutional, not merely procedural or managerial, reform of the Commission.²⁴⁹ With the shortcomings of the current structure and operation of the Commission established and various reform proposals examined, the required areas of reform for the new presidential administration are illuminated.

V. NECESSARY CONSIDERATIONS OF THE NEXT PRESIDENTIAL ADMINISTRATION AND CONGRESS

While the 1996 Telecomm Act significantly updated the country's communication regulatory structure, the foundation of that structure remained the same: the 1934 Communications Act.²⁵⁰ As one commenter noted, "The 1934

²⁴⁴ FCC Procedural Reform for Openness and Clarity Encouraging Sensible Solutions (FCC PROCESS) Act, H.R., 110th Cong. pmb. (2008) (draft legislation), *available at*, http://www.broadcastingcable.com/file/2304-FCC_Procedural_Reform_for_Openness_and_Clarity_Encouraging_Sensible_Solutions_Act_FCC_PROCESS_Act_.pdf.

²⁴⁵ The management style and the manner in which Chairman Martin ran the FCC was the focus of criticism from members of Congress and the FCC alike. *See, e.g.*, Jim Puzanghera, *Criticism of the FCC's Chairman Is Widely Aired*, L.A. TIMES, Dec. 10, 2007 at C1; Jim Puzanghera, *FCC Chairman Target of House Panel's Investigation*, L.A. TIMES, Dec. 4, 2007 at C3; Kim Hart, *FCC Chairman Draws Fire for Cross-Ownership Plan*, WASH. POST, Dec. 6, 2007 at D3.

²⁴⁶ FCC PROCESS Act, H.R., 110th Cong. §3 (providing additional time for the public to weigh in on changes the FCC is considering regarding draft regulations already circulated for public comment).

²⁴⁷ FCC PROCESS Act, 110th Cong. sec. 3, § 5B(a)(1)(C), (a)(2).

²⁴⁸ *Id.* sec. 3, § 5B(a)(3).

²⁴⁹ ESBIN, SCALPEL OR STEAMROLLER, *supra* note 21, at 5. Esbin provides an excellent summary of the Barton legislation's shortcoming in terms of institutional reform.

²⁵⁰ Hazlett, *Physical Scarcity*, *supra* note 38, at 905-06 ("Despite ambitious rhetoric regarding the scope of liberalization in telecommunications markets, the omnibus 1996 Telecommunications Act did shockingly little to disturb age-old regulatory arrangements in

Act was written in such a way that the various categories of the telecommunications industry were kept in ‘silos,’ with each category having different federal rules as well as a mix of federal and state interpretations.²⁵¹ In light of converged technology and the ills of the current regulatory paradigm at the FCC, what should be the regulatory framework in a digitalized and converged communications industry?

A. New Legislation to Update the 1996 Telecom Act

There are a number of principles and specific provisions that should be included in any proposed new legislation to update the 1996 Telecom Act. These principles aim to address the barriers facing the digitalized environment under the Commission’s outdated regulatory models. These principles, or proposals, include revoking the policy-making authority from the FCC, and increasing the transparency of the issues over which the Commission has authority. Furthermore, while the FCC should not retain policy-making powers, it should continue to play the role of adjudicator in several areas including spectrum management and interconnection.

1. Removal of Policy-making Powers from the FCC

First, reform legislation should take away policy-making powers from the FCC. The legislative and executive branches should create the nation’s communications policy, rather than an independent agency like the FCC.²⁵² Com-

radio and television broadcasting.”); Speta, *Internet Time*, *supra* note 76, at 1068 (noting that while the 1996 Telecom Act did ease some roadblocks for competition in the telephone market, such as “eliminating legal barriers to entry into all telecommunications markets, . . . [b]ut Congress did nothing further to assist the development of intermodal competition. Rather, it continued the historic, but increasingly irrelevant, regulatory divisions between services, based on the technologies used to deliver them.”).

²⁵¹ Nelson, *supra* note 74, at 6.

²⁵² Scholars and commentators have written extensively on the constitutionality and the legal limits of delegated authority, independent agencies, and the unitary executive principle. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–64 (2003) (arguing that recent emphasis on political accountability in independent agencies has led to an unfortunate decrease in the focus on arbitrary decision-making by independent agencies); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2384 (2001) (arguing that greater presidential control of the administrative states enhances agency effectiveness and accountability); Barron, *supra* note 66, at 1097 (describing centralization and politicization as two methods by which presidential administrations have achieved greater control over agency decision-making, and arguing that despite the increased coherence resulting from the greater presidential control, more emphasis should be placed on involving alternative stakeholders). These questions of administrative and constitutional law are beyond the scope of this Com-

munications policy-making should reside in the Commerce Department, which already houses the National Telecommunications and Information Administration (“NTIA”).²⁵³ As two commentators explain, citing the Environmental Protection Agency and the Food and Drug Administration as examples, it is not necessary to have complex and important policy-making functions reside in administrative agencies.²⁵⁴ Given the increasing importance of the communications industry in the national economy and spillover effects to other industries,²⁵⁵ the policy-making functions of the FCC should reside within the executive branch.

When the FCC chooses to stake out a strong policy position, it often results in delay, confusion, and politicization. For example, the auction of spectrum for a nation-wide, interoperable public safety network failed to generate a bid that met the Commission’s reserve price and remains unresolved.²⁵⁶ The auction of the AWS-3 spectrum—an unpaired slice of spectrum from 2155–2175 MHz for fixed and mobile services—is in a stalemate over concerns that the FCC has tailored the auction rules to one company and business model: M2Z’s plan for a nation-wide free wireless “broadband” service.²⁵⁷ Policy-making in

ment.

²⁵³ See Nat’l Telecomm. & Info. Admin., About the NTIA, <http://www.ntia.doc.gov/about.html> (last visited Feb. 2, 2009). The NTIA describes itself as

the President’s principal adviser on telecommunications and information policy issues In addition to representing the Executive Branch in both domestic and international telecommunications and information policy activities, NTIA also manages the Federal use of spectrum; performs cutting-edge telecommunications research and engineering, including resolving technical telecommunications issues for the Federal government and private sector; and administers infrastructure and public telecommunications facilities grants.

Id.

²⁵⁴ Devins & Lewis, *supra* note 189, at 464 (noting that each of these regulatory policy areas is “delegated to hierarchical executive-branch bureaus”).

²⁵⁵ See, e.g., Robert D. Atkinson, *Framing a National Broadband Policy*, 16 COMMLAW CONSPECTUS 145, 154–65 (2007) (discussing the spillover effects broadband policy has on other industries and the ability of the United States to compete in a global market).

²⁵⁶ Press Release, Fed. Comm’n Comm’n, FCC Delinks 700 MHz Upper D Block from Other Blocks, Will Release Information on 700 MHz Auction Winning Bidders (Mar. 20, 2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280948A1.pdf; see also *In re Service Rules for the 698–746, 747–762 and 777–792 MHz Bands; Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band*, *Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 14,301, ¶ 1 (Sept. 25, 2008).

²⁵⁷ *In re Service Rules for Advanced Wireless Services In the 2155–2175 MHz Band; Service Rules for Advanced Wireless Services in the 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz Bands*, *Comments of CTIA—The Wireless Association*, WT Docket Nos. 07-195, 04-356, at 4 (July 25, 2008) [hereinafter *AWS Comments of CTIA*] (accessible via FCC Electronic Comment Filing System). In exchange for the spectrum, M2Z proposed to “make available free, high speed broadband access to nearly every consumer, business and non-profit and public safety entity in the United States without relying on the Universal Service Fund or other taxpayer dollars.” *In re M2Z Networks Inc.*,

the executive branch could resolve this issue by allowing for more certainty and consistency, ensured through increased political accountability for failed policies.²⁵⁸

As an example of failed policy making with little accountability, in 2000, Northpoint Technology, Ltd. sought to convince the FCC to put Multichannel Video Programming Distributor (“MVPD”) service offered by that particular company into spectrum allocated for Direct Broadcast Service (“DBS”).²⁵⁹ Because the Commission wrote the auction rules with this company in mind, when Northpoint failed to participate in the auction, the spectrum remained fallow.²⁶⁰ When the FCC moves away from serving as a regulatory body and instead dictates policy outcomes, communications policy and consumers suffer.

Aside from specific examples of the Commission’s failure to achieve policy goals as evidence for the need to move policy-making authority to the Executive, the grant of statutory authority to the FCC based on the public interest is extremely broad, granting nearly unfettered discretion to the Commission to pursue whatever public policies it chooses.²⁶¹ Courts have raised a wary eyebrow to the constitutionality of a standard as vague as the public interest, but have not yet struck it down.²⁶²

But while the legality of the public interest standard is constitutional, it does not follow that allowing the FCC to promulgate public policy under this standard constitutes good governance. It is possible that instead of making policy in the public interest, the FCC has made policy first and then justified decisions post-hoc by claiming that such decisions are in the public interest. Re-

Application for License and Authority to Provide National Broadband Radio Service in the 2155–2175 MHz Band, *Application*, WT Docket No. 07-16, at 1 (May 5, 2006) (accessible via FCC Electronic Comment Filing System). The FCC later adopted some of M2Z’s proposals in the FNPRM in the docket. *See In re Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band; Service Rules for Advanced Wireless Services in the 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz Bands, Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 9859, ¶ 3 (June 20, 2008).

²⁵⁸ May, *supra* note 22, at 1324 (“[Chairman Powell] did, however, explicitly recognize that as part of the executive branch, the agency at least would be more politically accountable to the president in exercising whatever policymaking discretion Congress has delegated.”).

²⁵⁹ *See Service Rules for Advanced Wireless Services, Ex Parte of CTIA—The Wireless Association*, WT Docket Nos. 04-365, 07-195, at 4 (June 5, 2008).

²⁶⁰ *See id.*

²⁶¹ *See Gillian E. Metzger, Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2066 (2008) (“Terms such as ‘the public interest’ are frequently viewed as conveying broad policymaking authority—indeed, the more commonly voiced concern is that such a delegation leaves the responsible agency official essentially unconstrained in setting policy.”).

²⁶² *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943).

moving policy-making functions from the Commission would eliminate this ambiguous standard, at least in terms of policymaking, an area of authority much broader and less constrained than, for example, adjudicating interference complaints.

Removing policy-making functions from the FCC and placing such responsibilities in the executive branch also makes sense given the growing role of worldwide regulatory structures.²⁶³ The growth of multinational communications corporations and alliances, as well as international traffic, has placed an increased importance on international trade negotiations and trade laws.²⁶⁴ The International Telecommunications Union (“ITU”), for example, is responsible for the international allocation of spectrum.²⁶⁵ The State Department already represents U.S. policy positions before the ITU with assistance from the FCC and the NTIA.²⁶⁶ Given the President’s nearly unilateral power regarding foreign policy and the role of the State Department in international affairs, the executive branch is the natural home for responsibility for the federal government’s communications policy.

Transferring the policy-making function to the executive branch and leaving the FCC as merely an adjudicatory agency is not without its downsides.²⁶⁷ First, policy-making and regulatory actions take place in a dynamic environment, and the stakeholders would react to such a change.²⁶⁸ While lawmakers are not

²⁶³ See Russ Taylor, *Rethinking Reform of the FCC: A Reply to Randolph May*, 58 FED. COMM. L.J. 263, 275–76 (2006) (noting the growing role of regulatory structures with a global jurisdiction, such as the World Trade Organization and the Internet Corporation for Assigned Names and Numbers, and arguing that the “FCC may find itself unable to make policy in a particular area because that role has been assigned to another, more internationally-focused entity.”).

²⁶⁴ See *id.* Marks, *supra* note 80, at 201 (listing British Telecom, Sprint, Deutsche Telekom, and France Telecom as multinational alliances).

²⁶⁵ Int’l Telecomm. Union, About ITU, <http://www.itu.int/net/about/index.aspx> (last visited Mar. 27, 2009).

²⁶⁶ Angele A. Gilroy & Marcia S. Smith, *The Federal Communications Commission: What Role for the Future?*, in THE FEDERAL COMMUNICATIONS COMMISSION: WHAT ROLE? 31, 44 (Martha P. Largo, ed., 2004).

²⁶⁷ See, e.g., Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (“Forcing the politically responsive president to share power with a partially insulated, politically unresponsive bureaucracy tends to reduce the variance in policy outcomes, because bureaucratic insulation creates a kind of compensatory inertia that mutes the significance of variation in the president’s policy preferences.”).

²⁶⁸ See Taylor, *supra* note 263, at 274 (“The regulatory environment—that space or arena in which debates occur and decisions are taken—is not static. A legal shift of control over the FCC’s policymaking functions to the executive branch would be followed by countershifts and not just from Congress.”); see also David A. Curran, *Rethinking Federal Review of Telecommunications Mergers*, 28 OHIO N.U. L. REV. 747, 779 n.204 (2002) (noting that Congress may not find it in their interest to give more control of the policy apparatus of the government to the executive branch, even if executive agencies—compared to independent agencies—served the public better).

fortune-tellers with the ability to see future outcomes of legislation, it does not follow that reasoned and considered approaches to identified problems should not be acted upon for a lack of certainty regarding their ultimate effect.

Second, the proliferation of independent agencies occurred partially due to a belief that such entities are better insulated against politics, which interfere with decision-making.²⁶⁹ Whether that is true in practice is a matter of lively academic debate.²⁷⁰ Regardless, there should be no doubt that political gamesmanship occurs at the Commission in its operations, regulatory decision-making, and personnel management.²⁷¹ Aside from broad level reform of the regulatory structure, specific policies need to be implemented.

Precedent demonstrates that the abolition of regulatory agencies may be more effective than attempted improvement. Both the ICC and the Civil Aeronautics Board (“CAB”) were abolished, and their jurisdictions were transferred to the executive branch.²⁷² The ICC regulated entry and exit of service providers in the railroad market,²⁷³ as well as in the trucking industry.²⁷⁴ Utilizing common carrier regulations, the ICC forced railroads to run unprofitable routes and created an oligopoly in the trucking industry.²⁷⁵ The ICC was abolished in 1995, after Congress, over the course of twenty-five years, had eliminated many aspects of the ICC’s regulatory jurisdiction.²⁷⁶ Congress shifted part of the ICC’s responsibility to the Department of Transportation (“DOT”) under the new Surface Transportation Board (“STB”), which is described as an agency with reduced independence.²⁷⁷

²⁶⁹ May, *supra* note 22, at 1310.

²⁷⁰ See, e.g., Barron, *supra* note 66, at 1095 (examining the reality of presidents “attemp[t]ing to order administrative agencies to comply with . . . preferred policy prescriptions”).

²⁷¹ See Devins & Lewis, *supra* note 189, at 459; see also Peter DiCola, Note, *Choosing Between the Necessity and Public Interest Standards in FCC Review of Media Ownership Rules*, 106 MICH. L. REV. 101, 129 (2007).

²⁷² May, *supra* note 22, at 1323; see Kearney, *FCC Go the Way*, *supra* note 170, at 1156 (discussing the elimination of the ICC and the transfer of some of its jurisdiction to the Surface Transportation Board within the Department of Transportation); Duffy, *supra* note 35, at 1119 (noting that Congress dissolved the Civil Aeronautics Board).

²⁷³ See Speta, *Internet Time*, *supra* note 76, at 1078–79; Read & Weiner, *supra* note 2, at 308 (noting that the goals for railroad regulation were to: “minimize competition; . . . provide universal service to the public; and . . . protect agricultural product shippers from exploitation by the railroad cartels”).

²⁷⁴ See Speta, *Internet Time*, *supra* note 76, at 1074.

²⁷⁵ *Id.* at 1074–75, 1078 & n.56 (noting a number of laws passed that eased the regulations regarding entry and exit in the railroad market, beginning in 1970, including the Rail Passenger Service Act of 1970, the Regional Rail Reorganization Act of 1973, the Railroad Revitalization and Regulatory Reform Act of 1976, and the Staggers Rail Act of 1980).

²⁷⁶ ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified at 49 U.S.C. § 701 (2000)); Kearney, *FCC Go the Way*, *supra* note 170, at 1156.

²⁷⁷ Custos, *supra* note 222, at 618 (describing the independence of agencies such as the STB as reduced because of “its non incorporation into a department . . . and [being] headed

Just like the common carrier provisions of the 1934 Act, the CAB regulated the airline industry through economic regulations such as rate regulation and control over market entry and exit.²⁷⁸ When Congress passed the Airline Deregulation Act of 1978, it mandated the abolishment of the board seven years following its passage and granted DOT jurisdiction over CAB's remaining functions.²⁷⁹ Furthermore, in abolishing the CAB, "Congress expressly preempted state regulation relating to rates, routes, or services of any air carrier having authority . . . to provide interstate air transportation."²⁸⁰ The abolishment of the ICC and the CAB offer evidence that regulatory agencies can be dismantled and reformed—specifically by reallocating agency functions to the Executive Branch—in a workable manner.

2. Reformed Transparency

The Government in Sunshine Act ("Sunshine Act")²⁸¹ prohibits all federal agencies consisting of more than two commissioners or members, like the FCC, from meeting together unless the meeting is open to the public.²⁸² Designed to open government processes to the public, the Sunshine Act has had the perverse effect of preventing FCC commissioners from discussing their concerns regarding matters before an official Commission meeting.²⁸³ This well-intentioned legislation should be revisited with the goal of greater Commission cohesiveness by allowing the decision-makers to discuss pending agenda items in advance of official meetings. While counter-arguments suggest that closing the door to the public regarding government decision-making is ill advised, there must be a way to uphold the spirit of the Sunshine Act, without prohibiting basic communication between commissioners. Currently, this prohibition simply enhances the prestige and power of the commissioners'

by an administrator who can be discharged at will by the President.").

²⁷⁸ See Speta, *Internet Time*, *supra* note 76, at 1071.

²⁷⁹ *Id.* at 1071–72 & n.23.

²⁸⁰ Cooper & Koukoutchos, *supra* note 24, at 311.

²⁸¹ Government in Sunshine Act of 1976, Pub. L. No. 94-409, 90 Stat. 1241 (codified in 5 U.S.C. § 552(b)).

²⁸² 5 U.S.C. § 552(b) (2006).

²⁸³ See *Oversight of the Federal Communications Commission: Hearing Before the H. Subcomm. on Telecommunications and the Internet*, 110th Cong. 22, 25 (2007) (statement of Michael Copps, Comm'r, Fed. Commc'ns Comm'n).

I encourage you to consider modifying the closed meeting rules so that the five Commissioners . . . aren't just together in their act one time a month or a year or whatever it is up here, but let us get our act together down at the Commission. Let more than two Commissioners get together and meet and talk. I cannot think of a proceeding at the FCC that would not have been improved by our ability to get together and talk.

Id.

high-level staff members, who are not subject to such restrictions on discussing pending Commission matters.

Once policy-making functions are removed from the FCC, the new administration should not seek specific policy means that drive desired outcomes for the communications industry, except perhaps in the broadest terms. Technologies are simply moving too fast for government to try to influence the means of achieving the end goals and desired outcomes. Instead, the new administration should seek outcome-driven policies to ensure a policy structure that reflects the dynamic nature of the communications industry.²⁸⁴ What has happened with the FCC in its traditional form is that the communications industry ossifies around the regulation once enacted—even if the industry did not support the regulation in the first place—and it becomes more difficult to remove the regulation because the industry reacts by reorganizing its business models around the regulation. Outcome-driven policies let the market's power and efficiency-enhancing properties work, prevent this ossification, and let the industry and the market drive new technologies, not regulation.

In a competitive marketplace, there is no longer a need for an industry-specific agency for protection of consumers; investigation and enforcement of consumer complaints regarding communications services should be completely moved to the Federal Trade Commission ("FTC").²⁸⁵ The FTC does not possess jurisdiction over telecommunications providers who are subject to Title II's common carrier regulation.²⁸⁶ The FTC has expressed a willingness to serve a greater role in consumer protection regarding communications services,²⁸⁷ and in 2006, the FTC announced the creation of an Internet Access Task Force to examine the issue of net neutrality.²⁸⁸ Additionally, Congress has taken first steps to transfer authority for enforcement of consumer protection to the

²⁸⁴ See, e.g., Werbach, *Digital Tornado*, *supra* note 9, at 5 (seeking to promote a greater understanding "of the unique policy issues the Internet raises").

²⁸⁵ See Scott Cooper, *Technology and Competition Come to Telecommunications: Reexamining Exemptions to the Federal Trade Commission Act*, 49 ADMIN. L. REV. 963, 968 (1997) (arguing that the FTC should have jurisdiction over consumer protection issues in the communications industry, and "[a]s limited choice gives way to a myriad of options, propositions and solicitations, the role of the regulator must change from administrator of retail utility services to enforcer of consumer protections in an open marketplace.").

²⁸⁶ Weiser, *Next Frontier*, *supra* note 81, at 289 (citing 15 U.S.C. §§ 44, 45(a)(2) (2000)).

²⁸⁷ See Anne Veigle, *Senate Commerce Wants Prepaid Calling Card Reforms*, COMM. DAILY, Sept. 11, 2008, at 3. The Chairman of the FTC has sought to rollback the prohibition of FTC enforcement against common carriers, citing the FTC's "extensive expertise with advertising, marketing, billing and collection, areas in which significant problems have emerged in the telecommunications industry." *Id.*

²⁸⁸ Press Release, Fed. Trade Comm'n, FTC Chairman Addresses Issue of "Net Neutrality," Aug. 21, 2006, <http://www.ftc.gov/opa/2006/08/neutrality.shtm>; Bara Vaida, *The New Overseers?*, NAT'L J., Sept. 9, 2006, at 66.

FTC.²⁸⁹

Furthermore, the FCC's own actions have already expanded the FTC's jurisdiction over new communications technologies and services.²⁹⁰ Easing such a transition of authority to the FTC is the reality that the FCC has come under fire for its lackluster consumer protection efforts; a report from the Government Accountability Office ("GAO") found the FCC closed over eighty-percent of its investigations based on consumer complaints without an enforcement action between 2003 and 2006.²⁹¹ For the forgoing reasons, the FCC's role in enforcing consumer protection in the communications industry should be relocated to the FTC.

Without its policy-making or consumer protection authority, the Commission should return to its original purpose of serving as an adjudicatory body, a goal all the more important in what portends to be an era of aggressive competition among companies, no doubt requiring mediation when necessary. Administrative law professor Louis Jaffe noted, independent agencies should not dictate "industrial policies," but serve as the source of "regulation of an industry."²⁹² The Commission's adjudicatory role should not be between consumers and corporations, but between corporations as they compete in the marketplace.²⁹³ While policy-making functions would be transferred to the executive branch, the FCC would still have an important role to play in three key areas: spectrum management, enforcement, and interconnection disputes.

3. Powers the FCC Should Retain

The FCC should retain its spectrum management authority to enforce the rights of spectrum licensees and protect against interference.²⁹⁴ As the Com-

²⁸⁹ The House of Representatives unanimously passed H.R. 3402, which carved out an exception to the FCC's exclusive jurisdiction over common carriers for the prosecution of fraud in the prepaid calling card industry. Anne Veigle, *The House Late Thursday Passed HR-3403*, COMM. DAILY, Sept. 29, 2008, at 11.

²⁹⁰ See Weiser, *Next Frontier*, *supra* note 81, at 289. The result of the FCC classifying new technologies and services, such as cable modem and DSL offerings, under Title I is that the FTC is able to expand its jurisdiction over broadband service providers because the providers are no longer considered common carriers. *Id.*

²⁹¹ U.S. GOV'T ACCOUNTABILITY OFFICE, FCC HAS MADE SOME PROGRESS IN THE MANAGEMENT OF ITS ENFORCEMENT PROGRAM, BUT FACES LIMITATIONS, AND ADDITIONAL ACTIONS ARE NEEDED, 19–20 fig. 5 (2008), available at <http://www.gao.gov/new.items/d08125.pdf>.

²⁹² Duffy, *supra* note 35, at 1136.

²⁹³ This idea is not new and, perhaps, is what the Commission would argue it already does. See *FCC Strategic Plan*, *supra* note 18, at 3–4 (outlining the goal for the Commission moving forward as "enforc[ing] the rules so that business compete fairly" and "promote competition, open markets, and technological innovation").

²⁹⁴ Kearney, *FCC Go the Way*, *supra* note 170, at 1198–99 (acknowledging that the FCC

mission brings more spectrum to the market²⁹⁵ and technologies develop that allow for more efficient use of spectrum,²⁹⁶ Philip Weiser and Dale Hatfield argue that “the FCC must develop the institutional abilities to function as a ‘spectrum court’ to avoid employing a quasi-legislative approach to managing spectrum” and suggest the use of administrative law judges in such a court.²⁹⁷

Furthermore, any legislation overhauling the Commission should revamp the traditional Title III regulatory framework for spectrum management and policy. Despite improvement in bringing more spectrum to the market, the Commission has not altered the policy goals behind the regulatory model of Title III. For example, the 1996 Telecom Act provided the FCC the option of giving additional spectrum to television broadcasters to aid in the digital television transition.²⁹⁸ The FCC promptly gave away the spectrum to the broadcasters, but without much discussion of the structure of public interest obligations the broadcasters would have to serve in return for the free spectrum.²⁹⁹ Indeed, such a discussion would have been—and continues to be—very timely because the justification for imposing public interest obligations on broadcasters, spectrum scarcity, is rapidly becoming obsolete.³⁰⁰ Regardless of the ultimate result

still has a role to play in spectrum allocation, service rule development, assignment of licenses, enforcement, and interference protection).

²⁹⁵ See, e.g., Fed. Comm’n Comm’n, Spectrum Policy Task Force Report 1 (2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf.

²⁹⁶ See Kevin Werbach, *Supercommons: Toward a Unified Theory of Wireless Communications*, 82 TEX. L. REV. 863, 896–98 (2004) (discussing a number of technologies that enable efficient use of spectrum, including cognitive radios).

²⁹⁷ Philip J. Weiser & Dale Hatfield, *Spectrum Policy Reform and the Next Frontier of Property Rights*, 15 GEO. MASON L. REV. 549, 601–02 (2008).

²⁹⁸ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 107–08 (codified in 47 U.S.C. § 336(a)).

²⁹⁹ See *In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, *Fifth Report and Order*, 12 F.C.C.R. 12,809, ¶ 2 (Apr. 3, 1997). President Clinton did create an advisory committee to examine the public interest obligations of digital television broadcasters, however, the recommendations largely have not been implemented. Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, Exec. Order No. 13,038, 62 Fed. Reg. 12,065, 12,065 (Mar. 11, 1997).

³⁰⁰ HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW § 9.3 (1999) (noting that the Telecommunications Act of 1996 recognizes that the broadcasters no longer control the levers of “electronic mass communication” given direct broadcast satellite, Internet, and cable television, and hence, a regulatory model based on spectrum scarcity and the power of broadcasters is losing justification); Sascha D. Meinrath & Victor W. Pickard, *The New Network Neutrality: Criteria for Internet Freedom*, 12 INT’L J. COMM. L. & POL’Y 225, 234–35 (2008) (arguing that the FCC’s licensing model has failed to evolve to take into account digital technologies and leads to entrenched licensees heading the opposition against forward-thinking shifts in spectrum use, such as low-power FM, interference temperature and unlicensed use of spectrum). See *Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1998) (noting that “[t]he Supreme Court has obliquely suggested it might reconsider that doctrine on the FCC’s ‘signal . . . that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.’” (quoting *FCC v. League of*

of the spectrum management reform debate—whether to embrace a property rights model³⁰¹ or the commons model³⁰²—the FCC would be tasked with an adjudicatory role regarding spectrum disputes in either construct.³⁰³

In an era of spectrum abundance, where multiple platforms exist to receive audio and video content, commentators have proposed a “play or pay” regulatory regime for broadcasters accompanied with enhanced public disclosure.³⁰⁴ One commentator suggested a play or pay regulatory structure where “broadcasters are given a choice between complying with public interest requirements or paying someone else to put public interest programming on the air.”³⁰⁵ This new regulatory framework makes sense for a number of reasons: it would remove First Amendment concerns regarding content regulation of broadcasting; public broadcasting entities that want to create educational programming would have a dedicated revenue stream; broadcasters would now be treated by regulators like cable and the Internet; the FTC could have jurisdiction to enforce multiple-ownership rules,³⁰⁶ the Department of Justice could enforce indecency laws under existing authority,³⁰⁷ and technology in cable set-top boxes, like the V-Chip, could eliminate concerns over parental control over indecent content.³⁰⁸

Women Voters, 468 U.S. 364, 376–77 n.11 (1984)).

³⁰¹ See Ellen P. Goodman, *Spectrum Rights in the Telecosm to Come*, 41 SAN DIEGO L. REV. 269, 370–71 (2004). Under a property rights system, the government would no longer allocate spectrum, but would serve as a judicial body for spectrum disputes using the guidelines of well-developed common law principles of nuisance and trespass. *Id.* at 323 & n.163.

³⁰² See *id.* at 272. Under a commons model, the FCC would not be in the business of deciding who uses the spectrum, but in deciding how users exist with each other in the spectrum through interference rules and end-user device standards. *Id.* at 372–73.

³⁰³ See *id.* at 323, 372–73. After thoroughly examining how the common law principals of nuisance and trespass would apply to the adjudication of interference claims in a property rights model of spectrum management and exploring the procedural and administrative challenges of implementing spectrum conflict resolution mechanism in a commons model, Goodman concludes, “[t]he regulatory agency must play a continuing role in the resolution of spectrum conflict.” *Id.* at 404.

³⁰⁴ See Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 504–05 (2000) (arguing that enhanced disclosure requirements for broadcasters would enable government regulatory activity through “public pressure,” noting that it would be the “simplest and least intrusive of regulatory instruments”).

³⁰⁵ Sunstein, *supra* note 304, at 538.

³⁰⁶ Aarons, *supra* note 38, at 336 (discussing the value of enhanced cross-ownership rules in this new structure because “economic scarcity is a great barrier to diversity”).

³⁰⁷ 18 U.S.C. § 1464 (2006) (“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”).

³⁰⁸ Henry Geller, *The Gore Commission, 10 Years Later: The Public Interest of Digital TV Broadcasters in Perfect Hindsight*, Address at George Mason University School of Law: the Information Economy Project (Oct. 3, 2008), available at <http://iep.gmu.edu/assets/media/gorecommission/3.mp3>.

Further, the FCC would continue to play an important role regarding the interconnection disagreements among RBOCs because ILECs control over local networks necessitates a “regulator that can adjudicate interconnection disputes.”³⁰⁹ An independent agency with bi-partisan membership would serve the purpose of a more neutral adjudicatory body of disputes between members of the communication industry. Indeed, the original purpose of the FCC was to make efficient sense of limited spectrum and usage by broadcasters.³¹⁰ Given the growing need for the limited commercial spectrum currently available,³¹¹ this would be a large and important task for the Commission.³¹²

VI. CONCLUSION

The time to reform the FCC is now. Many of the historic justifications for the Commission’s regulatory models and policy goals no longer apply to modern communications technologies, devices, and services. The FCC should return to its roots as an adjudicatory body, particularly as competition between converging companies escalates,³¹³ but with stronger federal preemption powers. The Commission’s role in managing spectrum should continue, but no longer with spectrum scarcity as the regulatory justification. Network neutrality should be codified as the natural continuation of the Commission embracing competition and deregulation. Policy-making functions should be moved to the executive branch, particularly given the role that technology and communications play in the world economic structure today.

³⁰⁹ Kearney, *FCC Go the Way*, *supra* note 170, at 1198 (arguing that the FCC will continue to exist because of the need for an agency to adjudicate disputes regarding interconnection requirements under 47 U.S.C. § 251); *see Speta, Internet Time*, *supra* note 76, at 1134.

³¹⁰ *See* Jonathan Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 *BUFF. L. REV.* 615, 647–53 (1991) (discussing how the FRC’s “first task” was to bring order to radio broadcasters’ usage of the spectrum).

³¹¹ *See, e.g.*, Keith Mallinson, Analysis—Alternatives in LTE, *WIRELESSWEEK*, May 1, 2008, <http://www.wirelessweek.com/article.aspx?id=159694> (describing tight spectrum availability for wireless carriers seeking to deploy WiMax and LTE services).

³¹² *See* Thomas W. Hazlett, *A Law & Economics Approach to Spectrum Property Rights: A Response to Weiser and Hatfield*, 15 *GEO. MASON L. REV.* 975, 1021 (2008) (calling for the creation of a “Spectrum Court” to enforce spectrum licenses and usage requirements).

³¹³ *See* JOHN KENNETH GALBRAITH, *THE ECONOMICS OF INNOCENT FRAUD: TRUTH FOR OUR TIME* 51 (2004) (“More important, it must be seen that good corporate behavior with effective regulation is greatly in the public interest. . . . This must be understood not as oratory, not as threat, but as reality. . . . Remedy and safeguard must have the force of law.”).