

June 2017

## The FCC and Quasi-Common Carriage: A Case Study of Agency Survival

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### Recommended Citation

Brent Skorup & Joseph Kane, *The FCC and Quasi-Common Carriage: A Case Study of Agency Survival*, 18 MINN. J.L. SCI. & TECH. 631 (2017).

Available at: <http://scholarship.law.umn.edu/mjlst/vol18/iss2/4>

*The Minnesota Journal of Law, Science & Technology* is published by the University of Minnesota Libraries Publishing.

# The FCC and Quasi-Common Carriage: A Case Study of Agency Survival

Brent Skorup\* & Joseph Kane†

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## I. INTRODUCTION

The Federal Communications Commission (FCC) has been called “the paradigmatic New Deal agency,”<sup>1</sup> created in 1934 with broad authority to regulate a general area of the economy and “largely staffed with reformers eager to expose and correct the misdeeds of corporate institutions and executives.”<sup>2</sup> Its charge was to regulate the common-carrier telegraph,

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1. Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 40 (2015).

2. JOHN BROOKS, TELEPHONE: THE FIRST HUNDRED YEARS 196 (1976).

telephone operators, and the nascent broadcast radio industry as public utilities.<sup>3</sup> To that end, Congress created the FCC to “make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”<sup>4</sup>

This broad grant of jurisdiction allowed agency goals to shift markedly and expansively into adjacent markets. Major regulatory interventions into mass media, such as broadcast media ownership rules,<sup>5</sup> investigation into newspaper-broadcast cross-ownership,<sup>6</sup> the Fairness Doctrine,<sup>7</sup> and cable TV regulation,<sup>8</sup> were not expressly authorized in the 1934 Act. These self-initiated expansions in authority were sometimes

3. Senator Dill, author of the bill that created the Federal Radio Commission, told colleagues, “[i]n this proposed law, however, we have laid down a basic principle—namely, the principle of the public interest, convenience, and necessity—which is the general legal phrase used regarding all public utilities engaged in interstate commerce.” 68 CONG. REC. 3006, 3027 (1927). This public utility language was retained in the 1934 Communications Act when the FCC was created and its authority extended to telegraph and telephone. See Communications Act of 1934, 47 U.S.C. § 152 (“[R]apid growth of communications technology requires unified system of regulation, and sufficient flexibility and breadth of mandate to permit Commission, confronted with new technology nor governed by statute but having serious impact on technology that is, to adopt such regulations as will enable it to protect public interest.”).

4. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. § 151 (2012)).

5. See FCC, REPORT ON CHAIN BROADCASTING (1941); Comment, *The Impact of the FCC’s Chain Broadcasting Rules*, 60 YALE L.J. 78, 78 n.3 (1951) (“The Communications Act does not specifically authorize the FCC to regulate competition in the radio industry and the legislative history is at best equivocal.”).

6. Orders No. 79 and 79-A, No. 60651, 8 F.C.C. 589, 589–591 (1941); Law Review Editors, Comment, *Old Standards in New Context: A Comparative Analysis of FCC Regulation*, 18 U. CHI. L. REV. 78, 78 n.3 (1950) (citing *Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943), as the seminal case).

7. Report on Editorializing by Broad. Licensees, No. 8516, 13 F.C.C. 1246 (1949). These “fairness” requirements were ratified by Congress in 1959. See 47 U.S.C. § 315(a) (2012).

8. The Communications Act never contemplated cable TV, and the FCC repeatedly failed to receive authority to regulate cable and its predecessor, community antenna TV (CATV). Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1194 (1973). With a change in administration, the FCC decided it did have the authority, and the Supreme Court upheld its claim. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). This authority was codified by Congress about twenty years later. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

ratified by courts or Congress later, but Congress's major amendments to the Communications Act since the 1970s<sup>9</sup> have deregulated cable TV<sup>10</sup> and telecommunications.<sup>11</sup> However, unlike two other industry-specific common-carrier regulators, the Civil Aeronautics Board and the Interstate Commerce Commission, the FCC survived the national mood for laissez-faire regulation.<sup>12</sup> Even modest grants of regulatory authority resulted in substantial increases in new staff and appropriations,<sup>13</sup> and today the FCC still exercises considerable authority over mass-media and telecommunications firms<sup>14</sup> including Comcast-NBCU, Google, AT&T-DirecTV, Disney-ABC, Sirius-XM, and T-Mobile.<sup>15</sup>

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9. See JEREMY TUNSTALL, COMMUNICATIONS DEREGULATION: THE UNLEASHING OF AMERICA'S COMMUNICATIONS INDUSTRY 11 (1986) (“[B]ut communications deregulation predates Reagan’s inauguration in January 1981 by several years. Moreover, it was the Democratic administration of President Carter which, in the late 1970s, gave communications deregulation its major political momentum.”).

10. Cable Communications Policy Act of 1984, 98 Stat. at 2779 (repealing many FCC cable TV regulations). However, the 1992 amendments to the Act did expand the FCC’s regulatory authority over cable. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (Oct. 5, 1992).

11. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996). However, many believed this law was inadequate for the task. Only a few months after President Clinton signed the Telecommunications Act of 1996 into law, his former advisor John Podesta wrote that “technology, and especially the Internet, is about to sweep past this legislation and make it obsolete. Once again, Congress has legislated with all eyes firmly fixed on the rear view mirror.” John D. Podesta, *Unplanned Obsolescence: The Telecommunications Act of 1996 Meets the Internet*, 45 DEPAUL L. REV. 1093, 1109 (1996).

12. Joe Kane, *The FCC: How an Obsolete Agency Survives*, PLAINTEXT (Sept. 28, 2016), <https://readplaintext.com/the-fcc-how-an-obsolete-agency-survives-8b3891982dd9> (“Since the 1970s, much economic regulation of established technologies has come to be seen to be obsolete. Both the ICC and CAB were abolished, but the FCC survives.”).

13. After the 1992 Act took effect, the FCC’s budget increased by \$80 million—nearly forty percent—and the agency hired new staff for price regulation of the cable industry. PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM 122 (1997).

14. The FCC’s common-carrier laws are found in Title II of the Communications Act of 1934, 47 U.S.C. §§ 201–76 (2012). The FCC’s TV laws are found in Title VI. 47 U.S.C. §§ 521–73 (2012).

15. See, e.g., Christopher S. Yoo, *Merger Review by the Federal Communications Commission: Comcast-NBC Universal*, U. PENN. L. SCH.

The FCC's recent assertions of authority to oversee internet services, apps, and online user privacy mark a long-anticipated reality: the great projects of the twentieth-century FCC are over.<sup>16</sup> We document the breakdown of the public utility model for mass media and telecommunications. The telegraph has disappeared, as has the AT&T long-distance monopoly. Facilities-based, local phone competition, thought impossible even as recently as the 1990s, is present.<sup>17</sup> Gone are the days of three broadcast TV networks and a few local stations, and mass media consumer choice has never been more abundant.<sup>18</sup> Today hundreds of TV channels and ubiquitous internet access provide access to every viewing niche imaginable.<sup>19</sup>

In theory, these accomplishments might warrant the elimination or reduction of a New Deal agency's regulatory authority.<sup>20</sup> An agency should shrink once its goals have been achieved, whether by market forces or by regulatory intervention,<sup>21</sup> and members of Congress have proposed

(2014), [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2544&context=faculty\\_scholarship](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2544&context=faculty_scholarship).

16. See, e.g., Kevin Werbach, *The Death and Life of a Great American Agency*, 31 CRITICAL STUD. MEDIA COMM. 160, 160 (2014) ("As communications and media platforms converge into a digital broadband amalgam, the case for a sector-specific regulator suddenly appears uncertain.").

17. See *infra* Part II.

18. See, e.g., Adam Thierer & Grant Eskelsen, *Media Metrics: The True State of the Modern Media Marketplace*, PROGRESS & FREEDOM FOUND. 16–19 (Summer 2008), <http://www.pff.org/mediametrics/Media%20Metrics%20%5BVersion%201.0%5D.pdf>.

19. FCC, INTERNET ACCESS SERVICES: STATUS AS OF DECEMBER 31, 2013, at 10 (Oct. 2014), [https://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db1016/DOC-329973A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1016/DOC-329973A1.pdf) (finding that ninety-three percent of households in census tracts where internet service providers reported connections had three or more providers offering at least 10 Mbps).

20. NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 67 (1995) ("A television system with hundreds or thousands of channels—especially channels that people pay to watch—not only destroys the notion of channel scarcity upon which the public-trustee theory rests but simultaneously breathes life and logic into the libertarian model."); Werbach, *supra* note 16, at 161 ("In this environment, the foundations for the FCC's legal authority are unsteady."); see HUBER, *supra* note 13, at 16 (proposing the elimination of the FCC and a return to common law).

21. Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 910 (1994).

dismantling the FCC since the late 1970s.<sup>22</sup> What accounts for the FCC's persistence, even as its original purposes—overseeing a national telephone monopoly and promoting a nascent broadcast radio industry—are obsolete?

We posit, after reviewing trends in communications law, that the FCC is not going anywhere soon. In this article we identify why, despite competition, falling prices, and expanding output in telecommunications and media, the agency will survive indefinitely and may expand its jurisdiction. We address a prominent theory after the passage of the deregulatory 1996 Telecommunications Act that the FCC would survive simply as a modest economic regulator of “bottlenecks.”<sup>23</sup> While it is still too early to dismiss this theory completely, it failed to foresee some important changes in the FCC's regulatory philosophy and strategy. Namely, the FCC and its defenders in recent years have largely shifted the FCC from an economic regulator to a social regulator—a shift consistent with public choice theory.<sup>24</sup> We also highlight a resilient (and incoherent) theory of law—quasi-common carriage—that coincided with this shift and will keep the agency and its constituencies quite active going forward.<sup>25</sup> This

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22. Representative Lionel Van Deerlin, the liberal Democratic chairman of the House Subcommittee on Communications and former broadcast TV anchorman, drafted a bill to eliminate the FCC. See Carole Shifrin, *FCC Members Oppose Executive Branch Unit*, WASH. POST (July 19, 1978), <https://www.washingtonpost.com/archive/business/1978/07/19/fcc-members-oppose-executive-branch-unit/ba8fc3f0-f3b3-49d1-a5c2-3bc227e91b63>. The bill would have replaced the FCC with a modest Communications Regulatory Commission. Communications Act of 1978, H.R. 13015, 95th Cong. (1978).

23. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1324 (1998) (“The role of the agency has been transformed from one of protecting end-users to one of arbitrating disputes among rival providers and, in particular, overseeing access to and pricing of ‘bottleneck’ facilities that could be exploited by incumbent firms to stifle competition.”).

24. See MURRAY L. WEIDENBAUM, *BUSINESS, GOVERNMENT, AND THE PUBLIC* (2d ed. 1981); Bruce Yandle & Elizabeth Young, *Regulating the Function, Not the Industry*, 51 PUB. CHOICE 59 (1986).

25. As we discuss *infra* Section III.A, quasi-common carriage has existed for decades at the FCC, but Professor Rob Frieden seems to be the first scholar to have highlighted the phenomenon. See Rob Frieden, *The Rise of Quasi-Common Carriers and Conduit Convergence*, 9 I/S J.L. & POL'Y 471, 472 (2014) (explaining how the FCC has been able to impose what the author considers “quasi-common carrier” responsibilities, such as mandatory carriage of local broadcast TV signals, on ventures that do not appear to qualify for FCC regulation).

change in regulatory philosophy, which evolved over decades but became prominent in recent years as common carriage withered in the face of deregulatory pressures,<sup>26</sup> will likely ensure agency survival for the foreseeable future.

## II. BACKGROUND: THE END OF THE PUBLIC UTILITY MODEL IN TELEPHONE AND BROADCAST

The agency's dominant standard is to regulate wired and wireless distributors according to "public interest, convenience, or necessity."<sup>27</sup> This is a classic phrase used in public utility statutes but has a unique interpretation under the Communications Act.<sup>28</sup> In this Part, we highlight the breakdown of industrial policy and the gradual shift to social objectives in telecommunications and media. For telecommunications, the Communications Act was designed to allow the FCC to regulate the AT&T long-distance monopoly and promote a single, compatible telephone network.<sup>29</sup> For broadcast, the sustaining theory for public utility regulation was the scarcity of airwaves, which required technocratic allocation to prevent damaging interference.<sup>30</sup> Technological change undermined theories that telephony was a natural

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26. See Eli M. Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, 18 TELECOMM. POL'Y 435, 435 (1994).

27. Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 295 (1930) (discussing the use of the "public interest, convenience, or necessity" standard in many communication regulation statutes).

28. As the first general counsel of the Federal Radio Commission, Louis Caldwell, said, "[o]nly an indefinite and very elastic standard should be prescribed for the regulation of an art and a field of human endeavor which is progressing and changing at so rapid a pace as is radio communication." *Id.* at 296. Caldwell noted that broadcasting was a non-common-carrier public utility. *Id.* at 328. He reproduced a Federal Radio Commission majority statement that broadcast is in "a different group of public utilities, i.e., those engaged in purveying commodities to the general public, such, for example, as heat, water, light and power companies, whose duties are to *consumers*, just as the duties of broadcasting stations are to listeners." *Id.* at 327-28 n.62 (*italics in original*).

29. PETER W. HUBER, MICHAEL K. KELLOGG & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW 21 (2d ed. 1999).

30. See FCC, JOHN W. BERRESFORD, THE SCARCITY RATIONALE FOR REGULATING TRADITIONAL BROADCASTING: AN IDEA WHOSE TIME HAS PASSED, MEDIA BUREAU STAFF RESEARCH PAPER NO. 2005-2 (Mar. 2005), <https://transition.fcc.gov/ownership/materials/already-released/scarcity030005.pdf>.

monopoly and that broadcast media was uniquely scarce.<sup>31</sup> Increasingly, therefore, the FCC relied on social—not economic—aims to preserve the public utility status of telecommunications and mass media firms.<sup>32</sup>

#### A. THE END OF NATURAL MONOPOLY IN TELEPHONE

In 1934 it was accepted that local and long-distance telephone service were natural monopolies.<sup>33</sup> The Communications Act therefore vested the FCC with oversight of interstate telecommunications service—the AT&T long-distance telephone monopoly.<sup>34</sup> However, by the 1960s and 1970s, the natural-monopoly justification for telecommunications regulation came under stress as competitors like MCI entered the long-distance market.<sup>35</sup> With the natural monopoly theory undermined, the FCC made universal telephone service a major pillar of agency action.<sup>36</sup> An extraordinarily complex system of cross subsidies developed,<sup>37</sup> in which the FCC administered and subsidized local phone service with long-distance rates.<sup>38</sup>

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31. *Id.*

32. Caldwell, *supra* note 27.

33. S. REP. NO. 781-73, at 2–3 (1934); H.R. REP. NO. 1850-73, at 2–3 (1934); 78 CONG. REC. 4139, 8822–24, 8853, 10312–17, 10322–23 (1934); see also *Hearings before Sen. Comm. on Interstate Commerce on Commission on Communications*, 71st Cong. 1085-88, 1250, 1582-85, 2115-31, 2137 (1929-1930); *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*, 14 FCC Rcd. 11364, 11366 & n.9 (1999) (citing 78 CONG. REC. 10314 (1934) (remarks of Rep. Rayburn)) (“Congress enacted the section 214(a) entry certification requirements to prevent useless duplication of facilities . . .”).

34. The agency’s charge was to ensure just, reasonable, and nondiscriminatory rates and practices toward other, mostly local, telecommunications providers. See 47 U.S.C. § 201 (2012). Regulation of local phone service rates and practices were largely devolved to the states and enforced by state public utility commissions. *Id.*

35. See Robert W. Crandall, *Telecommunications Liberalization: The U.S. Model*, 8 NBER-EASE 415, 415 (Jan. 2000), <http://www.nber.org/chapters/c8489.pdf> (describing the entry of MCI into the long-distance communications market).

36. MILTON L. MUELLER, JR., UNIVERSAL SERVICE: COMPETITION, INTERCONNECTION AND MONOPOLY IN THE MAKING OF THE AMERICAN TELEPHONE SYSTEM 155 (1997).

37. The existing universal-service mechanisms created “a system of such aggregate bewildering complexity that it [was] intelligible only to specialized accountants—at best. Society at large, including its policy makers, [had] long lost the ability to . . . judge the . . . system by some criteria of fairness or



The shift that occurred in telephone regulation since the 1960s suggests a recurring pattern: 1. the FCC's original industrial policy is superseded, and 2. new social goals replace prior economic regulation. Occasionally Congress or the courts will ratify this expansion in FCC authority, sometimes decades later. As Professor Milton Mueller has documented, this universal-service role for the FCC was largely manufactured as a post hoc justification for the Bell monopoly as competitors like MCI began encroaching on AT&T's long-distance business.<sup>39</sup> Residential phone penetration at the time already exceeded ninety percent.<sup>40</sup> Nevertheless, the FCC's policy shift away from oversight and maintenance of phone monopolies and toward universal service was ratified by Congress in the 1996 Telecommunications Act and persists today.<sup>41</sup> The four universal-service programs have distributed tens of billions of dollars since the passage of the Telecommunications Act but have a record of dubious efficacy<sup>42</sup>—economists estimate the cost of adding a marginal telephone subscriber in this era exceeded \$100,000.<sup>43</sup> (As we'll see, this pivot toward dubious social goals using largely ineffective mechanisms serves an adaptive function for the agency.)

Longstanding theories of natural monopoly in local telephony, so-called last-mile bottlenecks, are also undone.

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efficiency." Eli M. Noam, *Beyond Liberalization III: Reforming Universal Service*, 18 TELECOMM. POL'Y 687, 691 (1994).

38. This is the so-called Ozark Plan. See Jerry Hausman & Howard Shelanski, *Economic Welfare and Telecommunications Regulation: The E-Rate Policy for Universal-Service Subsidies*, 16 YALE J. ON REG. 19, 23 (1999).

39. Milton Mueller, *Universal Service in Telephone History: A Reconstruction*, 17 TELECOMM. POL'Y 352, 355 (1993) ("Thus the modern notion of universal service . . . is a very recent construction. It is not a longstanding historical policy with its roots in the Communications Act.").

40. FCC, UNIVERSAL SERVICE MONITORING REPORT 48 tbl.6.4 (2014). Telephone penetration has hovered around ninety-five percent for the last twenty years. FCC, UNIVERSAL SERVICE MONITORING REPORT 46 (2015).

41. 47 U.S.C. § 254 (2012).

42. See, e.g., Robert W. Crandall, *The Remedy for the "Bottleneck Monopoly" in Telecom: Isolate It, Share It, or Ignore It?*, 72 U. CHI. L. REV. 3, 9 (2005); Hausman & Shelanski, *supra* note 38, at 21 (finding that the Schools and Library program "is unusually costly" and funded in a way that "conflicts with established principles of public finance and welfare economics").

43. Thomas W. Hazlett & Scott J. Wallsten, *Unrepentent Policy Failure: Universal Service Subsidies in Voice & Broadband*, ARLINGTON ECON. 53 (June 2013) (estimating that "the cost per extra (voice) connected household exceeds \$100,000").

After the 1984 breakup of AT&T, federal policy reversed and began encouraging competition in local telephone markets, another reversal codified in the 1996 Telecommunications Act.<sup>44</sup> Congress, however, only partially repudiated the natural-monopoly status of phone companies and therefore had infrastructure-sharing mandates for the incumbent phone operators.<sup>45</sup> These mandates failed at producing effective competition,<sup>46</sup> but competition nevertheless arrived. The local phone companies saw their hold on subscribers broken by providers that Congress scarcely contemplated when writing the 1996 Telecommunications Act: cable TV and cellular providers.

Consumers have fled the legacy phone providers—incumbent local exchange carriers, who have suffered losses of about 100 million subscribers since 2000<sup>47</sup>—for the wireless and cable upstarts.<sup>48</sup> In 2003 only about 3% of households were wireless only,<sup>49</sup> but by 2015 about 47% of households were wireless only.<sup>50</sup> Voice over Internet Protocol (VoIP) service from cable operators has also made huge inroads. The FCC's most recent report on telephone competition showed that more residential customers had VoIP service, typically from cable

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44. See Joseph D. Kearney, *Will the FCC Go the Way of the ICC?*, 71 U. COLO. L. REV. 1153, 1191 (2000).

45. See Robert W. Crandall & Leonard Waverman, *The Failure of Competitive Entry into Fixed-Line Telecommunications: Who Is at Fault?*, 2 J. COMPETITION L. & ECON. 113 (2006), for a discussion of the practical and legal deficiencies of the FCC's network unbundling and interconnection rules.

46. See Thomas W. Hazlett, *Rivalrous Telecommunications Networks with and Without Mandatory Sharing*, 58 FED. COMM. L.J. 477, 482 (2006).

47. Compare WIRELINE COMPETITION BUREAU, LOCAL TELEPHONE COMPETITION: STATUS AS OF JUNE 30, 2008, at 5 tbl.2 (July 2009) (reporting that incumbent local exchange carriers had over 140 million residential customers in 2000), with WIRELINE COMPETITION BUREAU, VOICE TELEPHONE SERVICES: STATUS AS OF JUNE 30, 2015, at 3 fig.2 (Aug. 2016) (reporting that ILECs had under 40 million residential customers in 2015).

48. Hazlett, *supra* note 46, at 489, 499–500. Cable systems offering phone service utilize Voice over Internet Protocol (VoIP) and interconnect with traditional telephone providers. *Id.* at 489–91.

49. FCC, ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO COMMERCIAL MOBILE SERVICES 71 (2005).

50. FCC, ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO COMMERCIAL MOBILE SERVICES 99 chart VII.D.1 (2015).

companies, than traditional switched telephone service.<sup>51</sup> The results have been significant downward pressure on price, multiple competitors in every market, and the attainment of facilities-based phone competition.<sup>52</sup> In short, the natural monopoly justifications for public utility regulation of local (and long-distance) markets have evaporated.<sup>53</sup> Yet once again the FCC discovered novel social goals in the Communications Act. Local exchange carriers and their new cable competitors now find themselves subject to internet content nondiscrimination rules—net neutrality—which focuses on social, not economic or competitive considerations.<sup>54</sup> Net neutrality is discussed more fully below.

## B. THE END OF SCARCITY IN MASS MEDIA

The FCC is the primary regulator of mass media distributors. The public-trustee model in broadcast, justified by spectrum scarcity,<sup>55</sup> has long been proffered as a defense against the “libertarian model,” which resists government attempts to shape media content, business models, and

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51. WIRELINE COMPETITION BUREAU, LOCAL TELEPHONE COMPETITION: STATUS AS OF JUNE 30, 2015, at 3 fig.2 (Aug. 2016).

52. Hazlett, *supra* note 46, at 489, 505–06.

53. As Howard Shelanski concluded in 2007, “[t]he combination of inter- and intramodal competition have greatly diminished the prospects for any exercise of market power by [local phone companies],” and “[t]he long-distance telephone market has all but disappeared as a viable line of business.” Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for US Telecommunications Policy*, 24 YALE J. ON REG. 55, 75–76 (2007).

54. Tim Wu, who coined “net neutrality,” noted that the FCC, not competition agencies, needs to regulate content nondiscrimination because “the FCC is equipped to deal with issues like regionalism, like localism, like diversity” and “political bias.” *Net Neutrality: Is Antitrust Law More Effective Than Regulation in Protecting Consumers and Innovation? Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 84, 94 (June 20, 2014) (comments of Professor Tim Wu, Columbia Law School). Net neutrality advocates say that competition does not negate the need for regulation. Werbach, *supra* note 16, at 163 (noting that “even in competitive markets,” companies “may act as de facto monopolists” and need regulation); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 150 (2005) (noting that competition among ISPs does not ensure passive carriage of internet content).

55. See HENRY GELLER, RAND CORP., THE FAIRNESS DOCTRINE IN BROADCASTING: PROBLEMS AND SUGGESTED COURSES OF ACTION (Dec. 1973), <http://www.rand.org/content/dam/rand/pubs/reports/2006/R1412.pdf>.

distributor architecture.<sup>56</sup> Despite a virtual explosion in media distributors and output, the FCC maintains its authority to regulate media outlets as public trustees.

The FCC derived its responsibility to control media composition and content<sup>57</sup> from a statutory duty to assign broadcast licenses if such assignment was in the public interest.<sup>58</sup> For most of FCC history, lasting until the 1990s when subscription cable TV dominated, broadcast licensure and content oversight were perhaps the highest priorities for top FCC officials.<sup>59</sup> Though explicitly limited to authority over broadcast and telecommunications, the agency asserted “ancillary authority” since the 1960s to regulate other media distributors like cable TV.<sup>60</sup> The scarcity rationale, then, while seemingly limited to broadcast, is also the source of FCC authority over non-broadcast media distributors.

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56. Krystilyn Corbett, *The Rise of Private Property Rights in the Broadcast Spectrum*, 46 DUKE L.J. 611, 627 (1996).

57. Broadcast licensees have censored political and titillating speech that, if aired, might endanger their lucrative licenses. Seymour N. Siegel, *Censorship in Radio*, 7 AIR L. REV. 1, 4 (1936) (“There have been verified instances where smaller stations, in the hope of gaining the good graces of the new party in power, refused facilities to the critics of the New Deal.”).

58. 47 U.S.C. §§ 303, 309(a) (2012). It was conventional wisdom for decades that, because spectrum was scarce and interference between users was a risk, the federal government needed to assign spectrum to deserving licensees for approved uses. Editorializing by Broad. Licensees, 13 FCC Rcd. 1246, 1257 (1948) (“Any regulation of radio, especially in a system of limited licensees, is in a real sense an abridgment of the inherent freedom of persons to express themselves by means of radio communications. It is however, a necessary and constitutional abridgment in order to prevent chaotic interference from destroying the great potential of this medium for public enlightenment [sic] and entertainment.”). This view was popularized by a 1943 Supreme Court decision. See *Nat’l Broad. Co., Inc. v. United States*, 319 U.S. 190, 296 (1943).

59. TUNSTALL, *supra* note 9, at 252 (“Commentators and ex-staff members of the FCC have noted that, throughout its history, the commission has always spent most, perhaps two-thirds, of its time on broadcast issues.”); see also FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* (1976).

60. See Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Bus. Radio Serv. for Microwave Stations to Relay Television Signals to Cmty. Antenna Sys., 2 F.C.C.2d 725, 746 (1966) (“[T]o insure effective integration of CATV within a fully developed television service, the new regulation will apply equally to all CATV systems, including those which require microwave licenses and those which receive their signals off the air.”).

The logic of the scarcity argument is largely discredited<sup>61</sup> but still has endorsement by the Supreme Court.<sup>62</sup> Technology and markets have largely swept away prior assumptions about the limits of spectrum assignment. The number of radio operators is illustrative. There were only about 600 AM radio operators on the air when the FCC was created, but there were over 5000 commercial stations in 1965 and more than 10,000 in 1995.<sup>63</sup> The FCC's approval of "hybrid digital" technology in 2002 made an additional 54,000 full-power FM broadcasts technically feasible.<sup>64</sup> In short, every media market in the United States has dozens or hundreds of radio channels available.

Broadcast TV has seen similar improvements in channel expansion. In 1950 there were fewer than 100 commercial broadcast stations in the United States and only 9.0% of households had a TV.<sup>65</sup> Yet a mere fifteen years later, there were over 500 stations and 92.6% of homes had a TV.<sup>66</sup> Still, in those early decades of broadcast TV, competition and choice were rare. Many cities in the 1960s had at best three or four TV channels.<sup>67</sup>

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61. Many scholars regard Supreme Court endorsement of the scarcity argument as a "spectacular error." HUBER, *supra* note 13, at 41; Jim Chen, *Liberating Red Lion from the Glass Menagerie of Free Speech Jurisprudence*, 1 J. TELECOMM. & HIGH TECH. L. 293, 296 (2002) ("Of course, no one besides the Justices actually believes the scarcity rationale.").

62. *Nat'l Broad. Co., Inc. v. United States*, 319 U.S. 190, 216 (1943) (holding that the Communications Act "puts upon the Commission the burden of determining the composition of [radio communication] traffic").

63. See Brent Skorup, *Broadcast Radio Remains Tightly Regulated*, MEDIA METRICS (Jan. 2016), <http://mediametrics.mercatus.org/broadcast-radio-remains-tightly-regulated/>.

64. Thomas W. Hazlett & Sarah Oh, *Exactitude in Defining Rights: Radio Spectrum and the Harmful Interference Conundrum*, 28 BERKELEY TECH. L.J. 227, 248 (2013).

65. TELEVISION BUREAU OF ADVERT., TV BASICS: A REPORT ON THE GROWTH AND SCOPE OF TELEVISION 2, 18 (2012) (citing TELEVISION & CABLE FACTBOOK and Nielsen Company data).

66. *Id.*

67. TUNSTALL, *supra* note 9, at 121 (1986). At that time, FCC chairman Newton Minow's goal to one day increase the number of TV networks from three to six was considered ambitious. MINOW & LAMAY, *supra* note 20, at 194.

Long gone are the days of three networks.<sup>68</sup> Even Minow concluded later that “[t]he FCC objective in the early 1960s to expand choice has been fulfilled—beyond all expectations.”<sup>69</sup> Cable TV, which in the 1960s served mostly to passively transmit broadcast channels to subscribers, began originating non-broadcast programming like HBO and ESPN. Slowly, after fits and starts of cable regulation, the “vast wasteland” of 1960s TV transformed into hundreds of channels as cable operators and networks grew.<sup>70</sup> This growth in consumer choice has entered a new stage—the Golden Age of Television<sup>71</sup>—in the last few years as satellite, internet, and telephone companies have ramped up the competition for eyeballs and programming.<sup>72</sup> Internet streaming made even more consumer choice possible, as more than 100 streaming video-on-demand services debuted in 2015 and targeted niche audiences.<sup>73</sup>

This explosion in competition and consumer choice,<sup>74</sup> however, poses a threat to the agency’s public utility oversight.

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68. It is now a popular complaint that there is “too much” TV and internet-delivered media and news. Emily Yahr, *What We Learned from the Giant List of 1,400 TV Shows Last Year*, WASH. POST (Jan. 29, 2016), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/01/29/what-we-learned-from-the-giant-list-of-1400-tv-shows-last-year/> (“In the last year, FX network president John Landgraf has been on a mission to convince people that there’s *too much TV*.”).

69. MINOW & LAMAY, *supra* note 20, at 200.

70. *Id.* at 188.

71. See David Carr, *Barely Keeping Up in TV’s New Golden Age*, N.Y. TIMES (Mar. 9, 2014), <http://www.nytimes.com/2014/03/10/business/media/fenced-in-by-televisions-excess-of-excellence.html>.

72. Since 2002 cable operators have lost over fourteen million subscribers and significant market share. See Brent Skorup, *Deregulation of Television Finally Bearing Fruit for Consumers*, TECH. LIBERATION (Oct. 14, 2015), <https://techliberation.com/2015/10/14/deregulation-of-television-finally-bearing-fruit-for-consumers/>. Compare Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming, 17 FCC Rcd. 26901 (Dec. 31, 2002) (reporting 68.8 million cable households), with Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming, 30 FCC Rcd. 3253 (Apr. 2, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-41A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-41A1.pdf) (reporting 54.4 million cable households).

73. Jeff Baumgartner, *INTX 2016: SVOD Reaches Its Second Stage*, MULTICHANNEL NEWS (May 20, 2016), <http://www.multichannel.com/news/content/intx-2016-svod-reaches-its-second-stage/405088>.

74. When asked to assess the state of TV in the early 1990s, before direct-broadcast satellite and telephone companies were a competitive threat to cable, former chairman Minow concluded that things have greatly improved. See MINOW & LAMAY, *supra* note 20, at 200 (“If you are a sports fan, a news

Minow warned, “[a] television system with hundreds or thousands of channels—especially channels that people pay to watch—not only destroys the notion of channel scarcity upon which the public-trustee theory rests but simultaneously breathes life and logic into the libertarian model.”<sup>75</sup> As with the demise of natural monopoly in telecommunications, the demise of scarcity in media sent FCC defenders searching for new theories of regulation.<sup>76</sup> As a rearguard defense against market proponents, Minow helpfully suggested new social objectives for the FCC, including affordability, inclusiveness, education of youth, and elimination of violence.<sup>77</sup> Accordingly, the FCC increasingly uses a foundational prerogative of public utility regulators—transaction approval—to extract content obligations from media firms and pursue other social objectives, like donations to public safety groups from regulated firms.<sup>78</sup> Like universal service responsibilities in telecommunications, these FCC-initiated social aims serve an adaptive purpose as scarcity of media outlets looks implausible as a basis for public utility regulation of media distributors.

### III. AGENCY SURVIVAL

“What giants do you mean?” said Sancho Panza in amaze. “Those you see yonder . . . are no giants, but windmills . . .”

“It seems very plain,” said [Don Quixote], “that you are but a novice in adventures: these I affirm to be giants; and if thou art afraid, get out of the reach of danger, and put up thy prayers for me, while I join with them in fierce and unequal combat.”<sup>79</sup>

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junkie, a stock-market follower, a rock-music devotee, a person who speaks Spanish, a nostalgic old-movie buff, a congressional-hearing observer, a weather watcher—you now have your own choice.”); *see also* John Eggerton, “Wasteland” Revisited, BROAD. & CABLE (Feb. 29, 2016, 8:30 AM), <http://www.broadcastingcable.com/news/washington/wasteland-revisited/154187>.

75. MINOW & LAMAY, *supra* note 20, at 67.

76. Werbach, *supra* note 16 (proposing the FCC shift focus to non-economic issues, regulation of bottlenecks, and “vestigial scarcities”).

77. MINOW & LAMAY, *supra* note 20, at 200–202.

78. *See, e.g.*, Brent Skorup & Christopher Koopman, *FCC Transaction Reviews and First Amendment Risks*, 39 HARV. J.L. & PUB. POL’Y 675 (2016).

79. MIGUEL DE CERVANTES SAAVEDRA, *THE HISTORY AND ADVENTURES OF THE RENOWNED DON QUIXOTE* 44 (Tobias Smollett trans., Wordsworth eds. 1998).

Agency obsolescence is a conundrum that scholars have long pondered.<sup>80</sup> Social and economic problems diminish or disappear, yet the agencies don't shrink and may actually grow larger.<sup>81</sup> The attainment of their original social aims is not entirely welcome by officials in the agency because, as Minow noted, those circumstances give credence to the libertarian model, and the agency must justify its existence or legacy programs.<sup>82</sup> Jonathan Macey goes further: "[O]nce an agency has become obsolete, particularly when that fact is beginning to become noticed by scholars, journalists, and interests whose objectives would best be served by the demise of the agency . . . [then] agency personnel all share the same basic goal: survival."<sup>83</sup> When statutes are obsolete, judges and agencies can interpret them in ways that occasionally preserve some usefulness.<sup>84</sup> When agencies are obsolete, however, they frequently behave in ways that inflict high economic costs.<sup>85</sup> Economist Thomas Sowell notes the significant opportunity cost of obsolete agencies: productive bureaucrats with high human capital divert their efforts to diminishing social or marketplace evils.<sup>86</sup> Controversial, politicized regulatory enforcement displaces market activity and galvanizes

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80. See Kearney, *supra* note 44 (discussing the obsolescence of the FCC's responsibilities); Macey, *supra* note 21, § II (discussing the obsolescence of the SEC's responsibilities).

81. For fiscal year 1993, the FCC budget was \$134 million (without adjusting for inflation) and 1700 employees; for FY 1996 the request was \$224 million and 2300 employees. 142 CONG. REC. S2207-08 (daily ed. Mar. 15, 1996) (statement of Sen. Pressler). For fiscal year 2000, the FCC estimated costs of \$230.9 million (without adjusting for inflation) and 1930 full-time equivalents (FTEs). FCC, FISCAL YEAR 2000 BUDGET ESTIMATES 36 (1999), <https://transition.fcc.gov/Reports/fcc2000budget.pdf>. For fiscal year 2017, the FCC requested \$358.3 million and 1650 FTEs. FCC, FISCAL YEAR 2017 BUDGET IN BRIEF 4 (2016), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0209/DOC-337668A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0209/DOC-337668A1.pdf).

82. See sources cited *supra* note 75 and accompanying text.

83. Macey, *supra* note 21, at 917-18.

84. *Id.* at 913.

85. *Id.* at 913.

86. See THOMAS SOWELL, KNOWLEDGE AND DECISIONS (1996). Sowell further explains: "As those evils are successively reduced, either by the agency's own activity or by other technological or social developments, the agency must then apply more activity per residual unit of evil, just in order to maintain its current employment and appropriations level." *Id.* at 141; see also Macey, *supra* note 21, at 914.



congressional and pressure group defenders, while important but less controversial proceedings fall by the wayside.<sup>87</sup>

The resilience of the FCC is particularly confounding. Congress foresaw a diminishing role for the FCC in telecommunications<sup>88</sup> and media markets<sup>89</sup> and a negligible role in regulation of the internet and internet service providers.<sup>90</sup> It appears the FCC initially accepted those widespread norms about allowing market competition to replace regulation.<sup>91</sup> In 1999 the FCC published a draft document called “Strategic Plan: A New FCC for the 21st Century” that outlined the agency’s new vision.<sup>92</sup> The document predicted that the early years of the new millennium would see “vigorous competition that will greatly reduce the need for direct regulation.”<sup>93</sup> The agency also noted that the convergence of communications and media would erode the traditional regulatory silos.<sup>94</sup>

This deregulatory posture attracted notice from regulatory scholars. Joseph Kearney and Thomas Merrill noted in a

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87. For one such example, see John Haring & Evan Kwerel, *Competition Policy in the Post-Equal Access Market* 6 (FCC Office of Plans & Pol’y, Working Paper, 1987), [https://transition.fcc.gov/Bureaus/OPP/working\\_papers/oppwp22.pdf](https://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp22.pdf) (discussing the economic costs of the FCC’s pursuit of inefficient direct regulation after the 1984 AT&T divestiture).

88. The 1996 Telecommunications Act gave the FCC unprecedented authority to unilaterally decide to forbear from enforcing its common-carrier rules and statutes. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The common-carrier forbearance provision is codified at 47 U.S.C. § 160 (2012).

89. The FCC has the authority to repeal some media ownership rules. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12 (1996); Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004).

90. The Act announced a policy that the internet and internet service providers should be free from regulation entirely. “It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b) (2012). “Interactive computer service” is provided by ISPs. 47 U.S.C. § 230(f)(2) (2012).

91. For instance, in its fiscal year 2000 budget request, the agency stated it would “deregulate as competition develops.” See FISCAL YEAR 2000 BUDGET ESTIMATES, *supra* note 81, at 35.

92. FCC, STRATEGIC PLAN: A NEW FCC FOR THE 21ST CENTURY (Aug. 1999), [https://transition.fcc.gov/Bureaus/Miscellaneous/News\\_Releases/1999/draft\\_strategic\\_plan.pdf](https://transition.fcc.gov/Bureaus/Miscellaneous/News_Releases/1999/draft_strategic_plan.pdf).

93. *Id.* at 1.

94. *Id.* at 3.

seminal 1998 article that regulated industries like telecommunications, energy, and transport were undergoing a transformation.<sup>95</sup> They documented a shift away from traditional entry restrictions and oversight of tariffs, toward an emerging philosophy where public agencies would regulate only the “monopoly bottlenecks” and leave the rest to competition.<sup>96</sup>

With nearly twenty years of hindsight, that theory can be modified for telecommunications and media regulation. As media and communications markets grow competitive, FCC focus has moved away from vanishing monopolies and toward regulation of “gatekeepers,” a concept that elides the market power that Kearney and Merrill contemplate. Gatekeeper appears to mean an exclusive contractual relationship between an operator and a supplier or an end user<sup>97</sup>—what the FCC idiosyncratically called in one recent order a “monopoly on access to subscribers”—that exists even when several competing providers are present.<sup>98</sup> Having adjudged a provider a gatekeeper, the FCC even disclaims needing to determine whether the provider has the ability to raise price.<sup>99</sup>

Identifying gatekeepers in mass media and communications was only the first step. To stave off obsolescence, the FCC also needed to tie regulation of gatekeepers to extant legal precedent. Fortunately for the agency, coinciding with the rise of competitive communications and media markets was the breakdown of common carriage. What remains is a contradictory mess of quasi-common carriage precedents dating back decades. While it is impossible to glean a coherent theory of common carriage from these precedents, their inconsistencies give legal plausibility to the FCC’s selective enforcement of common-carrier obligations on gatekeepers. The shift to regulate gatekeepers, unmoored from findings of market power and the strictures of pure common

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95. Kearney & Merrill, *supra* note 23.

96. *Id.* at 1405.

97. The “net neutrality” order uses the term “gatekeeper” dozens of times and reveals the flexibility of the term. *See* Protecting & Promoting the Open Internet, 30 FCC Rcd. 5601, ¶ 78 (Feb. 26, 2015) (“Broadband providers function as gatekeepers for both their end user customers who access the Internet, and for various transit providers, CDNs, and edge providers attempting to reach the broadband provider’s end-user subscribers.”).

98. *Id.* ¶ 80.

99. *Id.* ¶ 84 (“We therefore need not consider whether market concentration gives broadband providers the ability to raise prices.”).

carriage, gives the FCC expansive and lasting powers over broadband internet and the nascent services that ride on data networks.

#### A. THE BREAKDOWN OF COMMON CARRIAGE

The Communications Act, as noted, created the FCC and brought broadcast radio and telecommunications under a single regulator. Both were viewed as a type of public utility.<sup>100</sup> These two services corresponded to two distinct ways people were using wireless and wired technologies in the 1930s. Telephone (and telegraph) was a wired, one-to-one, common-carrier communications service under one regulatory framework called Title II.<sup>101</sup> In contrast to phone companies, most broadcast infrastructure owners originated and acquired programming and exercised significant editorial functions over the messages transmitted.<sup>102</sup> Radio, therefore, was a wireless, broadcast, private-carrier communications service under a separate regulatory framework called Title III.<sup>103</sup> “Broadcast via wire” service—that is, one-to-many, via wireline—was thought infeasible around the time of the FCC’s creation.<sup>104</sup> This omission would fuel the quasi-common-carriage precedents, since the FCC, decades later, would struggle mightily to classify technology like cable TV and data services that resembled neither radio broadcast nor telephony.

Modern common carriage is derived from common-law precedents regarding public “callings,”<sup>105</sup> but identifying a consistent theory about which providers are common carriers

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100. The first general counsel of the Federal Radio Commission (FRC) noted that broadcasting was a non-common-carrier public utility. Caldwell, *supra* note 27, at n.62; Law Review Editors, *supra* note 6, at 79.

101. HUBER, *supra* note 13, at 31.

102. There were some early wireless common carriers when the FRC was created, such as fixed point-to-point stations. See Caldwell, *supra* note 27, at 328.

103. HUBER, *supra* note 13, at 31.

104. Caldwell, *supra* note 27, at 319 (“Theoretically wires could be made to perform [one-to-many] services, but economically this is impossible.”).

105. See Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 169–70 (1904). Courts today primarily look to how a network functions, not how regulators classify it. See Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC, 525 F.2d 630, 644 (D.C. Cir. 1976) (“A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.”).

and what obligations they have is difficult.<sup>106</sup> In communications law, common carriage implies many statutory duties, such as just and reasonable rate requirements (typically implemented by the filing of tariffs) and nondiscrimination mandates.<sup>107</sup> Perhaps the single hallmark that distinguishes common carriers from private carriers is that common carriers abandon control over the content traversing the network.<sup>108</sup> Telecommunications providers are common carriers and therefore function as “dumb pipes” that passively transmit messages.<sup>109</sup> Private carriers like broadcasters curated content and therefore avoid common-carriage obligations.<sup>110</sup>

These neat distinctions between common carrier and private carrier would not last.<sup>111</sup> Largely because of government attempts to control and influence content, broadcast and media distributors were burdened with some common-carrier attributes and compelled to abandon some control of transmitted messages. On the other hand, traditional common-carriage requirements in telecommunications were weakened, largely by deregulatory policy, after the 1970s.

Today, therefore, telephone, cable TV, satellite TV, broadcast, and internet service providers all have attributes of common carriage and private carriage—that is, they are quasi-

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106. See Thomas B. Nachbar, *The Public Network*, 17 *COMMLAW CONSPICUOUS* 67, 109 (2008) (“It is hard to find a specific characteristic that leads to nondiscriminatory access and rate regulation.”); Kevin Werbach, *Only Connect*, 22 *BERKELEY TECH. L.J.* 1233, 1247 (2007) (“Common law sources are also unhelpful, offering competing and largely inconsistent rationales.”); Christopher Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 *HOUS. L. REV.* 545, 552 (2013) (“[A] number of recent scholars have reviewed the historical justifications of common carriage only to conclude . . . that they fail to yield a coherent rationale.”).

107. See Noam, *supra* note 26, at 436; James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 *FED. COMM. L.J.* 225, 262 (2002).

108. Allen S. Hammond, IV, *Network Regulation in the United States*, in 13 *THE FROELICH/KENT ENCYCLOPEDIA OF TELECOMMUNICATIONS* 241 (Fritz E. Froehlich & Allen Kent eds., 1997) (“All who pay a timely subscription fee . . . may gain access and enjoy usage” of the common commercial carrier network.).

109. See 47 U.S.C. § 153(50) (2012) (defining telecommunications).

110. Cf. HUBER, *supra* note 13, at 42–43.

111. A mere three years after the formation of the FRC, its former general counsel stated in a law review article, “I must frankly confess that I do not know where the exact boundary line should be fixed in determining what kinds of stations should be placed under the common carrier obligation. Clearly some ought to be, and just as clearly some cannot be.” Caldwell, *supra* note 27, at 329.

common carriers. A quasi-common carrier may control and curate some content on its network but is prohibited from exercising total control over content. Today's quasi-common carriers typically don't need to file tariffs but may need FCC permission to launch new services or modify existing services.

As formalized by the Telecommunications Act of 1996, the three major categories the FCC regulates are common-carrier telecommunications services; free, over-the-air broadcast services; and subscription cable TV services.<sup>112</sup> These stylized categories have almost completely broken down as networks converged and competed. As we explain, for decades, common carriers have offered non-common-carrier services and entities that are not common carriers, such as cable TV companies and FM radio broadcasters, have entered the telecommunications field as technology and consumer behavior changed.

## 1. Broadcast

Broadcasters' control of their facilities and content is not absolute, and for decades the FCC imposed nondiscrimination burdens on licensees.<sup>113</sup> By statute, broadcasters are not common carriers,<sup>114</sup> yet common-carriage elements have crept

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112. Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 985 (1997).

113. See Lili Levi, *The Four Eras of FCC Public Interest Regulation*, 60 ADMIN. L. REV. 813, 825–26 (2008). There is no accepted meaning of the public interest. Then-Assistant Secretary of Commerce for Telecommunications and Information Henry Geller said in 1978 that the standard represented surrender from Congress: “All the public interest standard says is ‘We give up.’” Erwin G. Krasnow, Herbert A. Terry & Lawrence D. Longley, *Rewriting the 1934 Communications Act, 1976–1980: A Case Study of the Formulation of Communications Policy*, 3 COMM/ENT L.J. 345, 365 (1980). Though they are members of the press protected by the First Amendment, the Supreme Court has withheld strong First Amendment protections for FCC regulation of broadcaster speech. This has long posed a First Amendment paradox—broadcasters are speakers but have programming obligations as public trustees. *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 252 (D.C. Cir. 1974) (“At present we simply do not know how to ideally resolve the conflict between diversity and freedom from regulation.”); Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149, 163 (2006).

114. 47 U.S.C. § 153(11) (2012) (“[A] person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.”). In fact, the FCC revoked the license of a broadcaster who sold inexpensive five-minute blocks of airtime to amateurs, foreign-language programmers, and

into broadcast licensure. As one scholar noted years ago, “[o]ver the years, government regulation of broadcast content has been tailored toward making the broadcaster a hybrid—part autonomous speaker, part common carrier. The much maligned ‘public trusteeship’ doctrine reflects a view of broadcaster as common carrier.”<sup>115</sup>

While the “media access” theories<sup>116</sup> that sought to impose common carriage requirements on media distributors weren’t prevalent until the 1960s, the FCC and its predecessor, the Federal Radio Commission (FRC), nourished that movement by expressly considering program content in the early public-interest determinations for license renewal. The FRC had, and the FCC has, no statutory authority to influence the choice of programming,<sup>117</sup> and the FRC’s initial intrusion into programming, according to the commission’s first general counsel, happened inadvertently.<sup>118</sup> Yet by 1940 the FCC had made content a critical element of renewal and declared that

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religious groups and did not police the content aired. *Cosmopolitan Broad. Corp. v. FCC*, 581 F.2d 917 (D.C. Cir. 1978).

115. Stephen L. Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 YALE L.J. 581, 595 (1984). Another quasi-common-carrier requirement for broadcasters was the mandate for “equal time” for legally qualified candidates for political office. 47 U.S.C. § 312(a)(7) (2012). The Supreme Court upheld this mandate and “statutory right of access” as comporting with the First Amendment. *CBS v. FCC*, 453 U.S. 367, 396 (1981).

116. The media access school, which crested in the 1960s and 1970s, advocated that FCC regulation of media was required to promote democracy and free speech. See, e.g., Jerome A. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); Michael Botein, *Federal Communications Commission’s Fairness Regulations: A First Step Towards Creation of a Right of Access to the Mass Media*, 54 CORNELL L. REV. 294 (1969). As one scholar noted at the time, “the owners and managers of the media have become the real sources of suppression and censorship in America, with perhaps an even greater capacity to suppress thought than the government itself.” David L. Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C. L. REV. 1, 9 (1973).

117. Louis G. Caldwell, *Freedom of Speech and Radio Broadcasting*, 177 ANNALS AM. ACAD. POL. & SOC. SCI. 179, 188 (1935); see also 47 U.S.C. § 326 (2012) (prohibiting FCC censorship and protecting broadcasters from free-speech interference).

118. In the immediate wake of the creation of the FRC in 1927, the airwaves were in chaos because many broadcasters were attempting to secure their place on the air, yet it took three years for the FRC to adopt even basic procedural regulations. Caldwell, *supra* note 117, at 196–97. The FRC, needing some way to differentiate between similarly qualified applicants in the interim, began considering programming for licensure. *Id.* at 197–98.

broadcasters were public trustees who needed to be “sensitive to the problems of public concerns in the community and to make sufficient time available, *on a non-discriminatory basis*, for the full discussion thereof.”<sup>119</sup> Abandonment of control over content followed. Broadcaster obligations were augmented with the 1949 “fairness” requirements, including the “obligation to make available on demand opportunities for the expression of opposing views.”<sup>120</sup>

Other quasi-common-carriage norms accumulated. Like any utility and telecommunications provider, broadcasters must apply to the FCC before building a broadcast station or transferring a license, and the FCC must find that the public interest, convenience, and necessity will be served.<sup>121</sup> In the 1970s, stations found that even their decisions to modify formats, say, from money-losing classical music to rock music, required FCC permission<sup>122</sup>—an obligation that resembles the 214 process whereby common carriers apply to the FCC to discontinue or reduce their services.<sup>123</sup>

Also, in the 1960s the fairness requirements evolved, at the insistence of the FCC and the Supreme Court, into a restricted right of access to broadcast facilities and free airtime.<sup>124</sup> As a result, complaints about fairness and access dominated commissioners’ time.<sup>125</sup> Courts struggled to adjudicate complaints against broadcasters, who were formally private carriers but had to comply with these quasi-common carriage obligations. In a 1971 case concerning a network’s rejection of an anti-Vietnam War advertisement, the U.S. Court of Appeals for the DC Circuit even granted public-issue groups the “limited right of access to radio and television” they sought on

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119. United Broad. Co. (WHKC), 10 F.C.C. 515, 517 (1945).

120. Report on Editorializing by Broad. Licensees, *supra* note 7, at 1251.

121. 47 U.S.C. § 310(d) (2012).

122. Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926, 930 (D.C. Cir. 1973) (reprimanding the FCC for “desir[ing] as limiting an interpretation as possible”); *see also* Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 250 (D.C. Cir. 1974) (“[W]hen the format to be discontinued is apparently unique to the area served . . . a hearing on the public interest must be held.”); Citizens Comm. to Pres. the Present Programming of the Voice of the Arts in Atlanta on WGKA-FM v. FCC, 436 F.2d 263 (D.C. Cir. 1969).

123. 47 U.S.C. § 214(a) (2012).

124. *See* Red Lion Broad. v. FCC, 395 U.S. 367 (1969) (upholding an FCC determination that a Goldwater critic was entitled to free airtime to respond to an on-air attack).

125. TUNSTALL, *supra* note 9, at 252.

First Amendment grounds.<sup>126</sup> The Supreme Court reversed that holding because such a ruling rendered broadcasters common carriers,<sup>127</sup> yet the Court equivocated and affirmed that broadcasters, as public trustees, must sacrifice their editorial discretion and continue to provide a right of access to their facilities.<sup>128</sup> With the tacit backing of the FCC and the courts, community activists made constant appeals to stations for airtime, many of which were granted by broadcasters who feared loss of license.<sup>129</sup>

During the Carter and Reagan administrations, proponents of laissez-faire also blurred the lines between common carriage and private carriage by encouraging Title III broadcasters to enter markets that were previously the domain of Title II common carriers.<sup>130</sup> Broadcast technology advances meant more efficient use of wireless frequencies, which left excess capacity. For decades, the FCC watched uneasily as

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126. *Bus. Execs.' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 648 (D.C. Cir. 1971) (italics in original omitted). This decision contains an early no-blocking requirement for broadcasters. *Id.* at 646 ("We hold specifically that a flat ban on public issue announcements is in violation of the First Amendment . . .").

127. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973).

128. The FCC "must remain in a posture of flexibility to chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media." *Id.* at 120; see also Lange, *supra* note 116, at 40 ("Yet it is abundantly clear that the majority is unprepared either wholly to accept the 'risks of abuse' posed by unlimited editorial discretion or to abandon the 'government control' already imposed upon broadcast content."). This equivocation permitted the FCC to create de facto content mandates. Harry Cole & Patrick Murck, *The Myth of the Localism Mandate: A Historical Survey of How the FCC's Actions Belie the Existence of a Governmental Obligation to Provide Local Programming*, 15 *COMMLAW CONCEPTUS* 340, 358 (2007) ("The Commission's goal was to create a regulatory system which, if complied with, would effectively (but indirectly) compel broadcasters to do something which the FCC could not obligate them to do.").

129. The agency listed detailed rules requiring licensees to ascertain the programming desires of the community, including polling the views of powerful local groups. Levi, *supra* note 113, at 835–36. To retain their license, broadcasters needed to send detailed logs of programming to the FCC to demonstrate that their programming was responsive to the programs requested via survey. See, e.g., *Office of Comm'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1422 (D.C. Cir. 1983); *Reregulation of Radio and TV Broad.*, 69 F.C.C.2d 979, 1002–08 (Sept. 22, 1978).

130. See generally Jason Oxman, *The FCC and the Unregulation of the Internet*, 584 *ANN. INST. ON TELECOMM. POL'Y & REG.* 231 (1999).



wireless services substituted for wired telecommunications<sup>131</sup> and occasionally attempted to prevent Title III services from encroaching on Title II service.<sup>132</sup> Scholars at the time foresaw the tension created by Communication Act's artificial point-to-point and broadcast distinction:

As long as radio communications and common carrier transmissions remained relatively separable industries, administration of these different standards did not prove difficult. But as the nonbroadcast, nonentertainment carriers increasingly utilize radio in the performance of their services, the Commission will be called on more often to reconcile the diverse approaches of Title II and Title III.<sup>133</sup>

In the mid-1950s, to bring a semblance of legal consistency, the FCC allowed only wired common carriers to operate point-to-point microwave radio systems.<sup>134</sup> However, this was permitted only on a developmental basis, and microwave's classification was unclear.<sup>135</sup> Also around that time, new FM stations were using their channels to broadcast ad-free, subscription music services (Muzak and other "background music" providers marketed these services to retail stores and commercial venues).<sup>136</sup> The FCC tried to create a "non-broadcast" point-to-point classification for subscription music that was ancillary to the broadcast service but that decision was reversed at court.<sup>137</sup>

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131. For instance, in the late 1950s, 22% of long-distance telephone miles and 78% of TV circuit miles of the Bell System were provided by microwave radio. Comment, *Allocating Radio Frequencies between Common Carriers and Private Users: The Microwave Problem*, 70 YALE L.J. 954, 956–57, n.19 (1961).

132. Radio broadcasters risked their license if their programming resembled point-to-point messaging. Adelaide Lillian Carrell et al., 7 F.C.C. 219, 222 (1939) (noting that "the use of a broadcast station for point-to-point delivery of messages" to the local police department violates Commission rules); Bremer Broad. Co., 2 F.C.C. 79, 83 (1936) (noting that transmitting horserace results to "particular individuals," rather than the general public, violates commission rules); Scroggin & Co. Bank, Station KFEQ, 1 F.C.C. 115, 196 (1934–1935) (condemning the transmission of personalized advice to radio listeners); Applications of Standard Cahill Co., 1 F.C.C. 227, 230 (1935) (disapproving of sponsored programming for horserace fans on the grounds that such arrangements are "point-to-point communication rather than broadcasting").

133. *Allocating Radio Frequencies*, *supra* note 131, at 956.

134. *Id.* at 957–59.

135. *Id.*

136. See Peter Blechta, *Muzak, Inc. – Originators of "Elevator Music,"* HISTORYLINK.ORG (Apr. 6, 2012), <http://www.historylink.org/File/10072>.

137. *Functional Music, Inc. v. FCC*, 274 F.2d 543, 545 (D.C. Cir. 1958).

With deregulation norms in the 1970s and 1980s, however, the FCC decided to allow radio and TV broadcasters to use excess subchannels for ancillary services, including common-carrier services like paging and telemetry.<sup>138</sup> The FCC quietly omitted classification of these new services,<sup>139</sup> leading one commenter to call one such proceeding “another ‘Title II ½’ action,” midway between common carriage (Title II) and broadcasting (Title III).<sup>140</sup>

A prominent breakdown in the common carrier–broadcast dichotomy came after the 1982 authorization of direct broadcast satellite (DBS) service.<sup>141</sup> Satellite carriers started out as pure common carriers of cable TV programming competing with AT&T’s long-distance transmission service, but satellite operators began deviating from common carriage by distributing their own TV programming tiers directly to consumers.<sup>142</sup> Scholars and FCC staff were struggling to decide whether new “multi-functional technologies” like DBS should be classified as a common carrier or as a broadcaster.<sup>143</sup> Rather than force the issue, the FCC expressly declined to slot DBS into either Title II or Title III.<sup>144</sup> In 1986, so as not to bias new services like DBS toward any one business model or service, the FCC declared subscription, encrypted wireless services to be “non-broadcast services,” neither broadcast nor telecommunications.<sup>145</sup> Such operators are permitted use

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138. Susan Tyler Eastman, *Policy Issues Raised by the FCC’s 1983 and 1984 Subcarrier Decisions*, 28 J. BROAD. 289, 292, 297 (1984); Howard A. Shelanski, *The Bending Line Between Conventional “Broadcast” and Wireless “Carriage,”* 97 COLUM. L. REV. 1048, 1070 (1997).

139. The FCC in the 1950s allowed TV broadcasters to operate microwave relay facilities for temporary periods until common carrier facilities were available. Allocation of Frequencies in the Bands Above 890 Mc., 27 F.C.C.2d 359, 412 (1959). The FCC equivocated on whether such point-to-point microwave transmissions were Title II or Title III. *Allocating Radio Frequencies*, *supra* note 131, at 956.

140. Eastman, *supra* note 138, at 295.

141. Shelanski, *supra* note 138, at 1062–63.

142. HUBER, *supra* note 13, at 64–65.

143. John Lyon & Mike Hammer, *Deregulatory Options for a Direct Broadcast Satellite System*, 33 FED. COMM. L.J. 185, 187 (1981).

144. Inquiry into the Dev. of Regulatory Policy in Regard to DBS for the Period Following the 1983 Reg’l Admin. Radio Conference, 90 F.C.C.2d 676, 708 (1982) (“[W]e decline at this point to require DBS systems to operate under a particular service classification . . .”).

145. See Subscription Video Serv., 51 Fed. Reg. 1817, 1822 (1986).

their allocations and capacity for common-carrier services and programming services.<sup>146</sup>

## 2. Telecommunications

In telecommunications, likewise, the breakdown often came from deregulatory actions. In particular, regulators since the 1970s have encouraged telecommunications providers to enter non-telecommunications markets like TV distribution and “information services,” and the mixing of services on the same facilities made carriage distinctions and Title II enforcement difficult.<sup>147</sup>

The withering away of common carriage in telecommunications, which Professor Eli Noam warned of in the mid-1990s, may have been inevitable.<sup>148</sup> The nineteenth-century conception of common carriage based on physical transport such as railroads and ferries never quite fit the transmission of information via telegraph and telephone. Turn-of-the-century judges were not certain how to apply the common-carrier principles to these new distributors, with some courts expressly deeming phone operators “quasi-common carriers.”<sup>149</sup>

Despite this unsettled history, the FCC attempted to quarantine common carrier, dumb-pipe services for years with diminishing success. Telephone companies (telcos) were constantly looking for new, nontelephone markets to serve.

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146. Shelanski, *supra* note 138, at 1068; *see also* Inquiry into the Dev. of Regulatory Policy in Regard to DBS for the Period Following the 1983 Reg'l Admin. Radio Conference, 90 F.C.C.2d 676 (1982), *aff'd in part sub nom.* Nat'l Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1199–1206 (D.C. Cir. 1984).

147. *See generally* CCTA, *History of Cable*, CALCABLE.ORG, <https://www.calcable.org/learn/history-of-cable/> (last visited Feb. 22, 2017).

148. *See* Noam, *supra* note 26.

149. *South Carolina v. Citizens' Tel. Co.*, 39 S.E. 257 (S.C. 1901) (holding that telephone systems are quasi-common carriers); *Cent. Union Tel. Co. v. Swoveland*, 42 N.E. 1035, 1038 (Ind. App. Ct. 1895) (“While it may be true, that telegraph and telephone companies do not occupy the exact legal status of common carriers of passengers and freight, yet they bear a strong analogy to these.”); S. WALTER JONES, A TREATISE ON THE LAW OF TELEGRAPH AND TELEPHONE COMPANIES INCLUDING ELECTRIC LAW 32 (2d ed. 1916) (citing court decisions for the notion that telegraph and telephone companies “are not, strictly speaking, common carriers in that they are not insurers”); S. WALTER JONES, A TREATISE ON THE LAW OF TELEGRAPH AND TELEPHONE COMPANIES 28 (1906) (“The telegraph and telephone companies are not common carriers and so insurers of a correct transmission of messages . . .”).

Given the incentive of AT&T and its affiliates to leverage their monopoly power into new services, the Department of Justice, in a 1956 antitrust settlement, required Bell operators to offer only common carrier services.<sup>150</sup> This decision only briefly paused telco entry into non-telecommunications.

First, the rise of computerization a few years later stimulated telcos' interest in this new field. Starting in the 1960s, the FCC endeavored to maintain the common carrier quarantine and delineate between "enhanced" services and "basic" services that use telecommunications lines.<sup>151</sup> Signaling the difficulty that would plague communications policy to the present, the FCC recognized "hybrid" services that straddled the line between pure communications and pure data processing, and the agency decided to classify such services on a case-by-case basis.<sup>152</sup> In the ensuing Computer II and Computer III proceedings, the FCC allowed common carriers to offer information services (but on a highly regulated basis).<sup>153</sup> And while the Bell companies were at first prohibited from providing "electronic publishing" and "information services" in the 1982 breakup,<sup>154</sup> even that prohibition was relaxed a few years later.<sup>155</sup>

TV distribution also presented a new, non-common carrier service for telcos. While "broadcast via wire" was impractical in the 1930s, entrepreneurs in the field of cable and community antenna TV (CATV) started distributing over-the-air TV programs in the 1940s and 1950s.<sup>156</sup> Telephone operators recognized TV as a new revenue opportunity, and non-Bell

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150. *United States v. W. Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D. N.J. 1956).

151. Regulatory and Policy Problems Presented by the Interdependence of Computer and Commc'ns Servs. and Facilities, Tentative Decision, 28 F.C.C.2d 291 (1970).

152. *Id.* ¶ 15.

153. Amendment of Section 64.702 of the Comm'n's Rules & Regulations, Second Computer Inquiry, Final Decision, 77 F.C.C.2d 384 (1980); Amendment of Section 64.702 of the Comm'n's Rules & Regulations, Third Computer Inquiry, Report & Order, 104 F.C.C.2d 258 (1986).

154. *United States v. AT&T*, 552 F. Supp. 131, 180-86, 189-90 (D. D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

155. *United States v. W. Elec. Co.*, 767 F. Supp. 308 (D. D.C. 1991), *stay lifted*, 1991 WL 238308 (D.C. Cir.), *aff'd sub nom. Am. Newspaper Publishers Ass'n v. United States*, 502 U.S. 932 (1991).

156. See CCTA, *History of Cable*, *supra* note 147.

companies made a few efforts to enter that business.<sup>157</sup> The FCC stood firm at first, prohibiting cable-telephone cross ownership in 1970,<sup>158</sup> and in 1971 it rejected a 214 petition<sup>159</sup> from a New York City phone company that wanted to lease its conduit for cable-TV-like video programming in competition with cable systems.<sup>160</sup> Congress codified this cross-ownership prohibition in 1984, essentially denying telco entry into TV.<sup>161</sup> Yet in 1992, in order to promote TV competition, the FCC again weakened the firewall between telecommunications and non-telecommunications by permitting “video dial tone” from common carrier phone companies.<sup>162</sup> Video dial tone, which included interactive and video-on-demand services, was invented as a way to thread the needle between a Title II common carrier channel service and a Title VI curated cable TV service.<sup>163</sup>

In the 1996 Telecommunications Act, Congress erased the formal distinction between common carrier networks and private-carrier video networks.<sup>164</sup> Drawing on the controversial

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157. *See id.*

158. Applications of Tel. Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Cmty. Antenna Television Sys., Final Report and Order, 21 F.C.C.2d 307 (1970), *recons. in part* by 22 F.C.C.2d 746 (1970).

159. Section 214 provides that telephone companies must obtain FCC approval that new facilities are in the public interest. 47 U.S.C. § 214 (2012).

160. The FCC declined the Section 214 authority, citing duplication and waste. *See* Better TV, Inc., 31 F.C.C.2d 939, 948 (1971), *modified on reh'g*, 34 F.C.C.2d 142 (1972). The Bell operating companies had been offering channel service, a common carrier transmission of TV programming often used in lieu of pole attachment agreements, to CATV and cable companies since 1959. *See* Gen. Tel. Co. of California v. FCC, 413 F.2d 390, 399 (D.C. Cir. 1969); *United States v. W. Elec. Co.*, 1956 Trade Cas. (CCH) para. 68,246 (D.N.J. 1956).

161. *See* 47 U.S.C. § 533(b) (1994), *repealed* by Pub. L. No. 104-104 (1996).

162. Tel. Co.-Cable Television Cross-Ownership Rules, Second Report and Order, Recommendation to Cong., & Second Further Notice of Proposed Rulemaking, 7 FCC Rcd. 5781 (Aug. 14, 1992).

163. Robert L. Pettit & Christopher J. McGuire, *Video Dialtone: Reflections on Changing Perspectives in Telecommunications Regulation*, 6 HARV. J.L. & TECH. 343, 344-47 n.14 (1993). Video dial tone profoundly affected the speaker status of common carriers, and phone companies even began defending their entry into video on First Amendment grounds. *See* Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *vacated and remanded per curiam for consideration of mootness*, 116 S. Ct. 1036 (1996).

164. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

video dial tone proceedings and a Clinton administration proposal,<sup>165</sup> Congress reversed its 1984 prohibition and expressly allowed telcos to enter the video and TV market. Namely, under the law, phone companies could elect to be *open video systems*, a novel regulatory classification of video provider that imposed certain common carrier obligations on the participating company, such as nondiscrimination amongst programmers.<sup>166</sup>

Another deregulatory action that muddied the common carrier-private carrier dichotomy was the 1996 law that gave the FCC authority to refrain from applying common carrier regulations under certain conditions.<sup>167</sup> Today, therefore, the FCC continues the nearly impossible task of designating and delineating between telecommunications and non-telecommunications.<sup>168</sup> Recent proceedings have involved distinguishing between functionally similar services, such as VoIP and switched telephony, which are classified differently.<sup>169</sup> VoIP is not a Title II service but the FCC still imposed many Title II regulations on a subset of VoIP providers.<sup>170</sup> Most recently, in the 2015 net neutrality Order, the FCC distinguished between “non-broadband Internet access service,” which is not a Title II service, and “broadband Internet access service,” now a Title II service.<sup>171</sup> Title II broadband services offer similar services as non-Title II data

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165. See Eli M. Noam & Carolyn Cutler, *Freedom of Expression and the 1992 Cable Act: An Introduction*, 17 HASTINGS COMM. & ENT. L.J. 1, 11 (1994).

166. 47 U.S.C. § 573 (2012).

167. 47 U.S.C. § 160 (2012).

168. See generally Connect Am. Fund, NPRM, 26 FCC Rcd. 4554, 4582 (2011).

169. See *id.*

170. VoIP, is a telephone-like communications service that uses internet protocol. The FCC declined to declare VoIP a Title II service. These Title II obligations include customer proprietary network information protection, 911 calling capability, and universal-service contribution. Connect Am. Fund, *supra* note 168, at 4582.

171. Protecting & Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, *supra* note 97, ¶ 35; Brent Skorup, *Why the FCC's Net Neutrality Rules Could Unravel*, PLAIN TEXT (Mar. 1, 2016), <https://readplaintext.com/why-the-fcc-s-net-neutrality-rules-could-unravel-cc26c6b96418>.

services and there is considerable uncertainty about how the FCC will distinguish between them.<sup>172</sup>

### 3. Cable TV

The 1934 Communications Act didn't contemplate cable TV, and the service has always straddled common carrier and private-carrier classification.<sup>173</sup> Early cable systems in the 1940s and 1950s, known as CATV, at first were wired, passive carriers of broadcast TV, similar to "dumb pipe" telecommunications companies.<sup>174</sup> However, cable operators eventually began inserting advertising, curating content, and originating shows.<sup>175</sup> As cable systems expanded, city officials began requiring operators to set aside a portion of their channel capacity for certain groups, typically on a first-come-first-serve basis, as a condition of receiving a monopoly franchise.<sup>176</sup> These quasi-common-carriage requirements for cable providers<sup>177</sup> were then required by the FCC in 1972.<sup>178</sup> The FCC rules were struck down by the Supreme Court a few years later because they impermissibly transformed cable into common carriers<sup>179</sup> but were later reinstated by Congress in 1984, acceding to explicit calls for quasi-common carriage treatment from media access groups.<sup>180</sup>

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172. See, e.g., John Peha, *The Network Neutrality Battles That Will Follow Reclassification*, 12 I/S: J.L. & POL'Y 11, 23 (2015) ("There is no practical difference between the case where a provider offers both a [Title II] BIAS and a separate [non-Title II] non-BIAS data service over the same, shared capacity, and the case where a provider uses 100% of the capacity to offer a BIAS and some specialized non-BIAS services happen to run on top.").

173. See generally CFTA, *History of Cable*, *supra* note 147.

174. See U.S. Patent No. 9,521,464 (filed Aug. 12, 2013) (discussing the history and background of cable systems).

175. HUBER, *supra* note 13, at 63.

176. Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 790 (1972).

177. Lange, *supra* note 116, at 5 ("The result is to force cable systems to operate *pro tanto* as common carriers.").

178. Cable Television Report and Order, 36 F.C.C.2d 143, 190–92 (1972).

179. FCC v. Midwest Video Corp., 440 U.S. 689, 708–09 (1979).

180. 47 U.S.C. § 532 (2012). A gay-rights group, for instance, testified to Congress in 1978 that "cable could be held to a quasi-common carrier standard and the rights of minority group access." The Communications Act of 1978: *Hearings Before the Subcomm. on Comm. of the H. Comm. on Interstate & Foreign Com. on H.R. 13015*, 95th Cong. 264 (statement of Martha Fourt & William B. Kelly, Illinois Gay Rights Task Force).

Then, in the 1992 Cable Act, Congress imposed a strict common-carriage duty on cable systems—a requirement to carry all local broadcast programming upon request,<sup>181</sup> a condition the Supreme Court upheld despite First Amendment challenge.<sup>182</sup> Today, cable TV systems and other TV providers are quasi-common carriers, and they are prohibited from exercising control over considerable amounts of programming on their own networks. They are required to carry all broadcast TV programming in their local market, permit access to public, educational, and government groups, and lease access to competing programmers even though cable systems are nominally private carriers.<sup>183</sup> Further, as discussed above, cable providers have entered the telephone market with interconnected VoIP and also offer internet services and are therefore obliged to follow many Title II regulations despite the uncertain classification these services.<sup>184</sup>

#### B. EVOLUTION TO SOCIAL REGULATION AS A DEFENSE AGAINST OBSOLESCENCE

Some agencies survive but eventually disappear as their governing statutes become obsolete.<sup>185</sup> Literature on the forms of regulation often begins with the distinction between social and economic regulation, and, prior to the 1990s, three agencies are regularly cited as examples of economic regulators: the ICC, the Civil Aeronautics Board (CAB), and the FCC.<sup>186</sup> All three were agencies with a public-interest mandate that regulated such things as market entry-exit and rates, so the persistence of the FCC, and not the other two quintessential economic regulators, is a puzzle that requires explanation.

Public choice literature appears to offer an explanation. Lilley and Miller<sup>187</sup> predicted what Yandle and Young later

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181. 47 U.S.C. § 534(a) (2012).

182. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); see also *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (affirming FCC authority to require cable operators to provide channel capacity for local origination).

183. Frieden, *supra* note 25, at 488–89.

184. Connect Am. Fund, *supra* note 168.

185. See Kane, *supra* note 12.

186. See William Lilley III & James C. Miller III, *The New “Social Regulation,”* 47 PUB. INT. 49, 50 (1977); Yandle & Young, *supra* note 24, at 59.

187. Lilley & Miller, *supra* note 186, at 50.



confirmed:<sup>188</sup> economic regulation would go out of style and be replaced by more social regulation. Social—or function, as Yandle and Young prefer—regulation agencies grew rapidly throughout the 1970s and early 1980s, whereas the growth of economic regulators stagnated and, in many cases, fell away.<sup>189</sup> The ICC and CAB proved to be obsolete as economic regulators and eventually went extinct.<sup>190</sup> But the FCC avoided that fate, in our view, because it adapted and evolved into a social regulator.

Becoming a social regulator can be an effective defense for an obsolete economic regulator. Social regulators are more durable and insulated from the factors that killed the ICC and CAB.<sup>191</sup> For instance, social regulators serve a broader constituency.<sup>192</sup> Economic regulators mainly interface with a specific industry (e.g., shipping), and any benefits to consumers are diffused so that the consumers themselves are not a significant constituency of the regulator.<sup>193</sup> Social regulators, as Yandle and Young argue, are “perceived as having a larger impact on consumers,” and so consumers “tend to emerge as a viable interest group.”<sup>194</sup> Social regulators also lay claim to more industries since they regulate broad functions rather than narrow markets.<sup>195</sup> In this respect, the previous relationship between industry and regulator is significantly augmented by a transition from economic to social regulator.<sup>196</sup> These characteristics of social regulation lead to an agency with markedly greater jurisdiction, more opportunities for custom-tailored rules,<sup>197</sup> and, therefore, greater claim to the sort of relevance that rebuts claims of obsolescence.

These phenomena appear in the case of the FCC and help account for its rapid shift from an economic regulator of

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188. Yandle & Young, *supra* note 24, at 59.

189. Yandle & Young, *supra* note 24, at 66 (“Function regulation is the distinguishing feature that separates the growing from the declining agencies.”).

190. *See* Kane, *supra* note 12.

191. *See id.*

192. *See id.*

193. *See id.*

194. Yandle & Young, *supra* note 24, at 63.

195. *See* Kane, *supra* note 12.

196. *See id.*

197. Yandle & Young, *supra* note 24, at 63.

bottlenecks around 2000 to its more expansive role as regulator of media gatekeepers after 2010. At the same time that the CAB and ICC were abolished, “consumer advocacy” groups (namely the media access movement) focused on communications policy, and today this movement manifests itself as “tech populism.”<sup>198</sup> The second phenomenon of a pivot towards social regulation, claiming authority over more industries, has seen a surge in recent years. The FCC has long shaped social policy and programming, often as a soft censor of media,<sup>199</sup> and advocates today wish to import many of the FCC’s earlier social goals—like diversity of voices and democratic participation—to the internet.

For instance, President Obama’s transition team member for telecom policy, Professor Kevin Werbach, has encouraged the FCC to focus on noneconomic, societal concerns as the prior justifications for FCC authority, like scarcity and natural monopoly, wither away.<sup>200</sup> FCC Chairman Tom Wheeler in 2016 expressly positioned the FCC as a consumer protection agency against media and communications companies and ISPs.<sup>201</sup> Communications scholar Tim Wu has likewise defended the FCC in congressional testimony as the superior source of regulatory oversight over internet services (as opposed to antitrust agencies) because “the FCC is equipped to deal with issues like regionalism, like localism, like diversity” and “political bias.”<sup>202</sup> In the last few years alone, the FCC’s expansion into social regulation has included rules about

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198. See generally ROBERT D. ATKINSON, DANIEL CASTRO & ALAN MCQUINN, INFO. TECH. & INNOVATION FOUND., *HOW TECH POPULISM IS UNDERMINING INNOVATION* (2015).

199. See FRIENDLY, *supra* note 59.

200. Werbach, *supra* note 16.

201. C-SPAN host Peter Slen asked Chairman Thomas Wheeler whether the agency’s mission had changed as the industry changed. Wheeler replied, “[i]t’s changed multiple times over those decades and I hope it continues to evolve because the job of the FCC is to be the advocate for consumers in a vastly-changing environment.” C-SPAN, *Communicators with Tom Wheeler*, THE COMMUNICATORS (Apr. 7, 2016), <http://www.c-span.org/video/?407802-1/communicators-tom-wheeler>.

202. *Net Neutrality: Is Antitrust Law More Effective Than Regulation in Protecting Consumers and Innovation? Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 84, 94 (June 20, 2014) (comments of Professor Tim Wu, Columbia Law School).

and investigations into Comcast's TV programming,<sup>203</sup> satellite radio programming,<sup>204</sup> internet user privacy,<sup>205</sup> ISP interconnection agreements,<sup>206</sup> video apps,<sup>207</sup> and online video providers.<sup>208</sup> The FCC also recently launched an initiative to improve health outcomes and ties the vitality of healthcare technologies to its statutory authority.<sup>209</sup>

Certainly the most significant proceeding and pivot to social regulation was partially applying Title II rules to internet access providers—the Open Internet or so-called net neutrality rules.<sup>210</sup> Here we see how the flexibility of quasi-

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203. FCC Comcast-NBCU Conditions, app. A 139–40 (2011), <http://corporate.comcast.com/images/FCC-11-4-Appendix-A-Conditions.pdf> (requiring the merged firm to transmit public access, educational, and governmental programming to most of its cable TV subscribers and to exercise no editorial control over those programs).

204. XM Satellite Radio Holdings, Inc., 25 FCC Rcd. 14774 (Oct. 19, 2010), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-10-184A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-184A1.pdf) (Applications for Consent to the Transfer of Control of Licenses to Sirius Satellite Radio, Inc.) (outlining requirements that Sirius-XM lease a portion of their channel capacity to unaffiliated programmers owned by racial and ethnic minorities and prohibiting the exercise of editorial control by Sirius-XM over those leased programs).

205. Sherrese M. Smith et al., *FCC Releases Notice of Proposed Rulemaking for New Broadband ISP Privacy Rules*, LEXOLOGY (Apr. 4, 2016) <https://www.lexology.com/library/detail.aspx?g=18d81770-47c8-4f84-b1a6-06fc55cfc9df>.

206. The FCC further required the common-carrier obligation of mandated interconnection on wireless internet access, a service the FCC had classified as a lightly regulated information service. Frieden, *supra* note 25, at 485.

207. The FCC tentatively concluded that the Commission has legal authority to implement its proposed TV programming access rules on makers of hardware and software, including applications that allow consumers to access multichannel video programming and other services. Expanding Consumers' Video Navigation Choices, 31 FCC Rcd. 1544 (Feb. 18, 2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-16-18A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1.pdf).

208. Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distrib. Servs., 29 FCC Rcd. 15995, (Dec. 19, 2014) (notice).

209. FCC, CONNECT2HEALTHFCC, <https://www.fcc.gov/about-fcc/fcc-initiatives/connect2healthfcc> (last visited Aug. 2, 2016).

210. *FCC Adopts Strong, Sustainable Rules to Protect the Open Internet*, FCC (Feb. 26, 2015), <https://www.fcc.gov/document/fcc-adopts-strong-sustainable-rules-protect-open-internet>. Broadband internet carries the services the FCC has traditionally regulated—voice communications, TV, and radio—as well as relatively new services like the web, the Internet of Things, and mobile applications. See *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd. 5901 (Mar. 22, 2007).

common carriage allows an adaptive expansion of FCC power. Broadband internet has long defied easy categorization,<sup>211</sup> since it carries many telecommunications-like and curated TV-like services and is thus susceptible to many quasi-common-carriage precedents. Quasi-common-carriage regulation of the powerful, poly-service internet offsets whatever losses the FCC incurs as broadcasting wanes, traditional TV moves to internet distribution, and telephony is deregulated.<sup>212</sup> There are now advocates calling for FCC regulation for cloud-computing platforms and services like Facebook.<sup>213</sup>

The net neutrality rules in particular suggest that the predictions from Kearney and Merrill are at best incomplete. As they offered, “The role of the agency has been transformed from one of protecting end-users to one of arbitrating disputes among rival providers and, in particular, overseeing access to and pricing of ‘bottleneck’ facilities that could be exploited by incumbent firms to stifle competition.”<sup>214</sup> They emphasize that the transformation in regulated industries is predominantly a change in focus from protecting consumers to mediating disputes between firms.<sup>215</sup> Yet the FCC’s focus, resembling earlier broadcasting regulations in the media-access era, is all of the above: on suppliers, distributors, competitors, and consumers. The net neutrality rulemaking is suggestive.<sup>216</sup> It was the most significant FCC ruling in decades, yet the agency expressly disclaimed a need to examine

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211. Donald W. McClellan, Jr., *A Containment Policy for Protecting the Internet from Regulation: The Bandwidth Imperative* 2, PROGRESS & FREEDOM FOUND. (Aug. 1997), <http://www.pff.org/issues-pubs/pops/pop4.5containment.pdf>.

212. Fred B. Campbell, Jr., *The First Amendment and the Internet: The Press Clause Protects the Internet Transmission of Mass Media Content from Common Carriage Regulation*, 94 NEB. L. REV. 559, 576 n.121 (2016).

213. Kevin Werbach, *Network Utility*, 60 DUKE L.J. 1761, 1778 (2011) (“The mechanisms will be less drastic than the government-ownership or common-carrier regulation applied to traditional public utilities, but cloud platforms should be subject to reasonable policies to promote the public interest.”).

214. Kearney & Merrill, *supra* note 23, at 1326.

215. *Id.* at 1349–58.

216. See Protecting & Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, *supra* note 97, ¶¶ 138–43.

market power in broadband.<sup>217</sup> The economic analysis was rather meager, leading the FCC's chief economist to call the Order "an economics-free zone,"<sup>218</sup> and the FCC's economic analysis received blistering criticism upon legal review.<sup>219</sup> This groundbreaking Order is therefore at odds with the Merrill and Kearney thesis, which focuses on *market power* exercised by bottleneck providers. Market power plays no part in the FCC's rules and signals the agency's abandonment of economic regulation for social regulation.<sup>220</sup>

The FCC has succeeded in insulating itself from abolition in the face of obsolescence by adapting to the changing styles in regulation. Its shift from being an industry-specific economic regulator to a social regulator in the style of other agencies like the Environmental Protection Agency, the Consumer Finance Protection Bureau, and the Food and Drug Administration helps explain why it persists when its counterparts in other common carrier industries have faded away.<sup>221</sup>

#### IV. REGULATORY METAPHYSICS AND FINAL THOUGHTS

The FCC's attempts for decades to keep different distributors in different regulatory silos proved ineffective and costly.<sup>222</sup> Absent more congressional and judicial skepticism regarding quasi-common carriage and the FCC's embrace of social regulation, we foresee a new resonance of early laments

217. *Id.* ¶ 11 n.12 ("[T]hese rules do not address, and are not designed to deal with, the acquisition or maintenance of market power or its abuse, real or potential.").

218. L. Gordon Crovitz, "Economics-Free" Obamanet, WALL ST. J. (Jan. 31, 2016), <http://www.wsj.com/articles/economics-free-obamanet-1454282427>.

219. U.S. Telecom Ass'n v. FCC, No. 15-1063, slip op. at 32 (D.C. Cir. June 15, 2016) (Williams, J., dissenting), <http://law.justia.com/cases/federal/appellate-courts/cadc/15-1063/15-1063-2016-06-14.html>. ("The Order asserts that '[the paid prioritization ban] is supported by a well-established body of economic literature, including Commission staff working papers.' This claim is, to put it simply, false. The Commission points to four economics articles, none of which supports the conclusion that all distinctions in rates, even when based on differentials in service, will reduce the aggregate welfare afforded by a set of economic transactions.") (citations omitted).

220. Kearney & Merrill, *supra* note 23.

221. See sources cited *supra* notes 177–204 and accompanying text.

222. As Peter Huber noted, "[i]t is now clear beyond serious dispute that the Commission's schemes for maintaining apartheid in [communications systems] have cost the national economy hundreds of billions of dollars." HUBER, *supra* note 13, at 48.

about the FCC. “What in most businesses is a constitutional right to continue in an honorable calling becomes a mere privilege to be dispensed periodically to those who successfully sustain the burden of proving conformity with some vague and variable standard of conduct.”<sup>223</sup>

Maintaining service quarantine was difficult enough when different operators offered distinct services on different networks—telephone was on twisted-pair copper wire networks, broadcast was on ATSC wireless towers, and cable TV was on coaxial cable. Now, however, most operators offer distinct and hybrid services on the same physical infrastructure. A Verizon Wireless customer, for instance, could be receiving a Title I home-security service, a Title II phone service, and a Title VI TV service all via the same Title III wireless connection. It is not clear which classification services like non-broadband internet access and IPTV receive.<sup>224</sup>

Ironically, the rise of inter- and intramodal competition in phone, video, and data services—which laissez faire proponents cite as a reason for deregulation—fuels the FCC’s survival strategy. With many more bargainers negotiating interconnection and programming, there are many more opportunities to identify “gatekeepers” and regulate their conduct.<sup>225</sup> No modern distributor appears immune from a gatekeeper designation and the resulting quasi-common-carriage obligations.<sup>226</sup> Even a local wireless internet service provider serving a handful of rural customers is a “gatekeeper”

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223. Caldwell, *supra* note 117, at 206.

224. VERIZON, DOMESTIC AND INTERNATIONAL PHONE PLANS (2017), <http://www.verizon.com/home/phone/>; VERIZON, FIOS TV PLANS AND CHANNELS (2017), <https://www.verizon.com/home/fiostv/>; VERIZON, HOME SECURITY SYSTEM AND FIOS DIGITAL VOICE (2017), <https://www.verizon.com/support/residential/phone/homephone/general+support/fios+phone/questions+and+answers/127817.htm>.

225. See generally Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for US Telecommunications Policy*, 24 YALE J. ON REG. 55, 75–76 (2007).

226. HUBER, *supra* note 13, at 158–59; Frieden, *supra* note 25, at 492 (“[T]he FCC has fashioned new quasi-common carrier obligations for ventures whose managers probably thought they were free of such government oversight.”).

subject to Open Internet rules,<sup>227</sup> and the FCC requires absolutely no finding of market power to subject distributors to quasi-common carriage.<sup>228</sup> The resulting ad hoc rules, extensive rulemakings, litigation, and regulatory arbitrage give the FCC ample reason to justify its continued oversight of these rapidly changing media and communications industries.

Communications scholars Jeff Eisenach and Randy May compare FCC-made distinctions about what type of service is being provided to metaphysics because the questions the agency considers are unanswerable.<sup>229</sup> It's foreseeable that the embrace of quasi-common carriage for the internet and modern media, like the attempts to elucidate the difference between "basic" and "enhanced" services decades ago, will degenerate into regulatory instability and incoherence.<sup>230</sup>

Finally, the analysis presented, consistent with that of earlier public-choice theorists, shows that there is a fundamental policy asymmetry: agencies have the ability and incentive to avoid or postpone obsolescence, but there are no obvious mechanisms to ensure that an obsolete agency winds down.<sup>231</sup> The survivability of obsolete agencies is augmented by the information asymmetry that exists between an agency and its legislative overseers.<sup>232</sup> Agencies will tend to know more about the state of their sector than Congress, and they will therefore be able to act in response to oncoming obsolescence before it is noticed by legislators who may be interested in

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227. Ray Nolting, *Proposed Regulations Concern Business, FCC Commissioner*, PARSONS SUN (Feb. 21, 2015), [http://www.parsonssun.com/news/article\\_5d0c40a6-b99c-11e4-ac41-87b0f16bb661.html](http://www.parsonssun.com/news/article_5d0c40a6-b99c-11e4-ac41-87b0f16bb661.html).

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

229. JEFFREY A. EISENACH & RANDOLPH J. MAY, COMMUNICATIONS DEREGULATION AND FCC REFORM: FINISHING THE JOB 6 (2001).

230. Noam, *supra* note 26, at 436 (“[E]ventually the separation of two principles within the same carrier, the same facilities and the same bitstream cannot work. . . . How is one to maintain the definitional separation?”); Noam & Cutler, *supra* note 165, at 11 (“[C]ommon carriage will erode in time and . . . hybrid coexistence will not be stable.”); Jonathan Weinberg, *The Internet and Telecommunications Services, Universal Service Mechanisms, Access Charges, and Other Flotsam of the Regulatory System*, 16 YALE J. ON REG. 211, 232 (1999); Werbach, *supra* note 213, at 1778 (arguing that with regard to the regulatory classification of internet access, “any choice the FCC makes will only be a temporary solution”).

231. See Kane, *supra* note 12.

232. See *id.*

curbing the agency's influence.<sup>233</sup> And the case for expanding an agency (as is likely to be the response of an agency which finds its current turf slipping away) is fairly easy to make.<sup>234</sup> One need only petition legislators using the rhetoric of the original justification for the agency and then argue that expansion of the agency's budget, scope, or authority contributes to that goal.<sup>235</sup> But these benefits come at a diminishing rate and are often outweighed by the costs they impose on others (the marginal benefit of moving from 90% phone penetration to 95% is smaller and more costly than at lower levels), but the kernel of truth can make the case politically palatable to legislators.<sup>236</sup>

This case study suggests that even when an agency's goals have been achieved and Congress has passed deregulatory legislation, the agency has ample tools (including help from later champions in Congress, industry, and advocacy) to ensure survival and even growth. For instance, the FCC bases many of its rulemakings on reports of competition and service quality that the agency itself conducts. This practice creates a conflict of interest such that the FCC can always say that it has more regulating to do simply by altering its definition of what constitutes a "gatekeeper" or "the public interest."<sup>237</sup>

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233. *See id.*

234. *See id.*

235. The case is easy because, in a way, it is true. As Mises observed, "every service can be improved by increasing expenditures." LUDWIG VON MISES, BUREAUCRACY (1944).

236. *See, e.g.,* Sam Gustin, *Community Broadband Networks, Advocates Say*, MOTHERBOARD (Aug. 11, 2016), [https://motherboard.vice.com/en\\_us/article/fcc-municipal-broadband-congress-review](https://motherboard.vice.com/en_us/article/fcc-municipal-broadband-congress-review).

237. For instance, the FCC's definition of "broadband" changes depending on whether low-capacity or high-capacity lines would give it more regulatory authority. *See* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, 30 FCC Rcd. 1567 (Feb. 24, 2015). Depending on the issue, broadband means 25 megabits per second or greater, 10 megabits per second or greater, or 56 kilobits per second or greater. *See id.*; Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd. 1375, ¶ 3 (2015) (finding that broadband, "advanced telecommunications capability," requires download speeds of at least 25 Mbps); Connect Am. Fund, 29 FCC Rcd. 15644 (Dec. 18, 2014) (finding that broadband, "advanced telecommunications and information services," requires a minimum download speed of 10 Mbps); Protecting & Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, *supra*



For advocates of limited government and robust First Amendment protections, the analysis we've presented suggests some undesirable predictions. As Professor Rob Frieden notes,<sup>238</sup> "Government tinkering with the common carrier model has made it all but impossible to apply core principles." Justice Clarence Thomas, commenting on the application of quasi-common carriage to cable providers, noted that First Amendment jurisprudence for mass media is a "doctrinal wasteland."<sup>239</sup> It's an area we expect to become even more muddled. Quasi-common carriage will lead to a substantial increase in regulatory restrictions for media, telecommunications, and data services, continuing the trend since the ostensibly deregulatory Telecommunications Act.<sup>240</sup> Formulating restrictions means interminable regulatory proceedings. Quasi-common carriers like ISPs and cable TV operators will perpetually argue that they provide "reasonable" access to unaffiliated firms, and the FCC, media-access groups, and competitors will argue the opposite.<sup>241</sup> Merely defining a service can take years, and separating services when carried on the same infrastructure in these fast-changing technology markets will prove infeasible. The laborious findings about whether, say, a broadband provider or cable provider is "acting

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note 97, ¶ 187 (defining broadband internet access service as any non-dialup access service).

238. Rob Frieden, *Schizophrenia Among Carriers: How Common and Private Carriers Trade Places*, 3 MICH. TELECOMM. & TECH. L. REV. 19, 37 (1997).

239. *Denver Area Educ. Telecomm. Consortium, v. FCC*, 518 U.S. 727, 813 (1996) (Thomas, J., concurring).

240. Omar Al-Ubaydli & Patrick A. McLaughlin, *RegData: A Numerical Database on Industry-Specific Regulations for All United States Industries and Federal Regulations, 1997-2012*, REG. & GOV. (Jan. 2015), [http://data.regdata.org/?type=regulation\\_index&industry\[\]=515&industry\[\]=517&industry\[\]=518&regulator\[\]=299#](http://data.regdata.org/?type=regulation_index&industry[]=515&industry[]=517&industry[]=518&regulator[]=299#) (showing increases in restrictions from 1997 to 2012 ranging from 17% to 32%). Whether this increase in regulation leads to agency employment growth is less clear. However, because conclusions about unreasonable discrimination, a quasi-common carriage standard, in media are labor intensive, there may be employment growth.

241. The investigations into "zero rating" of IP-based content are illustrative. Shiva Stella, *Public Knowledge Files Comcast Stream TV Complaint with FCC to Protect Video Competition*, PUB. KNOWLEDGE (Mar. 2, 2016), <https://www.publicknowledge.org/press-release/public-knowledge-files-comcast-stream-tv-complaint-with-fcc-to-protect-vid>.

unreasonably” resemble the laborious findings<sup>242</sup> from the 1970s FCC examiner proceedings about whether broadcasters made “reasonable opportunity” to competing voices.<sup>243</sup> Further, these decisions by the FCC will carry very little precedential value because, unlike Title II unreasonableness determinations during the AT&T monopoly, modern broadband and media markets are competitive, and vertical agreements are in constant flux. This means that very similar fact patterns demand litigation and extensive agency examination.<sup>244</sup>

If quasi-common carriage is accepted as the new norm, the analysis presented above about the end of economic regulation in communications and media poses little threat to the FCC’s expanded jurisdiction. As lawmakers take interest in the troubling implications of quasi-common carriage, we echo the findings of current OIRA Administrator Howard Shelanski: “The lessons from the railroad, natural gas, banking, airlines, and wireless deregulation are to deregulate quickly and substantially when . . . competitive forces arise.”<sup>245</sup> The status quo—slow, piecemeal deregulation in the face of competition in an industry—appears socially costly and ineffective.<sup>246</sup>

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242. The FCC’s expanded oversight of broadcast-facility access complaints illustrates how policing quasi-common carriers can give the agency massive new caseloads to adjudicate. In 1966 the FCC received 409 fairness complaints, but by 1970 it received over 60,000. Jaffe, *supra* note 176, at 779 (1972).

243. This resemblance suggests a pernicious effect on the First Amendment protections of ISPs. Quasi-common carriers need to remain in the FCC’s good graces to operate, and the FCC is fond of using its substantial leverage in proceedings to attain ostensibly public-interest benefits. For decades, broadcast license renewals presented the FCC with the opportunity to shape the dominant media of the day. As former chairman Newton Minow said in a speech to broadcasters, “Clearly, at the heart of the FCC’s authority lies its power to license, to renew or fail to renew, or to revoke a license. As you know, when your license comes up for renewal, your performance is compared with your promises.” MINOW & LAMAY, *supra* note 20, app. 2 at 192; see also Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 87 (2015) (“Internet platforms face structural incentives to knuckle under government jawboning over content.”).

244. See generally Section II.A *supra* (explaining the AT&T monopoly).

245. Shelanski, *supra* note 53, at 99.

246. *Id.*

## V. CONCLUSION

The FCC's longstanding justifications for economic regulation of broadcast and telecommunications—spectrum scarcity and natural monopoly, respectively—have disappeared. The agency nevertheless soldiered on and pivoted toward more social regulation such as universal service in telephony and fairness in broadcasting. The move toward social regulation has accelerated in recent years, notably with promulgating the Open Internet rules and other proceedings for broadband distributors, as the agency seeks to justify its survival in a world of media choices, internet connectivity, and telecommunications competition. Aiding its expansion into questions of social policy is the breakdown of the distinction between common carriage and private carriage, which was fueled by demands for regulation and for deregulation. We predict and lament that delimiting and enforcing the shifting quasi-common-carriage obligations on distributors will lead to an incoherent body of communications and First Amendment law that will only entrench the FCC as its proceedings grow more inscrutable to outsiders.