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A New Telecommunications Act: Prioritizing Consumer Protection and Equality

Olivier Sylvain

A NEW TELECOMMUNICATIONS ACT: PRIORITIZING CONSUMER PROTECTION AND EQUALITY

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ABSTRACT

Through the Telecommunications Act of 1996, Congress imposed long overdue duties and structural limits on the telephone, broadcasting, and cable industries. Though the 1934 law was bold and important, legislators unwittingly enabled a handful of companies to concentrate power in those markets.

As needed as it was, the Telecommunications Act also had flaws. Congress's structure-of-the-market approach in 1996 did not protect against disparities in consumers' access. Nor did it (or could it) anticipate the informational harms that the internet would facilitate or enable.

These concerns ought to be the primary focus of reform today. To be sure, the Federal Communications Commission remains essential to promoting equality in the access to and use of communications infrastructure. But the Federal Trade Commission should now also play a greater role in light of the consumer-facing issues that have emerged. And it can do this pursuant to the authority it has under its enabling statute. Congress, too, can do more to liberalize, broaden, and sharpen the Federal Communications Commission's authority.

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I. INTRODUCTION

The Telecommunications Act of 1996 was a significant reform of communications law in the United States. Twenty-five years later, it is time that we take ritual stock of what Congress achieved.

Legislators' stated aim behind the Telecommunications Act was to promote competition and free-market principles in a legislative field in which Congress, in the 1934 Communications Act, had presumed too much about the progressiveness of centralized command-and-control oversight. The Telecommunications Act pales in comparison in scale and scope to the New Deal statute that it amended. Through it, Congress articulated a momentous shift in regulatory philosophy.

But the amended statute said little about "advanced communications services" or "information services"—the terms that Congress used to describe, respectively, broadband internet service and consumer-facing applications, services, and content. To the extent it said anything, Congress avowedly rejected positive government regulation of the then-emergent technologies.[1] It innocuously added a safe harbor for "interactive computer services" after the full bill had been marked up and reported out of committee.[2] Today, that provision and the way in which courts have interpreted it are widely seen as

1. 47 U.S.C. § 230(b)(2) (2018).
2. 47 U.S.C. § 230(c) (2018).
3. *See infra* Part V.

essential to internet regulation, even though the incentives that drive content production and distribution are undeniably different from those back then.

Policymakers in 1996 did not really understand how broadband service or the political economy of the internet generally would change even five years later. Nor really could they. Not even the most ardent internet evangelists knew what was coming. Perhaps legislators held the sense of uncertainty in abeyance on the faith that Congress would muster the political will to redress new challenges in the communications market as they emerged. Nor did policymakers anticipate the myriad ways in which consumer-facing services would (have the capacity to) administer almost the entirety of consumers' online experience—that they could cravenly collect consumer data to support advertising to third parties or manipulate consumers through dark patterns and other aesthetic designs.[3] The "information services" of twenty-five years ago are, today, the biggest and arguably most legally unaccountable companies in the United States.

A new communications act could do much to recalibrate current law for our time. It could do this by, first, clearly orienting the Federal Communications Commission's authority to affirmatively furthering equality in broadband deployment and service. Second, Congress could also sharpen current law addressed to consumer-facing "information services." One clear opportunity would be to bring the Federal Trade Commission more clearly into the role of policing consumer-facing companies in service of consumer protection. Online intermediaries and other online services have rested comfortably in the knowledge that current law is too weak or undefined to force them to bear the social costs of their services. These reforms would redress this failing.

This Article proceeds as follows. Parts II and III describe the justifications and subsequent implementation of, respectively, the Communications Act of 1934 and the Telecommunications Act of 1996. I explain the ways in which the governing ideologies and theories of communications policymaking evolved from the mid-century to the 1990s—from a focus on direct consumer programming and service to a structure-of-the-market approach. The next couple of Parts describe the 1996 Act's failings, as important as its structural focus was. Part IV underscores the statute's relative silence about emergent networked technologies, including broadband. And Part V discusses the market consolidation, access disparities, and disinformation and manipulation that prevail today. Part VI roughly sketches out an agenda for reform that prioritizes demonstrable equality in the provision of broadband service and

attends to the consumer-facing experience, particularly in light of prevailing information harms.

II. THE COMMUNICATIONS ACT: ITS PROMISE AND LIMITATIONS

In 1934, Congress consolidated existing regulatory authorities across two federal agencies into a new and independent Federal Communications Commission (FCC). Legislators charged this new agency with the authority to impose "public interest" regulations on the big tech companies of the day.[4] The statute's immediate aim was to protect consumers. For example, Congress authorized the FCC to impose common carrier rules on telephone companies and gave it broad authority to regulate radio and television broadcasting through an elaborate licensure regime.[5]

In the following decades, the FCC implemented the 1934 Act confidently if fitfully. With regards to telephony, for example, the agency established access charges and filing requirements. But these never meaningfully curtailed the AT&T monopoly.[6] To the contrary, over the long run, the agency treated the telecommunications giant's "universal service" as an inevitable incident of the ostensible "natural monopoly" characteristics of telephony.[7] Under this view, a large single provider avoids the cost redundancies that would be passed on to subscribers if one or more provider entered the same market.

This commitment to universal service helped to make telephony practically ubiquitous. Along the way, however, the FCC failed to limit the way in which

4. Olivier Sylvain, *Wireless Localism: Beyond the Shroud of Objectivity in Federal Spectrum Administration*, 20 MICH. TELECOMM. & TECH. L. REV. 121, 122 n.2 (2013) (referencing "the 'public interest' as a statutory term of art in the 1934 Communications Act").

5. 47 U.S.C. §§ 201-276 (2018); *see also* Sylvain, *supra* note 4, at 142–43 ("Through the new statute, legislators consolidated in a new federal agency the authority to administer spectrum policy . . . and telephony and telegraphy . . . the new FCC obtained authority to minimize signal interference, 'make a fair and equitable allocation' of licenses, and give interested members of the public an opportunity to argue in a hearing against the award of a license to any given applicant.").

6. *See* Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, *in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 3, 7–8 (Max D. Paglin ed., 1989); *see generally* BRETT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES 211–17 (2012); MILTON L. MUELLER, JR., UNIVERSAL SERVICE: COMPETITION, INTERCONNECTION, AND MONOPOLY IN THE MAKING OF THE AMERICAN TELEPHONE SYSTEM 1–3 (1997); TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 240–48 (2010).

7. Daniel F. Spulber & Christopher S. Yoo, *Toward a Unified Theory of Access to Local Telephone Networks*, 61 FED. COMM. L. J. 43, 48 (2009) ("The regulatory authorities condoned the Bell System's monopolization of all aspects of the telephone network.").

AT&T muscled local networks into agreeing to exclusive connection terms.[8] And, for years, it was unsuccessful at implementing rules that would forbid AT&T from blocking unapproved new devices that consumers could develop or use freely at home.[9] It was not until the late 1960s and 1970s that the FCC instituted restraints on the lines of business that AT&T could pursue, including, most notably, those in computing.[10] By then, however, AT&T had consolidated such a dominant market position in telecommunications that the Department of Justice filed its landmark antitrust suit in the 1970s—a suit that ended in the breakup of the company in 1982.[11]

Concerning broadcasting, Congress gave the FCC broad authority to license spectrum frequencies to applicants.[12] The law delegated to the agency the authority to define the nature of the then-emergent network system that partnered large broadcasting companies (generally based in New York) with "network affiliates" to locally transmit programming. The agency was to do this pursuant to "comparative" hearings in which local civic leaders, elected officials, advertisers, and residents would evaluate the applicant's commitment to the local "public interest" in their programming and operations.[13] As much as these comparative hearings invited obsequiousness, they also cultivated an obligation to tend to the nature and quality of their local programming for audiences.

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8. *Id.* at 73 (""Federal regulation of interstate rates was similarly unsuccessful . . . [the FCC] provided very little control or restriction on AT&T's interstate rates and activities but it did help prevent competition from arising.' For the first three decades following the enactment of the 1934 Act, the FCC failed to undertake an formal investigations or to create any systematic basis for evaluating the reasonableness of AT&T's rates.").

9. JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 58 (2007).

10. Harvey Reiter, *The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 FED. COMM. L.J. 243, 264 (2005) ("[W]ith the increasing development of computing technology and its dependence on the telephone networks . . . there was a growing threat . . . This threat led the FCC to rule 'that large telephone companies could only offer data processing services through a separate subsidiary.'").

11. *See* United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (1982).

12. Sylvain, *supra* note 4, at 138 ("Reformers believed that anything less than a centralized government overhaul of spectrum administration would not resolve the cacophony of signals"); Olivier Sylvain, *Broadband Localism*, 73 OHIO ST. L.J. 795, 823–24 (2012) ("AT&T ruled phone service much like a feudal lord would govern fiefdoms.").

13. Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 RUTGERS L. REV. 235, 269–70 (2004) ("The purpose of the comparative hearing was to determine which applicant was best qualified based on the FCC's objective and subjective factors.").

Comparative hearings were not the only ways in which the FCC drew on its authority under the Communications Act to attend to consumer needs. Under its "fairness doctrine," the FCC required licensees "to provide coverage of vitally important controversial issues of interest in the community served by the licensees" and "to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues."[14] In a similar vein, the agency also sought to ensure that children were never exposed to obscenity and indecency in daytime programming.[15]

But, as a result, the Communications Act, also entrenched the broadcast industry oligopoly of ABC, CBS, and NBC.[16] Indeed, the comparative hearings resembled coronations more than public interest vetting processes.[17] They were sometimes also rife with unseemly corruption, as in the award of licenses to powerful local network station affiliates whose managers had little to no broadcast programming experience.[18] Regardless, through their relationship with local affiliates (the actual stations that applied for FCC licenses), the networks essentially controlled what most Americans watched and heard. It was not until the 1970s, as with the turn in telephony, that the FCC started imposing limits on the networks' respective ownership and financial stake in local stations, production companies, and newspapers.

III. THE TELECOMMUNICATIONS ACT AND THE REGULATION OF MARKET STRUCTURES

The 1934 Act effectively assured that just a handful of companies would retain coveted gatekeeping positions in the telecommunications and broadcast markets. The Telecommunications Act sought to cure these failings. Through the Act, Congress sharpened the FCC's authority to promote competition and free market principles. Its sponsors believed that these reforms, even if not

14. Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 146 (1985); *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

15. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

16. *See* ROBERT BRITT HORWITZ, THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS 20–21, 116–17 (1989); ROBERT W. MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, & DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING 1928–35 (1993); HUGH R. SLOTTEN, RADIO AND TELEVISION REGULATION: BROADCAST TECHNOLOGY IN THE UNITED STATES 1920–1960 (2000).

17. Sylvain, *supra* note 4, at 123 ("The prior system of awarding licenses pursuant to public comparative hearings had grown notoriously inefficient and unresponsive to innovations in telecommunications.").

18. 47 U.S.C. § 254 (2018).

directly addressed to consumers, would in the long run necessarily redound to their benefit.[19]

One of the most important reforms in the Act was to the obligations incumbent telephone providers (principally AT&T) owed to emergent competitors. Among other things, Congress imposed strict interconnection and unbundling requirements on incumbents to promote competition in the markets for long-distance and local service.[20] These reforms were imposing enough that incumbent and emergent providers litigated them for almost a decade.[21]

Congress also expanded universal service programs to ensure "advanced telecommunications services" at "just, reasonable, and affordable" rates for all Americans.[22] These programs support low-income customers with their monthly service bills as well as telecommunications companies and healthcare providers in high-cost rural areas. The statute obliges telecommunications providers to contribute to a Universal Service Fund and meet other requirements in order to participate in the high-cost program.[23] It also supports discounted "E-Rates" for phone and internet connections for schools and libraries.[24] Today, pursuant to these terms, the FCC has sought to expand universal service programs to include broadband service in recognition of the need to make broadband as ubiquitous as telephone service.[25]

As important as these universal service interventions in 1996 were, however, Congress did not promulgate self-executing obligations or enforceable duties to ensure universal service. Congress instead called on the FCC to create a "Federal-State Joint Board" which, in turn, is entrusted to make recommendations to the agency.[26] These recommendations would be based on the regulatory "principles" set out above.

The FCC has dutifully, if unevenly, relied on these terms to support income-eligible consumers, finance deployment in underserved rural areas, and

19. NUECHTERLEIN & WEISER, *supra* note 9, at 69–74.

20. 47 U.S.C. §§ 251, 252 (2018).

21. *See, e.g.*, Iowa Utilities Board v. AT&T, 525 U.S. 366 (1999).

22. 47 U.S.C. § 254(b) (2018).

23. 47 U.S.C. § 254(d) (2018) ("Every telecommunications carrier . . . shall contribute . . . to [preserve] and [advance] universal service.").

24. *See E-Rate—Schools & Libraries USF Program*, FED. COMMC'NS COMM'N, https://www.fcc.gov/general/e-rate-schools-libraries-usf-program (Dec. 29, 2021).

25. *Universal Service*, FED. COMMC'NS COMM'N, https://www.fcc.gov/general/universal-service#:~:text=Universal%20service%20is%20the%20principle,policies%20to%20implement%20this%20principle (Nov. 24, 2021) ("Today, the FCC . . . is working to make broadband as ubiquitous as voice, while continuing to support voice service.").

26. 47 U.S.C. § 254(a)(1) (2018)*; see also* 47 U.S.C. § 226(e)(3) (2018).

support affordable broadband for schools and libraries.[27] But the agency has done so based on shifting electoral priorities, as in the occasional and sporadic appropriations Congress makes for infrastructure investment.[28] This is to say nothing of the ways in which these programs have arguably only expanded the dominance of a handful of incumbent providers.[29]

The 1996 amendments were plainly deregulatory in the broadcast setting. Congress built on the liberalizing reforms of the preceding decade. In 1987, the FCC effectively repealed the fairness doctrine[30]—a rule that the Supreme Court had approved because of the networks' powerful "public trustee" gatekeeping position. That rule no longer made sense, however, in light of the ways in which cable television had expanded the nature of the content available to consumers such that consumers no longer depended on the Big Three networks for programming. Just a few years later, Congress promulgated "must-carry" obligations on cable operators to carry local broadcast signals in recognition of the former's newfound gatekeeping power in the market for video distribution.[31] By the early 1990s, moreover, the FCC also started loosening longstanding media ownership rules, including regulations that restricted broadcasters from having a financial interest in the programs they air.[32] Congress expanded this deregulatory agenda in the 1996 Act by first requiring the FCC to review its ownership rules every four years and, second, by repealing or modifying those rules in the event they "are no longer in the public interest."[33] And, pursuant to a new statutory authority from Congress, the agency started using competitive bidding to award licenses for certain

27. *Universal Service*, FED. COMMC'NS COMM'N, https://www.fcc.gov/general/universal-service#:~:text=Universal%20service%20is%20the%20principle,policies%20to%20implement%20this%20principle (Nov. 24, 2021).

28. American Recovery and Reinvestment Act, Pub. L. No. 111-5 (2009); *see also* Infrastructure Investment and Jobs Act, H.R. 3684 (2021).

29. Mark P. Trinchero & Holly Rachel Smith, *Federal Preemption of State Universal Service Regulations Under the Telecommunications Act of 1996*, 51 FED. COMM. L.J. 303, 305–06 (1999) ("[P]romoting competition in local service is at odds with the current method of funding universal service through cross-subsidiaries . . . new competitive entrants are unable to compete in residential markets and high-cost areas because, unlike the incumbent providers, they do not have a captive customer base.").

30. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

31. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); *see also* Turner Broad. Sys. v. FCC, 512 U.S. 622, 671 (1994); Turner Broad. Sys. v. FCC, 520 U.S. 180, 188 (1997). This provision has given commercial television networks an option other than retransmission consent under 47 U.S.C. § 325*; see also* 17 U.S.C. § 111 (2018).

32. Starting in the early 1990s, these changes continued with great fanfare under the Bush administration and accelerated dramatically under Trump.

33. FCC v. Prometheus Radio Project, 141 S. Ct. 1150 (2021).

wireless services, including broadcasting uses.[34] Policymakers believed that competitive bidding would help to rectify inefficiencies and administrative problems in the comparative public hearing process.

In this way, in telephony, broadcasting, and cable, the Telecommunications Act continued a decade-long slide at the FCC away from the focus on substance of consumer content and services to *the structure of the market* for such services. By the time of its enactment, a consensus of policymakers across the political spectrum had committed to this structure-of-the-market framing,[35] forgoing regulations that presumed to protect consumers directly. Under this view, developers and entrepreneurs in a truly competitive environment are best situated to meet consumer demand; government oversight is limited to calibrating competition in ways that, in the long run, will redound to the benefit of consumers.[36] Since that time, the different presidential administrations and their respective appointments to the FCC have had different approaches, with Republicans generally less concerned about consolidations within and across media industries. But, for the most part, the basic form of regulation across administrations has been addressed to the competitiveness of markets rather than to the quality of consumer-facing content and service as such.[37]

IV. THE TELECOMMUNICATIONS ACT: LITTLE TO NOTHING ABOUT BROADBAND OR THE INTERNET

For all that it changed, the Telecommunications Act rarely mentions anything about the internet. The term that Congress used to denote broadband service, "advanced telecommunications service," appears infrequently.[38] The statute's relative silence has animated a two-decade long battle over whether and to what extent the FCC should or could regulate in this area. Much of that debate has turned on the question of whether broadband is a common carrier

34. Omnibus Budget Reconciliation Act, Pub. L. No. 103–66 (1993).

35. This was not just particular to this legislative field. Recall Bill Clinton's proclamation in his 1996 State of the Union Address that "the era of big government is over."

36. Olivier Sylvain, *Network Equality*, 67 HASTINGS L.J. 443 (2016).

37. *Compare* Federal Communications Commission, Protecting and Promoting the Open Internet, GN Docket No. 14–28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5601 ¶ 1 (Feb. 26, 2015) *with* Federal Communications Commission, Restoring Internet Freedom, WC Docket No. 17-108, Declaratory ruling, Report, and Order, 33 FCC Rcd 311, 311 ¶ 1 (Jan. 4, 2018).

38. *See* 47 U.S.C. § 1302(d)(1) (2018) ("The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high quality voice, data, graphics, and video telecommunications using any technology.").

"telecommunications service" or an "information service" to which common carrier obligations do not apply. Policymakers in 1996 should probably be forgiven for their oversight because very few people knew or understood that broadband would be as important or popular as it has been. Very few people even anticipated that cable providers would be the ones to lead the way just half a decade later. Nor did most observers appreciate that online video and gaming would be as popular with consumers as they have been.

The lack of clarity on the substantive requirements under the Telecommunications Act for broadband service has fueled high-octane policy clashes between Republican- and Democratic-led FCCs, the most notable of which is over "network neutrality."[39] The debate generally turns on whether or the extent to which broadband service providers may leverage their gatekeeping position to block or receive remuneration from websites, applications, and online services. As I have argued elsewhere, this structure-of-the-market focus has distracted policymakers from the quality of service that consumers receive.[40] Instead, pursuant to the prevailing approach, policymakers have been preoccupied with the question of whether the broadband providers or application developers in the internet supply and distribution chain should be freest to innovate. The courts have not been able to direct the agency on the point because of the statute's ambiguity.[41]

This is not to say that the Telecommunications Act is silent or ambiguous about all aspects of the internet. As part of the 1996 Act, legislators set out what is today one of their most recognized enforceable terms on internet regulation. In 47 U.S.C. § 230, Congress established the "Good Samaritan" safe harbor for "interactive computer services."[42] The courts have read this provision broadly; they generally hold that the amendment immunizes online intermediaries from liability for unlawful user-generated content as well as for their good faith efforts to take objectionable user-generated content down.[43]

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39. Daniel T. Deacon, *Institutional Considerations for the Regulation of Internet Service Providers*, 74 FED. COMM. L.J. 111 (2021–2022) (advocating existing regulatory framework for commercial mobile radio services for open internet rules).

40. *See* Sylvain, *supra* note 36.

41. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); Verizon Commc'ns v. Fed. Commc'ns Comm'n, 740 F.3d 623 (D.C. Cir. 2014); Mozilla Corp. v. Fed. Commc'ns Comm'n, 940 F.3d 1 (D.C. Cir. 2019).

42. Legislators included this language only after the full bill had been marked up and reported out of committee, as if it was an afterthought.

43. *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1120–21 (9th Cir. 2003); Chi. Laws.' Comm. for C.R. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008); Doe v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir. 2008); Jones v. Dirty World Ent. Recordings LCC, 755 F.3d 398, 402 (6th Cir. 2014); Doe v. Backpage.com, LLC, 817 F.3d 12, 15 (1st Cir. 2016); Herrick v. Grindr

Through § 230, legislators sought 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."[44] They believed that online intermediaries would be best situated to moderate the distribution of user-generated content and that such companies would do it best without the threat of legal sanction. This deferential approach to technologists presumed a lot about the competence and beneficence of intermediaries.[45]

Relying principally on one of the two operative provisions of this amendment,[46] courts have since held that an "interactive computer service" may not be held liable for the unlawful content that their consumers post unless that service "materially contributes" to it.[47] The courts have been very generous in their reading of that protection, eschewing longstanding secondary liability theories applicable to other industries.[48] They have explained that intermediaries do not need to monitor their sites for unlawful content.[49] Nor do intermediaries even have to take unlawful content down when they have notice that it exists on the service.[50] Today, that provision and the way in which courts have interpreted it are widely seen as essential to the way in which social media and other popular internet applications have evolved, even as the incentives that drive content production and distribution are undeniably different from those when Congress passed § 230.

V. THE STATUTE'S WAKE: PROVIDER CONSOLIDATION, INEQUALITY, AND DISINFORMATION

If we are to assess the 1996 Act comprehensively, we should consider whether and to what extent Congress delivered on its stated aims. In this regard, Congress seemed to create new problems even while it credibly attempted to resolve others. At least, the regulatory shifts of the 1990s—

Holding Co., 765 F. App'x 586, 591 (2d Cir. 2019); Dyroff v. Ultimate Software Grp., 934 F.3d 1093, 1094 (9th Cir. 2019).

44. 47 U.S.C. § 230(b)(2) (2018).

45. *See* Olivier Sylvain, *Internet Governance and Democratic Legitimacy*, 62 FED. COMM. L.J. 205 (2010).

46. 47 U.S.C. § 230(c)(1) (2018).

47. Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1168 (9th Cir. 2008).

48. *Compare AOL*, 129 F.3d 327, 330–31 (4th Cir. 1997) (tort action against online intermediary for defamatory post by third-party user), *with* Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 168, 171–73 (2d Cir. 1968) (tort action against Coast Guard for physical damage to ship port), *and* Carr v. Wm. C. Crowell Co., 171 P.2d 5, 6, 8 (Cal. 1946) (tort action against employer for assault by employee).

49. *See, e.g.*, Jane Doe v. Internet Brands, 824 F.3d 846, 853 (2014).

50. *See AOL*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1988).

embodied most clearly in the 1996 Act—obscured Congress's consumerist aims of prior decades on the theory that consumers would be the inevitable downstream beneficiaries of competition among providers.[51]

The result has been both ironic and alarming. First, in spite of its aims, the market for communications is concentrated in the hands of just a handful of companies across media technologies—from cable to broadcast to mobile to broadband. Second, the quality of broadband service is still highly uneven between poorer, rural, and minority communities, on the one hand, and wealthier and whiter communities, on the other.[52] Third, the substantive content of programming across media technologies appears to have eroded a shared sense of purpose across our polity.[53]

Thus, today we are experiencing an economic and social disorder that in the mid-1990s most of us could not have anticipated or really wanted. The early internet's most outspoken evangelists tended to talk breathlessly about the structural transformation of markets, democratic politics, and social relations.[54] In their exuberance, however, they did not foresee the potential for consolidation, disparities in broadband access, algorithmic bias, consumer manipulation, and polarization.[55] Nor could they anticipate how rapidly networked computing would suddenly permeate all aspects life and economy. Today, even the former champions of "disruptive innovation" and "moving fast and breaking things" recognize that, as transformative as the new communication technologies have been, policy reform is inevitable.[56]

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51. Consider the long title of the 1996 Act: "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid development of new telecommunications technologies."

52. *See* Sylvain, *supra* note 36, at 448–49. Affordability remains a problem, but it is arguably better now than it was a couple years ago. Anyway, consumer service in the United States is expensive relative to that in other highly industrialized countries around the world. *Id.* at 451.

53. ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU (2011).

54. John Perry Barlow, *The Declaration of the Independence of Cyberspace* (Feb. 8, 1996), https://www.eff.org/cyberspace-independence; *see* CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS (2008).

55. *See* Olivier Sylvain, *Contingency and the 'Networked Information Economy': A Critique of 'The Wealth of Networks'*, 4 INT'L J. TECH., KNOWL. & SOC'Y (2008).

56. Mark Zuckerberg, *The Internet Needs New Rules. Let's start in these Four Areas.*, WASH. POST. (Mar. 30, 2019), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html ("I believe we need a more active role for governments and regulators. By updating the rules for the Internet, we can preserve what's best about it—the freedom for people to express themselves and for entrepreneurs to build new things—while

A. MARKET CONSOLIDATION

The prevailing (if sometimes marginally contested) laissez-faire approach across presidential administrations from 1996 to today has only created new opportunities for incumbent providers and internet companies to enlarge and retain dominant market positions at the expense of competitors and consumers.[57] The market for fixed broadband internet service since the 1990s, for example, has gone from being vibrant to now being effectively dominated by a duopoly (Comcast and Charter) in most parts of the country. These companies, moreover, have moved quickly into commanding positions in the content production business, well beyond the mere provision of broadband service. Meanwhile, the market for mobile broadband providers has also become consolidated across three carriers (AT&T, T-Mobile, and Verizon). One could rest assured that, in spite of these trends, consumers still have access to the full bazaar of internet services, applications, and content. But research of the past couple of years suggests that, in the wake of the Trump Administration's FCC decision to repeal very hard-fought network neutrality rules, providers (in mobile wireless markets in particular) have been throttling popular online video streaming applications like YouTube and Netflix, presumably because of the threat that those popular online companies pose to their own new video offerings.[58] In fact, this pattern is neither new or nor unsurprising.[59]

B. ACCESS DISPARITIES

During the COVID-19 pandemic, online applications and services have made many people's lives easier to manage. It is hard to understate, for example, how applications like Zoom, GrubHub, and Dropbox have helped many of us remain busy, nourished, and productive.

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also protecting society from broader harms . . . . From what I've learned, I believe we need new regulation in four areas: harmful content, election integrity, privacy and data portability.").

57. The exception substantiates this claim: peering arrangements and nongovernmental consensus-driven administration of the internet's underlying transmission engineering has, as far as I know, remained open and resilient. Even so, many companies up and down the layered stack have developed proprietary infrastructure and content delivery networks in furtherance of their own bottom-line interests.

58. Klint Finley, *Think Video on Your Phone Is Slow? It's Not Your Imagination*, WIRED (Aug. 20, 2019), https://www.wired.com/story/video-phone-slow-not-your-imagination/; Nick Statt, *Netflix and YouTube are Most Throttled Mobile Apps by US Carriers, New Study Says*, VERGE (Sept. 4, 2018), https://www.theverge.com/2018/9/4/17820508/netflix-youtube-throttled-att-verizon-t-mobile-net-neutrality-violations.

59. Comcast v. FCC, 600 F.3d 642 (D.C. Cir. 2010); *In re* Madison River Communications, 20 FCC Rcd. 4295 (2005).

But, even in consideration of these affordances, the pandemic has exposed and, in some cases, exacerbated extant deficiencies and disparities in broadband infrastructure.[60] Consider that at the height of the pandemic last summer in New York, about a quarter of children (more than 725,000) did not have adequate internet access at home to complete schoolwork. The problem is particularly notable for racial minorities, low-income people, and rural residents. In the United States, Black and Latinx students are significantly more likely to lack adequate internet access to keep up with schoolwork.[61] And children in rural areas are almost two times more likely than children in urban areas to have an unreliable connection.[62] School districts across the country relied on Wi-Fi-equipped buses to make up for these deficiencies in service.[63] Other kids reportedly did homework outside of stores and libraries with Wi-Fi.[64]

Schoolchildren were not the only ones who needed ad hoc stopgap support. A disproportionate number of elderly residents could not register for coronavirus vaccinations and related treatments since most states and localities administered those registrations through websites and apps.[65] Most jurisdictions offered options for registering by phone, but these services were overwhelmed with calls.[66] This was no surprise since older Americans have always been among the least likely to have service before the pandemic.[67]

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60. This failure is not particular to internet service. Infrastructure neglect is systemic. *See generally* Griff Witte, Abigail Hauslohner & Emily Wax-Thibodeaux, *In the shadow of Its Exceptionalism, America Fails to Invest in the Basics*, WASH. POST (Mar. 13, 2021), https://www.washingtonpost.com/nation/interactive/2021/america-growing-disparities/?utm_medium=email&utm_campaign=Newsletters&utm_source=sendgrid (describing how the market for networked applications "spins out endless entertainment to keep millions preoccupied during lockdown—and keep tech shares riding high on Wall Street—but leaves kids disconnected from the access they need to do their schoolwork").

61. COMMON SENSE MEDIA, *Teaching Through the Digital Divide* (Nov. 20, 2021), https://www.commonsensemedia.org/digital-divide-stories#/state/NY.

62. *Id.*

63. Sarah Al-Arshani, *School districts across the country are using school buses to deliver WiFi to students who lack access*, INSIDER (Mar. 31, 2020, 9:10 PM), https://www.insider.com/wifi-buses-being-used-across-country-to-give-kids-internet-2020-3.

64. Cecilia Kang, *Parking Lots Have Become a Digital Lifeline*, N.Y. TIMES (May 5, 2020), https://www.nytimes.com/2020/05/05/technology/parking-lots-wifi-coronavirus.html.

65. Rebecca Heilweil, *A big hurdle for older Americans trying to get vaccinated: Using the internet*, Vox (Jan. 27, 2021, 1:50 PM EST), https://www.vox.com/recode/22250606/older-americans-seniors-computer-literacy-skills-internet-digital-divide.

66. Sharon Otterman, *The Maddening Red Tape Facing Older People Who Want the Vaccine*, N.Y. Times (Sept. 2, 2021), https://www.nytimes.com/2021/01/14/nyregion/covid-vaccine-older-people-senior-citizens.html.

67. PEW RSCH. CENTER, *Internet/Broadband Fact Sheet* (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.

The key here, however, is not raw unevenness in access to broadband service on which most U.S. residents have come to rely. After all, the "digital divide" is closing. Rather, what remains are glaring disparities in the kinds of services available to different populations by virtue of the devices they use to access the internet.[68]

C. DISINFORMATION AND CONSUMER MANIPULATION

Add to these access disparities the distinctive two-sided market for online content (for consumers) and personal consumer data (for advertisers and data brokers) that Alphabet, Apple, and Meta (formerly Facebook) dominate. These Big Tech companies, as with all other interactive computer service providers under § 230, have been enjoying the windfall of the 1996 Act's regulatory approach. As explained above, Congress has not directed through law or otherwise the ways in which internet companies may develop, market, and administer their services. That is, legislators have done very little to adapt law to prevailing business models, practices, or phenomena.[69] Congressional inaction allows Big Tech companies to indulge the opportunity to optimize consumer engagement without compunction or fear of liability because it pays handsomely in ad revenue.

Today, online intermediaries of all sizes design their services to attract and hold consumer attention, even if the content that keeps consumers engaged is illicit, dangerous, or unlawful.[70] This is to say that they are not content with knowing that their services just host engrossing content. Moreover, they accelerate, amplify, and target content to consumers who are likeliest to be interested. As much as intermediaries have reconnected college roommates or spread awareness about #BLM or #MeToo, they also recommend connections between violent extremists and accelerate the proliferation of disinformation about public health, elections, and other highly consequential social facts. And they provide services that help advertisers target and deliver advertisements in ways that discriminate against historically marginalized groups in areas otherwise protected under civil rights laws, including housing

68. *See* Sylvain, *supra* note 36.

69. *But see* 47 U.S.C. § 230(e)(5) (2018) (Allow States and Victims to Fight Online Sex Trafficking Act & Stop Enabling Sex Traffickers Act, Pub. L. No. 115-164 (2017) (creating new § 230 exception under for actions concerning sexual exploitation of children and sex trafficking).

70. Karen Hao, *How Facebook Got Addicted to Spreading Misinformation*, WIRED (Mar. 11, 2021), https://www.technologyreview.com/2021/03/11/1020600/facebook-responsible-ai-misinformation/.

and employment.[71] Until recently, online intermediaries have done this with little apparent compunction, because, again, the courts have chosen to protect them on the theory that these "interactive computer services" are mere platforms for user-generated content, in spite of the active role they play in designing practically all of the online consumer experience.[72]

Current law effectively incentivizes distribution, amplification, and delivery of polarizing, misleading, and discriminatory content because it presents no friction or barrier to engaging in them at all. But the main problem with the doctrine today is not simply that it effectively allows these practices. The principal problem is that, under current law, these phenomena may proliferate at the expense of equality and consumer protection. This has the effect of entrenching extant systematic patterns of subordination and exclusion. Consumers and historically marginalized groups are likeliest to be harmed where law (other than § 230's sweeping immunity) has no effect.

VI. A NEW COMMUNICATIONS POLICY FOR EQUALITY AND CONSUMER PROTECTION

Reformers in the 1990s were right to redress the failings of twentieth-century regulation of broadcast content, cable, and long-distance telephony. But, in 2021, it is now plain that Congress's structure-of-the-market focus twenty-five years ago in the Telecommunications Act has fallen short, at least because market concentration and inequality continue to prevail in the covered industries. Those amendments' ambiguity about broadband internet service, moreover, has been kindling for a variety of intractable partisan tussles over network neutrality and other public policy concerns involving the internet. Additionally, legislators' assertively libertarian treatment of "interactive computer services" under § 230 has nudged the courts to promulgate a laissez-faire doctrine that, as I have argued elsewhere, facilitates the spread of disinformation and entrenches inequality.[73]

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71. *See* Olivier Sylvain, *Discriminatory Designs on User Data*, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV. (2018), https://knightcolumbia.org/content/discriminatory-designs-user-data; Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 202 (2018) [hereinafter Sylvain, *Intermediary Duties*].

72. *See, e.g.*, Force v. Facebook, 934 F.3d 53 (2d Cir. 2019); Dyroff v. Ultimate Software Group, 934 F.3d 1093 (9th Cir. 2019); Jane Doe v. Backpage, 817 F.3d 12 (1st Cir. 2016); Daniel v. Armslist, 386 Wis.2d 449 (Wisc. 2019).

73. *See, e.g.*, Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 YALE L. J. FORUM 475 (Nov. 16, 2021), *available at* https://www.yalelawjournal.org/forum/platform-realism-informational-inequality-and-section-230-reform; ; *see also* Alexandra S. Levine, *Misinformation About the Vaccine Could be Worse Than Disinformation About the Elections*, POLITICO (Dec. 21, 2020), https://www.politico.com/news/2020/12/21/social-media-

At this moment of reckoning twenty-five years after Congress enacted the Telecommunications Act, the United States' information environment is demonstrably dysfunctional. To wit, (1) just a couple of companies today have market-defining control in each respective media industry—cable, telephony, and broadband; (2) stark inequalities persist in the availability and quality of networked computing services for consumers; and (3) consumer-facing content developers have sliced and diced consumers and the electorate into highly stylized market segments and ostensibly irreconcilable political factions. These factions have, in turn, been exploited by self-regarding demagogues and manipulative advertisers.

The problem today lies in, first, underinvestment in equal deployment and availability of broadband service to individual consumers and, second, commercial development of services that entrench extant material distributional inequality among consumers. Communications policymakers can remedy these failures by committing to equality and consumer protection above all other policy priorities in at least the below-outlined ways.[74] These are foundational regulatory priorities to which federal policy should always attend no matter how innovative firms or technologies may be.[75]

A. BASIC EQUALITY

In the United States, courts have held that the Constitution forbids state actors from restricting companies' right to publish lawful internet content[76] or individuals' right to receive it.[77] Communications policy in the United States, however, is nowhere near as assertive about internet availability, affordability, and accessibility. This is not to say that policymakers do not attend to these matters. Some do more than others. Regardless, there is nothing even close to

vaccine-misinformation-449770; *U.S. Senators Target Tech's Legal Immunity to Stop Vaccine Misinformation*, REUTERS (July 22, 2021), https://www.reuters.com/world/us/us-senators-aim-stop-vaccine-misinformation-by-going-after-techs-legal-immunity-2021-07-22/; Louise Matsakis, *Facebook's Ad System Might be Hard-Coded for Discrimination*, WIRED (Apr. 6, 2019), https://www.wired.com/story/facebooks-ad-system-discrimination/.

74. The agenda set out here is not addressed to the resiliency of the United States' communications infrastructure. The workings of internet transmission technology and the backbone infrastructure are not the problem. The internet's early developers long ago sought to design networked computing protocols and infrastructure that could withstand nuclear attack, after all. Nor should policymakers concern themselves with innovation, a concept I have elsewhere called a third order priority of the Communications Act. Olivier Sylvain, *Network Equality*, 67 HASTINGS L.J. 443, 453 (2016).

75. *Cf. id.* at 460; Sylvain, *Broadband Localism*, *supra* note 12, at 811–12.

76. Prager Univ. v. Google, 951 F.3d 991 (9th Cir. 2020); Zhang v. Baidu, 10 F.Supp.3d 433 (S.D.N.Y. 2014); Search King v. Google, 2003 WL 21464568 (W.D. Okla. 2003); *see also* Wash. Post v. McManus, 944 F.3d 506 (4th Cir. 2019).

77. Reno v. ACLU, 521 U.S. 844 (1997).

resembling a sustained institutional obligation to make service available, affordable, or equally accessible. Instead, attention to these concerns has come and gone based on the vagaries of electoral politics and the shifting needs of fiscal policy. In recent years, legislators have shown their strongest support for investment in broadband infrastructure in response to emergencies and macroeconomic calamity.[78] In these instances, legislators have delegated the responsibility of administering such investments to federal agencies.[79]

During 2020, the year COVID-19 struck, policymakers mobilized resources to ensure that underserved communities could remain connected.[80] Congress passed the CARES Act within weeks of the national lockdown. That statute committed $100 million to the Agriculture Department's ReConnect program to support deployment in rural areas.[81] Later in the year, after the presidential election, Congress appropriated a $1 billion grant program to support deployment in tribal lands, $300 million for rural areas as well as others that lacked broadband, as well as other programs to support funding of historically Black and tribal colleges and universities to expand broadband connectivity.[82] Congress supplemented these substantial efforts with important but smaller appropriations for "connected care" telemedicine and support for distance education.[83]

As vital as these interventions have been, they reflect the ad hoc approach to closing gaps in service at a time when network connection was obviously vital for everyone. Today, with regards to systemic policy, however, the best the United States has is the Communications Act's stated aspirations for universal service. For the most part, these programs have provided important

78. *See, e.g.*, *Emergency Broadband Benefit Program,* FED. COMMC'NS COMM'N, https://www.fcc.gov/emergency-broadband-benefit-program (last visited Oct. 5, 2022).

79. Sylvain, *Broadband Localism*, *supra* note 12, at 795.

80. *See Show Us the Money: Federal Broadband Support During the COVID-19 Pandemic*, BENTON INSTITUTE, https://www.benton.org/blog/show-us-money-federal-broadband-support-during-covid-19-pandemic?utm_medium=email&utm_campaign=Newsletters&utm_source=sendgrid.

81. Pub. L. No. 116–136, § 11004, 134 Stat. 510 (2020) (CARES Act); *see also ReConnect Loan and Grant Program*, U.S. DEP'T AGRICULTURE, https://www.usda.gov/reconnect.

82. Consolidated Appropriations Act, Pub. L. No. 116–260 (2020); *see Grants Overview*, NAT'L TELECOMMS. INFO. ADMIN., BROADBAND USA, https://broadbandusa.ntia.doc.gov/ntia-common-content/overview-consolidated-appropriations-act-2021 (last visited Oct. 5, 2022).

83. *FCC Fights Covid-19 with $200M; Adopts Long-Term Connected Care Study*, FED. COMMC'NS COMM'N, https://www.fcc.gov/document/fcc-fights-covid-19-200m-adopts-long-term-connected-care-study (last visited Oct. 5, 2022); *Governor's Emergency Education Relief Fund*, OFFICE OF ELEMENTARY & SECONDARY EDUCATION, https://oese.ed.gov/offices/education-stabilization-fund/governors-emergency-education-relief-fund/ (last visited Oct. 5, 2022).

subsidies to individuals and providers who "build out" service to schools, hospitals, and rural areas.[84] But, as explained *supra*, the statute does not establish self-executing or enforceable protections that ensure "reasonably comparable" service to all Americans. The 1996 Act only sets objectives out in precatory terms. Furthermore, as drafted, Congress really meant that language for telephony, not broadband as such. Over the past decade, the FCC took it upon itself to draw on this authority to apply it to broadband explicitly.[85] This stated policy in the statute bespeaks how unclear Congress in 1996 was about the "broadband convergence" that would soon come. Legislators were content in the faith that private providers would fill in any gaps in broadband deployment, assuming the incentives were right.

The only provisions through which Congress clearly affirmed its intention to promote broadband deployment are in § 253 and § 706.[86] The first proscribes local and state governments from prohibiting "any entity" from providing telecommunications service. The second, § 706, enumerates a soup-to-nuts menu of regulatory tools on which the FCC could rely to promote "infrastructure investment"—everything from price cap regulation to forbearance.[87] But that is really all. Ever since, Congress has enacted piecemeal appropriations and financial incentivizes for private providers. Legislators have generally delegated administration of these funds to the FCC, the National Telecommunications Information Administration in the Commerce Department, the Agriculture Department, and other federal executive agencies.

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84. *Universal Service*, FED. COMMC'NS COMM'N, https://www.fcc.gov/general/universal-service#:~:text=Universal%20service%20is%20the%20principle,policies%20to%20implement%20this%20principle (last visited Oct. 5, 2022).

85. *Urban Rate Survey Data & Resources*, FED. COMMC'NS COMM'N, https://www.fcc.gov/economics-analytics/industry-analysis-division/urban-rate-survey-data-resources (last visited Oct. 5, 2022) ("Each year, the FCC conducts a survey of the fixed voice and broadband service rates offered to consumers in urban areas. The FCC uses the survey data to determine the reasonable comparability benchmarks for fixed voice and broadband rates for universal service purposes.").

86. The latter is codified in the U.S. Code at 47 U.S.C. § 1302 (2018).

87. 47 U.S.C. § 1302 (2018) ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."). The FCC has relied on this language far more than legislators in 1996 probably expected, most notably in the context of broadband network management—in essence, network neutrality.

1. Accountability for Data Collection and Content Delivery Disparity

This is weak stuff. State and local governments as well as foundations and community-based nonprofit organizations have sought to fill the notable gaps left by the piecemeal federal approach.[88] New York's very recent announcement that it will provide affordable internet to low-income families across the state is among the most notable of these interventions.[89] It can be a blueprint for large states across the country. But, again, this hardly counts as enough.

A better national policy would at least explicitly identify concrete benchmarks for deployment. Policymakers could assert that failing to meet such standards would be inconsistent with the institutional commitment to equality. They could also propose as much without creating a positive right to broadband service. Instead, a benchmark would at least formalize the federal government's sustained commitment to "reasonably comparable" broadband deployment.

Congress could, for example, expand and regularize FCC capacity to collect broadband deployment data by census block.[90] This granular information is important to understanding the extent, quality, and cost of service. In consideration of the correlation between neighborhood and race or class,[91] the data would advance the objective of delivering broadband service "to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex."[92] The FCC could be charged with

88. *See The New York City Internet Master Plan*, NYC MAYOR'S OFF. OF THE CHIEF TECH. OFFICER (Jan. 2020), https://www1.nyc.gov/assets/cto/downloads/internet-master-plan/NYC_IMP_1.7.20_FINAL-2.pdf (regarding New York State 2021 broadband effort).

89. Stacie Sherman, *Cuomo Signs New York Bill Requiring Low-Cost Broadband Access*, BLOOMBERG (Apr. 16, 2021), https://www.bloomberg.com/news/articles/2021-04-16/n-y-to-require-all-internet-providers-offer-low-cost-broadband. Nate Benson, *Gov. Cuomo Signs Legislation Ensuring Affordable Internet to Low-Income Families*, WGRZ (Apr. 16, 2021), https://www.wgrz.com/article/news/local/new-york/gov-cuomo-signs-legislation-ensuring-affordable-internet-to-low-income-families-broadband-new-york-state/71-4855037d-d587-4994-95f6-85c19dfb6049.

90. One very recent creative idea from the agency is to invite consumers to test their service speed on an FCC-provided app which, in turn, collects data about service for the limited purposes of measuring broadband deployment. *See FCC Encourages Public to Use Its Speed Test App to Measure their Broadband Speeds*, FED. COMMC'NS COMM'N (Apr. 12, 2021), https://www.fcc.gov/document/fcc-encourages-public-use-its-speed-test-app.

91. CONSUMER FIN. PROT. BUREAU, USING PUBLICLY AVAILABLE INFORMATION TO PROXY FOR UNIDENTIFIED RACE AND ETHNICITY: A METHODOLOGY AND ASSESSMENT 7–8 (2014), https://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf.

92. 47 U.S.C. § 151 (2018).

reporting its findings from time to time in the same way that other agencies, including the FCC, must report to Congress on other matters.[93]

Data collection could help keep providers accountable. Congress, moreover, could impose legal or budgetary consequences if service distribution falls short of some concrete benchmark. It could, for example, condition universal service funding on the given provider's demonstrable good faith efforts to affirmatively further highspeed broadband service to all communities. Such companies could not participate in universal service funding if some concrete measure of disparity exists across race or class. It is possible that this condition would diminish providers' incentive to invest in underserved communities, but this would not be because Congress was imposing costs on infrastructure research or development. Rather, it would be because providers have for years been the beneficiaries of a regulatory regime that has yet to close gaps in the quality and nature of affordable service across communities in the United States.

2. Broadband Localism

Broadband access is both a local service and a geographically contingent service.[94] This is a stubborn fact about the internet today. That is why, when communications policymakers speak about connecting all Americans, they generally refer to the availability of service in the "last mile" between the local provider and its consumers. The U.S. regulatory framework accordingly delegates or otherwise assumes that municipal governments and related local authorities are the best situated to assign to providers the responsibility of providing service to local residents through franchise agreements with providers. These arrangements account for local rights of way, community anchor institutions, topography, demographic distribution of residents, and other distinctly contingencies that local officials generally have the greatest capacity and competence to understand.[95]

In redoubling its commitment to equality and consumer protection, Congress should shift away from its presumptive institutional reliance on private providers and instead do more to enlist local governments. It could do this by asserting unambiguously that municipalities have the positive authority

93. *See, e.g.*, Fed. Commc'ns Comm'n, Notice of Proposed Rulemaking In the Matter of 2018 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (Dec. 13, 2018), https://docs.fcc.gov/public/attachments/FCC-18-179A1_Rcd.pdf.

94. *See generally* Sylvain, *Broadband Localism*, *supra* note 12, at 795–96 ("All broadband is local.").

95. *Id.*

to own and provide service or otherwise administer deployment.[96] Such a statutory command should also make plain that no private or state government entities may intrude on that authority.

This last point is important because in 2004, the Supreme Court held in *Nixon v. Missouri Municipal League* that Congress does not preempt states from preventing municipalities or public utilities from providing telecommunications service.[97] The plain text of the pertinent provision, 47 U.S.C. § 253, the Court explained, was not clear on the question; it provided that neither states nor local governments may bar "any entity" from providing telecommunications service.[98] This contrasted the explicit and direct restrictions on state regulation in other provisions under the statute.[99] For the Court, the constitutional interest in federalism required that Congress be clearer about its intention to bar states from imposing themselves on local governments because municipalities are instrumentalities of the states that create them. As written, however, the Court concluded that the Act did not bar states from regulating municipal service.

Missouri Municipal League concerned conventional telephone service. The Court's holding, however, shaped and constrained FCC regulation of broadband policy on a variety of fronts, including state network neutrality regulation, 5G wireless deployment, and municipally owned or administered broadband service.[100] In these areas, the courts have held true to *Missouri Municipal League*'s 2004 holding: Absent a clear statement from Congress on

96. *Cf.* Letter of Samuelson Law, Technology & Public Policy Clinic to Marlene H. Dortch, Re: Notice of Ex Parte Presentation Regarding the Emergency Broadband Benefit Program, WC Docket No. 20-445, (Feb. 22, 2021), https://www.law.berkeley.edu/wp-content/uploads/2021/07/02.22.2021-Ex-Parte-_-NCC-Meeting-with-Trent-Harkrader.FINAL_.pdf (highlighting how innovative and effective municipal broadband initiatives, such as San Rafael's community mesh network do not receive program funding).

97. Mo. Mun. League v. Nixon, 541 U.S. 125, 138 (2004).

98. The statute in its entirety provides that: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (2018).

99. 47 U.S.C. § 332(c)(7)(b) (2018) (providing that state or local regulations governing the "placement, construction, and modification of personal wireless services facilities . . . (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services").

100. *See* CONG. RSCH. SERV., STEPPING IN: THE FCC'S AUTHORITY TO PREEMPT STATE LAWS UNDER THE COMMUNICATIONS ACT (Mar. 26, 2021), https://fas.org/sgp/crs/misc/R46736.pdf.

the question, the Communications Act does not authorize the FCC to constrain states' regulation of their municipalities.[101]

Congress can and should prohibit states from blocking such efforts because municipal systems would compete with the one or two or maybe three incumbent providers in most local markets.[102] Proponents of state bans on municipally owned or operated broadband have argued that government-funded systems would have an unfair advantage in tax treatment and, moreover, would not bear the same internal budget and market-related constraints like the price mechanism. These are concerns worth serious consideration, but they do not help to resolve whether flat bans on municipal service make sense. Indeed, if the objective of municipal broadband is to promote competition in ways that redound to the benefit of consumers (in much the same way that the structure-of-the-market approach does), policymakers would have to be alert to the competitiveness of incumbents as well, even as they free up local governments to participate in the market for service.

B. INFORMATION SERVICES: CONSUMER INTERFACES AND EXPERIENCES

The 1996 amendments to the Communications Act could have said more about consumer protection. But, as I explain *supra*, legislators and policymakers in the 1990s were eager above all to reform the regulation of the structure of the market for telecommunications service. The common view back then was that a properly regulated market would eventually inure to the benefit of consumers.

This is to say that legislators paid little to no attention to the consumer-facing services, applications, and content that would run "on top" of the telecommunications infrastructure. Congress, to be fair, was not completely silent about those services in 1996; through § 230 it established a safe harbor for intermediaries that are not "responsible, in whole or in part, for the creation or development" of unlawful content.[103] But this new provision bespoke legislators' relative indifference to the potential dangers of then-emergent consumer-facing intermediaries—in essence, not merely just the physical infrastructure that brought those services to consumers' displays and devices.

101. *See* Mozilla Corp. v. FCC, 940 F.3d 1, 75 (D.C. Cir. 2019); Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016).

102. *See* Sylvain, *Broadband Localism*, *supra* note 12, at 795.

103. 47 U.S.C. § 230(f)(3) (2018). Congress, moreover, included "information service" in its definition of "interactive computer service." 47 U.S.C. § 230(f)(2) (2018) ("The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.").

Congress even enshrined this framing in the distinction between "information services" in Title I of the Act and "telecommunications services" under Title II.[104] The latter encompasses telephony, which, as I discuss above, Congress subjected to strict "common carrier" obligations. "Information services," on the other hand, connoted information processing capabilities that are made possible "via telecommunications"[105] and are subject to "light touch" regulatory oversight.[106] These statutory categories have been particularly relevant in litigation since 2005 about the appropriate regulatory classification for broadband—under the less demanding Title I or under the nondiscrimination and transparency requirements of Title II.[107]

As important as telecommunications infrastructure is today, consumer-facing "information services," applications, and content define consumers' online experiences more than anything else. There is much to celebrate in the wide range of affordances now available to consumers. But there are many alarming developments. The amended Communications Act provides very little direction on how the FCC might protect consumers directly.[108]

Policymakers will need newer and better honed regulatory tools that can redress, for example, rampant disinformation, consumer manipulation, and algorithmic bias. It is also not clear that the FCC could have a major role in this regard, at least because of the ways in which Congress has cabined its authority to focus on common carriers and related telecommunications services. Other federal agencies could ostensibly fill any such gaps, as when, for example, the Department of Housing and Urban Development commenced an investigation of Facebook's Ad Manager for violating fair housing laws.[109]

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104. These statutory forms drew on vestigial regulatory distinctions between "basic" "transmission" and "enhanced" "data processing."

105. 47 U.S.C. § 153(24) (2018) ("The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.").

106. Olivier Sylvain, *Network Equality*, 67 HASTINGS L.J. 443, 472 (2016) ("This really was a problem of the FCC's own creation: until just this past February, the agency had classified the Internet under the Communications Act as an 'information service' deserving of the lightest of regulatory oversight.").

107. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014); USTA v. FCC, 359 F.3d 554 (D.C. Cir. 2016).

108. *See supra* Sec. III.

109. *See* Pema Levy, *Facebook Settles Civil Rights Lawsuits Over Ad Discrimination*, MOTHER JONES (Mar. 19, 2019), https://www.motherjones.com/politics/2019/03/facebook-settles-civil-rights-lawsuits-over-ad-discrimination/; *see also Facebook Settlement*, NATIONAL FAIR

The Federal Trade Commission (FTC), however, is the oldest and among the most impactful transsubstantive consumer protection agencies in the federal government. Over the past decade, it has emerged as an important regulator of consumer-facing services and applications, particularly in the area of consumer data security.[110] Congress's decision over a century ago to exclude "common carriers" (as well as a dozen other regulated industries) from the FTC's jurisdiction changes nothing to the extent that consumer-facing intermediaries (i.e., not common carriers) are at issue.[111] In addition to broad investigatory powers, the FTC also has enforcement authority to protect against anticompetitive, unfair, and deceptive trade practices across industries.[112] Under its governing statute and judicial precedent, the FTC may issue cease and desist letters,[113] pursue civil enforcement actions in service of its section 5 authority,[114] and apply for court ordered injunctive relief.[115]

This authority would not mean much for information services if policymakers consider them to be nothing more than mere "platforms" for user-generated content. Apart from certain criminal and Intellectual Party exceptions, current § 230 doctrine immunizes them for their consumers' unlawful. Today, however, most online services and applications do far more than serve as dispassionate conduits for user-generated content. Even the biggest companies that purport to do little more than "bring the world together" and make new connections between users facilitate those

HOUSING ALLIANCE, https://nationalfairhousing.org/facebook-settlement/ (last visited Nov. 29, 2021).

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

111. 15 U.S.C. § 43(a)(2) (2018) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.").

112. 15 U.S.C. § 45(a)(1) (2018).

113. 15 U.S.C. § 45(b) (2018).

114. Federal Trade Commission Act § 5(a), 15 U.S.C. § 45).

115. *See* 15 U.S.C. §§ 45(l) & (m) (2018). *But see* AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341 (2021) (holding that section 13(b) of the Federal Trade Commission Act does not authorize courts to grant equitable monetary relief, including restitution or disgorgement, in spite of the prevailing practice of the past decade).

connections through recommendations and secret sorting algorithms.[116] In fact, there are a great assortment of ways in which online intermediaries curate and control the online consumer experience—from Reddit's simple and elegant system of featuring the content that users "vote up" to immersive open world multiplayer gaming experiences like Red Dead Redemption 2. Many of these consumer-facing services vigilantly attend to the harms of cyberharassment and consumer manipulation.[117] But others do not.[118] Others still, meanwhile, surreptitiously employ what many observers have called "dark patterns" in user interfaces.[119] They do so under the cloak of protection afforded by § 230 immunity[120] as well as pursuant to trade secret and other IP laws.[121] These service designs imperceptibly lure consumers into purchasing products they do not want or giving personal data they would otherwise keep private.[122] Deceptive and manipulative companies have always drawn scrutiny from the FTC, whether online or not. Current design features, however, have been especially worrisome because they are opaque to consumers and regulators or otherwise shielded from legal accountability, among other reasons. This is presumably why the FTC has intensified its attention to online consumer-facing services.[123] The agency has a variety of tools at its disposal to

116. Chaim Gartenberg, *What is Facebook? Just ask Mark Zuckerberg*, VERGE (Mar. 8, 2019), https://www.theverge.com/2019/3/8/18255269/facebook-mark-zuckerberg-definition-social-media-network-sharing-privacy.

117. *See, e.g.*, Assoc. Press, *Reddit Announces Anti-Harassment Policy in Attempt to Curb Cyberbullying*, GUARDIAN (May 14, 2015), https://www.theguardian.com/technology/2015/may/14/reddit-anti-harassment-policy-cyberbullying.

118. *See, e.g.*, Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398 (6th Cir. 2014).

119. *See* Sydney Fussell, *The Endless, Invisible Persuasion Tactics of the Internet*, ATLANTIC (Aug. 2, 2019), https://www.theatlantic.com/technology/archive/2019/08/how-dark-patterns-online-manipulate-shoppers/595360/; Arushi Jaiswal, *Dark Patterns in UX: How Designers Should Be Responsible For Their Actions*, UX COLLECTIVE (Apr. 15, 2018), https://uxdesign.cc/dark-patterns-in-ux-design-7009a83b233c; *see also Bringing Dark Patterns to Light: An FTC Workshop*, FED. COMMC'NS COMM'N (Apr. 29, 2021), https://www.ftc.gov/news-events/events-calendar/bringing-dark-patterns-light-ftc-workshop (panelist Johanna T. Gunawan referring to "aesthetic manipulation"); *see generally* Ryan Calo, *Digital Market Manipulation*, 82 Geo. WASH. L. REV. 995 (2014).

120. *See* Sylvain, *Intermediary Duties*, *supra* note 71, at 203.

121. *See* FRANK PASQUALE, BLACK BOX SOCIETY 12, 193 (2017).

122. *See, e.g.*, Fed. Trade Comm'n v. Accusearch, 570 F.3d 1187 (10th Cir. 2009); *see generally* Jamie Luguri & Lior Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43 (2021); Lauren E. Willis, *Deception by Design*, 34 HARV. J.L. & TECH. 115 (2020).

123. *See, e.g.*, Alyson Klein, *Popular Interactive Math Game Prodigy Is Target of Complaint to Federal Trade Commission*, EDUC. WK. (Feb. 23, 2021), https://www.edweek.org/technology/popular-interactive-math-game-prodigy-is-target-of-complaint-to-federal-trade-commission/2021/02; Fed. Trade Comm'n, Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter In the Matter of Tapjoy, Inc., Commission File No. 1723092 (Jan. 7, 2021), https://www.ftc.gov/system/files/documents/public_statements/

redress these emergent problems. Last April, for example, it convened a day-long workshop on "dark patterns."[124]

But, over the past fifty or so years, Congress and the courts have narrowed FTC authority. In the 1970s, for example, legislators imposed procedural requirements on the agency's authority to promulgate substantive rules in all but a couple areas.[125] Courts also have expressed skepticism about the FTC's enforcement authority.[126] In a unanimous opinion by Justice Stephen Breyer, the Supreme Court in spring 2021 rejected the FTC's decades-long practice of imposing restitution, disgorgement, and other monetary relief, even when the defendant company was demonstrably acting deceptively.[127] The Court reasoned that the specific statutory authority on which the agency has relied, section 13(b) of the FTC Act, limited the agency to equitable remedies. In other provisions in the statute, however, Congress has explicitly empowered the Commission to seek monetary remedies in addition to equitable ones. Section 5(a) of the FTC Act in particular is notable for its broad language and the careful but expansive adjudicatory and civil enforcement powers that flow from that authority.[128]

Researchers and writers have for years been advocating for or generatively musing about a new agency that would attend more directly to emergent networked information technologies—including robotics, artificial intelligence, and automated decisionmaking generally.[129] Such interventions could make sense, but, in consideration of the FTC's broad institutional

1585802/20210107_final_rchopra_tapjoy_statement.pdf; *Rent-To-Own Payment Plan Company Progressive Leasing Will Pay $175 Million to Settle FTC Charges It Deceived Consumers About Pricing*, FED. TRADE COMM'N (Apr. 20, 2020), https://www.ftc.gov/news-events/press-releases/2020/04/rent-own-payment-plan-company-progressive-leasing-will-pay-175; Fed. Trade Comm'n, *FTC Workshop Looks Into Loot Boxes*, FTC NEWS (Apr. 8, 2019), https://www.ftc.gov/news-events/blogs/business-blog/2019/04/ftc-workshop-looks-loot-boxes.

124. *See Bringing Dark Patterns to Light: An FTC Workshop*, FED. TRADE COMM'N (Apr. 29, 2021), https://www.ftc.gov/news-events/events-calendar/bringing-dark-patterns-light-ftc-workshop.

125. 15 U.S.C. § 57a (2018).

126. *Compare* LabMD v. Fed. Trade Comm'n, 776 F.3d 1275 (11th Cir. 2015), *with* Fed. Trade Comm'n v. Wyndham, 799 F.3d 236 (3d Cir. 2015). This is to say nothing about the conflict among the courts on what plaintiffs must allege in order to have standing to sue for data protection violations. Spokeo v. Robins*,* 578 U.S. 330 (2016); TransUnion v. Ramirez*,* 41 S. Ct. 2190 (2021).

127. AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341 (2021).

128. *See, e.g.*, 15 U.S.C. § 45(l) & (m)(1) (2018).

129. *See, e.g.*, Ryan Calo, *The Case for a Federal Robotics Commission*, BROOKINGS (Sept. 15, 2014), https://www.brookings.edu/research/the-case-for-a-federal-robotics-commission/; Adomas Siudika, *Anti-Discriminatory Algorithmic Accountability: Transparency By Design in AI-Powered Decision Making*, IAPP (Nov. 20, 2020), https://iapp.org/news/a/anti-discriminatory-algorithmic-accountability-transparency-by-design-in-ai-powered-decision-making/.

capacity and extant expertise, it would not take as much nor be as risky to clearly elaborate the Commission's delegated authority to more aggressively regulate or redress harms caused by consumer-facing online services.

VII. CONCLUSION

Through the Telecommunications Act of 1996, Congress imposed long overdue duties and structural limits on the telephone, broadcasting, and cable industries. As important as it was, however, Congress's structure-of-the-market approach in 1996 did not protect against disparities in consumers' access and use of emergent communications services. Nor did it (or could it) anticipate the informational harms that the internet would facilitate or enable. These consumer-facing concerns ought to be the primary focus of reform today.