

The FCC and Quasi-Common Carriage

A Case Study of Agency Survival

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Abstract

In this article, we identify why, despite competition, falling prices, and expanding output in telecommunications and media, the Federal Communications Commission (FCC) will survive indefinitely and may expand its jurisdiction. A prominent theory after the deregulatory Telecommunications Act of 1996 was that the FCC would survive simply as a modest economic regulator of "bottlenecks." 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 successfully shifted the FCC from a mostly economic regulator to a mostly social regulator—a shift that is consistent with public choice theory. We also identify a resilient (if incoherent) theory of law—quasi-common carriage—that will keep the agency and its constituencies quite active going forward. This change in regulatory philosophy, which evolved over decades but became prominent in recent years as common carriage withered in the face of deregulatory pressures, will ensure agency survival for the foreseeable future.

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Brent Skorup and Joseph Kane

I. Introduction

The Federal Communications Commission (FCC) has been called “the paradigmatic New Deal agency,”¹ 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.”² Its charge was to regulate the common-carrier telegraph and telephone operators and the nascent broadcast radio industry as public utilities.³ 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. . . .”⁴

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,⁵ investigation into newspaper-broadcast cross-ownership,⁶ the Fairness

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.

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

³ Senator Dill, a major proponent of the creation of the Federal Radio Commission, told colleagues, “In 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. 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 also* Randolph J. May, *A Leaner FCC*, LEGAL TIMES, November 15, 1999, available at <http://www.pff.org/issues-pubs/other/opinion/991115LegalTimes.html>.

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

⁵ FEDERAL COMMUNICATIONS COMMISSION, REPORT ON CHAIN BROADCASTING, Dkt. No. 5060 (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 In the Matter of Orders No. 79 and 79-A, 8 F.C.C. 589 (1941); Comment, *Old Standards in New Context: A Comparative Analysis of FCC Regulation*, 18 U. CHI. L. REV. 78 n.3 (1950).

Doctrine,⁷ and cable television regulation,⁸ were not expressly authorized in the 1934 Act. These self-initiated expansions in authority were sometimes ratified by courts or Congress later, but Congress's major amendments to the Communications Act since the 1970s⁹ have deregulated cable TV¹⁰ and telecommunications.¹¹ 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. Even modest grants of regulatory authority resulted in substantial increases in new staff and appropriations,¹² and today the FCC still exercises considerable authority over mass-media and telecommunications firms,¹³ including Comcast-NBCU, Google, AT&T-DirecTV, Disney-ABC, Sirius-XM, and T-Mobile.

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

⁷ Report on Editorializing by Broad. Licensees, 13 F.C.C. 1246 (1949). These "fairness" requirements were ratified by Congress in 1959. See 47 U.S.C. § 315(a) (2014).

⁸ The Communications Act never contemplated cable television, and the FCC repeatedly failed to receive authority to regulate cable and its predecessor, community antenna television (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 with the 1984 Cable Communications Policy Act.

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, Pub. L. No. 98-549, 98 Stat. 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.

¹¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. 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 After the 1992 Act took effect, the FCC's budget increased by \$80 million—nearly 40 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).

¹³ The FCC's common-carrier laws are found in Title II of the Communications Act of 1934. 47 U.S.C. §§ 201–76 (2014). The FCC's television laws are found in Title VI. 47 U.S.C. §§ 521–73 (2014).

are over. 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. In mass media, consumer choice has never been more abundant.¹⁴ Gone are the days of three broadcast TV networks and a few local stations. Today hundreds of TV channels and the ubiquitous Internet¹⁵ provide access to every viewing niche imaginable.

In theory, these accomplishments might warrant the elimination or reduction of regulatory authority.¹⁶ Common sense suggests that an agency should shrink once its goals have been achieved, whether by market forces or by regulatory intervention.¹⁷ Members of Congress have proposed dismantling the FCC since the late 1970s,¹⁸ which has raised the question ever since:¹⁹ Why does the agency persist and even grow its authority as the social ills present in 1930s telecommunications and media, namely monopoly and scarcity, diminish?

¹⁴ See, e.g., Adam Thierer & Grant Eskelsen, *Media Metrics: The True State of the Modern Media Marketplace*, THE PROGRESS & FREEDOM FOUNDATION (2008),

<http://www.pff.org/mediametrics/Media%20Metrics%20%5BVersion%201.0%5D.pdf>.

¹⁵ FEDERAL COMMUNICATIONS COMMISSION, INTERNET ACCESS SERVICES: STATUS AS OF DECEMBER 31, 2013, 10 (2014), https://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1016/DOC-329973A1.pdf (finding that 93 percent of households in census tracts where Internet service providers reported connections had three or more providers offering at least 10 Mbps).

¹⁶ 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”). See HUBER, *supra* note 12, at 16 (proposing the elimination of the FCC and a return to common law).

¹⁷ 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).

¹⁸ 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. The bill would have replaced the FCC with a modest Communications Regulatory Commission. Communications Act of 1978, H.R. 13015, 95th Cong.

¹⁹ HUBER, *supra* note 12, at 102 (describing the FCC’s existence since 1934 as an “economic catastrophe”); May, *supra* note 3 (“[The FCC] fails to recognize that competition has supplanted the need for many of the agency’s regulatory activities, and, consequently, the need for much of its regulatory staff”).

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.”²⁰ 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 successfully shifted the FCC from a mostly economic regulator to a mostly social regulator—a shift consistent with public choice theory.²¹ We also highlight a resilient (if incoherent) theory of law—quasi—common carriage—that will keep the agency and its constituencies quite active going forward.²² This change in regulatory philosophy, which evolved over decades but became prominent in recent years as common carriage withered in the face of deregulatory pressures,²³ 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.” This is a classic phrase used in public utility statutes

²⁰ Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1326 (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”).

²¹ Bruce Yandle & Elizabeth Young, *Regulating the Function, Not the Industry*, 51 PUB. CHOICE 59 (1986); MURRAY L. WEIDENBAUM, BUSINESS, GOVERNMENT, AND THE PUBLIC (2d ed. 1981).

²² As we discuss *infra*, 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 (2014).

²³ See Eli M. Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, 18 TELECOMM. POL’Y 435 (1994).

but has a unique interpretation under the Communications Act.²⁴ In this part, we highlight the breakdown of the public utility model and the creeping, diffuse social regulation 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.²⁵ For broadcast, the sustaining theory for public utility regulation was the scarcity of airwaves, which required technocratic allocation to prevent damaging interference. Technological change undermined theories that telephony was a natural monopoly and that broadcast media was uniquely scarce. Increasingly, therefore, the FCC relied on social—not economic—aims to preserve the public utility status of telecommunications and mass media firms.

A. The End of Natural Monopoly in Telephone

In 1934 it was accepted that local and long-distance telephone service were natural monopolies.²⁶ The Communications Act therefore vested the FCC with oversight of interstate telecommunications service, the AT&T long-distance telephone monopoly.²⁷ However, by the

²⁴ As the first general counsel of the Federal Radio Commission, Louis Caldwell, said, “Only 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.” Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930). Caldwell noted that broadcasting was a non-common-carrier public utility. 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).

²⁵ PETER W. HUBER, MICHAEL K. KELLOGG & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW 21 (2d ed. 1999).

²⁶ Benjamin Douglas Arden, *Competition Versus Regulation: “Mediating Between Right and Right” in the Wireless and Wireline Telephone Industries*, 57 FED. COMM. L.J. 107, 109–11, 119 (2004); *see also* 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 . . .”).

²⁷ The agency’s charge was to ensure just, reasonable, and nondiscriminatory rates and practices toward other, mostly local, telecommunications providers. 47 U.S.C. § 201 (2014). Regulation of local phone service rates and practices were largely devolved to the states and enforced by state public utility commissions.

1970s, the natural-monopoly justification for telecommunications regulation came under stress as competitors like MCI entered the long-distance market. With the natural monopoly theory undermined, the FCC made universal telephone service a major pillar of agency action.²⁸ An extraordinarily complex system of cross subsidies developed,²⁹ in which the FCC administered and subsidized local phone service with long-distance rates.³⁰ 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.³¹ The four universal-service programs, where the agency focus is consumer and social benefits, have distributed tens of billions of dollars since the implementation of the Telecommunications Act.

As 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.³² Residential phone penetration at the time already exceeded 90 percent,³³ and telephone penetration has hovered around 95 percent for the last twenty years.³⁴ Universal telephone service programs have a record of dubious efficacy—economists estimate the cost of adding a marginal telephone subscriber in this era exceeded \$100,000³⁵—and

²⁸ MILTON L. MUELLER, JR., UNIVERSAL SERVICE: COMPETITION, INTERCONNECTION AND MONOPOLY IN THE MAKING OF THE AMERICAN TELEPHONE SYSTEM 155 (1997).

²⁹ 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 efficiency.” Eli M. Noam, *Beyond Liberalization III: Reforming Universal Service*, 18 TELECOMM. POL'Y 687, 691 (1994).

³⁰ 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).

³¹ 47 U.S.C. § 254 (2014).

³² 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”).

³³ FEDERAL COMMUNICATIONS COMMISSION, UNIVERSAL SERVICE MONITORING REPORT 48 Table 6.4 (2014).

³⁴ FEDERAL COMMUNICATIONS COMMISSION, UNIVERSAL SERVICE MONITORING REPORT 46 (2015).

³⁵ Thomas W. Hazlett & Scott J. Wallsten, *Unrepentant [sic] Policy Failure: Universal Service Subsidies in Voice & Broadband*, ARLINGTON ECON. (2013).

are criticized as unnecessary.³⁶ (As we'll explain, 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 coming undone. 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.³⁷ Congress, however, only partially repudiated the natural-monopoly status of phone companies and therefore had infrastructure-sharing mandates for the incumbent phone operators.³⁸ These mandates failed at producing effective competition,³⁹ 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 bottleneck providers—incumbent local exchange carriers, who have suffered losses of about 100 million subscribers since 2000⁴⁰—for the wireless and cable upstarts.⁴¹ In 2003 only about 3 percent of households were wireless only,⁴² but by 2015 about

³⁶ 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).

³⁷ Joseph D. Kearney, *Will the FCC Go the Way of the ICC?*, 71 U. COLO. L. REV. 1153, 1191 (2000).

³⁸ See Robert W. Crandall & Leonard Waverman, *The Failure of Competitive Entry into Fixed-Line Telecommunications: Who Is at Fault?*, 2 J. OF COMPETITION L. & ECON. 113 (2006), for a discussion of the practical and legal deficiencies of the FCC's network unbundling and interconnection rules.

³⁹ See Thomas W. Hazlett, *Rivalrous Telecommunications Networks with and Without Mandatory Sharing*, 58 FED. COMM. L.J. 477 (2006).

⁴⁰ Compare WIRELINE COMPETITION BUREAU, LOCAL TELEPHONE COMPETITION: STATUS AS OF JUNE 30, 2008 Table 2 (FCC, July 2009) (reporting that incumbent local exchange carriers had over 140 million residential customers), with WIRELINE COMPETITION BUREAU, VOICE TELEPHONE SERVICES: STATUS AS OF DECEMBER 31, 2014 3 Figure 2 (FCC, March 2016) (reporting that ILECs had under 40 million residential customers).

⁴¹ Hazlett, *Rivalrous Telecommunications Networks with and Without Mandatory Sharing*, *supra* note 39, 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.

⁴² FEDERAL COMMUNICATIONS COMMISSION, ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO COMMERCIAL MOBILE SERVICES 71, Tenth Report, WT Dkt. No. 05-71 (2005).

47 percent of households were wireless only.⁴³ The FCC’s most recent report on telephone competition showed that more residential customers had Voice over Internet Protocol (VoIP) service, typically from cable companies, than traditional switched telephone service.⁴⁴ The results have been significant downward pressure on price, multiple competitors in every market, and the attainment of facilities-based phone competition.⁴⁵ In short, the natural monopoly justifications for public utility regulation of local and long-distance markets have evaporated,⁴⁶ and the FCC increasingly must look to other justifications, discussed below, for its intervention in telecommunications markets.

B. The End of Scarcity in Mass Media

The FCC is the primary regulator of mass media. The public-trustee model in broadcast, justified by spectrum scarcity,⁴⁷ has long been proffered as a defense against the “libertarian model,” which resists government attempts to shape media content, business models, and distributor architecture. Despite a virtual explosion in media distributors and output, the FCC maintains its authority to regulate media outlets as public trustees.

⁴³ FEDERAL COMMUNICATIONS COMMISSION, ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO COMMERCIAL MOBILE SERVICES 14613 Chart VII.D.1, Eighteenth Report, WT Dkt. No. 15-125 (2015).

⁴⁴ WIRELINE COMPETITION BUREAU, LOCAL TELEPHONE COMPETITION: STATUS AS OF DECEMBER 31, 2013 3 Fig. 2 (FCC, October 2014).

⁴⁵ Hazlett, *Rivalrous Telecommunications Networks with and Without Mandatory Sharing*, *supra* note 39, at 489, 505–06.

⁴⁶ As Howard Shelanski concluded in 2007, “The 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).

⁴⁷ See Henry Geller, *The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action*, RAND CORPORATION (December 1973), <http://www.rand.org/content/dam/rand/pubs/reports/2006/R1412.pdf>.

The FCC derived its responsibility to control media composition and content⁴⁸ from a statutory duty to assign broadcast licenses if such assignment was in the public interest.⁴⁹ For most of FCC history, probably lasting until the 1990s when subscription cable TV dominated, broadcast licensure and content oversight were perhaps the highest priorities for top FCC officials.⁵⁰ Though explicitly limited to authority over broadcast and telecommunications, the agency asserts “ancillary authority” to regulate other media distributors like cable TV.⁵¹ The scarcity rationale, then, while seemingly limited to broadcast, is the source of FCC authority over non–broadcast media distributors.

The dubious logic of the scarcity argument is largely disregarded today by legal scholars but still has endorsement by the Supreme Court.⁵² 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

⁴⁸ 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”).

⁴⁹ 47 U.S.C. §§ 303, 309(a) (2014). 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. In the Matter of Editorializing by Broad. Licensees, Dkt. No. 8516, 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, *Nat’l Broad. Co., Inc. v. United States*, 319 U.S. 190, 296 (1943).

⁵⁰ 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).

⁵¹ In the Matter of 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).

⁵² *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”). Many scholars regard Supreme Court endorsement of the scarcity argument as a “spectacular error.” HUBER, *supra* note 12, at 41; Jim Chen, *Liberating Red Lion from the Glass Menagerie of Free Speech Jurisprudence*, 1 J. OF TELECOMM. & HIGH TECH. L. 293, 296 (2002) (“Of course, no one besides the Justices actually believes the scarcity rationale”).

created, but there were over 5,000 commercial stations in 1965 and more than 10,000 in 1995. The FCC’s approval of “hybrid digital” technology in 2002 made an additional 54,000 full-power FM broadcasts possible.⁵³ In short, every media market in the US has dozens or hundreds of radio channels available.

Television, another broadcast technology, 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 percent of households had a television.⁵⁴ Yet a mere 15 years later, there were over 500 stations, and 92.6 percent of homes had a TV.⁵⁵ 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.⁵⁶ FCC chairman Newton Minow’s goal to one day increase the number of TV networks from three to six was considered, at the time, ambitious.⁵⁷

Long gone are the days of three networks.⁵⁸ Even Minow concluded two decades ago that “[t]he FCC objective in the early 1960s to expand choice has been fulfilled—beyond all expectations.”⁵⁹ Cable TV, which in the 1960s served mostly to passively transmit broadcast channels to subscribers, began originating nonbroadcast programming like HBO and ESPN. Slowly, after fits and starts of cable regulation, the “vast wasteland”⁶⁰ of 1960s television

⁵³ Thomas W. Hazlett & Sarah Oh, *Exactitude in Defining Rights: Radio Spectrum and the Harmful Interference Conundrum*, 28 BERKELEY TECH. L.J. 227, 248 (2013).

⁵⁴ TVB, TV BASICS: A REPORT ON THE GROWTH AND SCOPE OF TELEVISION 2, 18 (2012) (citing Television and Cable Factbook and Nielsen Company data).

⁵⁵ *Id.*

⁵⁶ TUNSTALL, *supra* note 9, at 121 (1986).

⁵⁷ MINOW & LAMAY, *supra* note 16, app. 2 at 194.

⁵⁸ 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, January 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*”) (italics in original).

⁵⁹ MINOW & LAMAY, *supra* note 16, app. 2 at 200.

⁶⁰ *Id.* at 188.

transformed into hundreds of channels as cable operators and networks grew. This growth in consumer choice has entered a new stage—the Golden Age of Television⁶¹—in the last few years as satellite, Internet, and telephone companies have ramped up the competition for eyeballs and programming.⁶² Internet streaming made even more consumer choice possible, as more than 100 streaming video-on-demand services debuted in 2015 and targeted niche audiences.⁶³

This explosion in competition and consumer choice,⁶⁴ however, posed a threat to the agency’s public utility oversight. 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.⁶⁵

As with the demise of natural monopoly in telecommunications, the demise of scarcity in media sent the FCC searching for new theories of regulation and new “bottlenecks.” As a rearguard defense against market proponents, Minow helpfully suggests other giants for the FCC to slay in media, including affordability, inclusiveness, education of youth, and elimination of violence.⁶⁶

The FCC has increasingly used a foundational prerogative of public utility regulators—

⁶¹ See David Carr, *Barely Keeping Up in TV’s New Golden Age*, N.Y. TIMES, March 9, 2014, <http://www.nytimes.com/2014/03/10/business/media/fenced-in-by-televisions-excess-of-excellence.html>.

⁶² Since 2002 cable operators have lost over 14 million subscribers and significant market share. *Compare* In the Matter of Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming 11, MB Dkt. No. 02-145 (FCC, December 31, 2002), https://apps.fcc.gov/edocs_public/attachmatch/FCC-02-338A1.pdf (reporting 68.8 million cable households), *with* In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming 4, MB Dkt. No. 14-16 (FCC, April 2, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-41A1.pdf (reporting 54.4 million cable households).

⁶³ 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>.

⁶⁴ When asked to assess the state of television 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. If you are a sports fan, a news 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.

MINOW & LAMAY, *supra* note 16, app. 2 at 200. See also John Eggerton, “Wasteland” Revisited, BROADCASTING & CABLE, February 29, 2016, <http://www.broadcastingcable.com/news/washington/wasteland-revisited/154187>.

⁶⁵ MINOW & LAMAY, *supra* note 16, at 67.

⁶⁶ MINOW & LAMAY, *supra* note 16, app. 2 at 200–202.

transaction approval—to extract content obligations from media firms and pursue other social objectives.⁶⁷ Like universal service responsibilities in telecommunications, these FCC-initiated social aims serve an adaptive purpose as scarcity of media outlets looks increasingly implausible as a basis for public utility regulation of media distributors.

III. Agency Survival

“What giants do you mean?” said Sancho Panza in amaze. “. . . [T]hose 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.”⁶⁸

Agency obsolescence is a conundrum that scholars have long pondered.⁶⁹ Social and economic problems diminish or disappear, yet the agencies don’t shrink⁷⁰ and may actually grow larger. 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. Jonathan Macey goes further:

Once 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 . . . agency personnel all share the same basic goal: survival.⁷¹

⁶⁷ See, e.g., Brent Skorup & Christopher Koopman, *FCC Transaction Reviews and First Amendment Risks*, 39 HARV. J.L. & PUB. POL’Y 675 (2016).

⁶⁸ MIGUEL DE CERVANTES SAAVEDRA, *THE HISTORY AND ADVENTURES OF THE RENOWNED DON QUIXOTE* 44 (Tobias Smollett trans., Wordsworth Editions 1998).

⁶⁹ See Kearney, *supra* note 37 (discussing the obsolescence of the FCC’s responsibilities); Macey, *supra* note 17 (discussing the obsolescence of the SEC’s responsibilities).

⁷⁰ For fiscal year 1993, the FCC budget was \$134 million (1993\$) and 1700 employees; for FY 1996 the request was \$224 million and 2300 employees. 142 CONG. REC. S2207–2208 (Mar. 15, 1996) (statement of Sen. Larry Pressler), <https://www.gpo.gov/fdsys/pkg/CREC-1996-03-15/html/CREC-1996-03-15-pt1-PgS2207.htm>. For fiscal year 2000, the FCC estimated costs of \$230.9 million (2000\$) and 1930 full-time equivalents (FTEs). FEDERAL COMMUNICATIONS COMMISSION, *FISCAL YEAR 2000 BUDGET ESTIMATES* (February 1999), <https://transition.fcc.gov/Reports/fcc2000budget.pdf>. For fiscal year 2017, the FCC requested \$358.3 million (2016\$) and 1650 FTEs. FEDERAL COMMUNICATIONS COMMISSION, *FISCAL YEAR 2017 BUDGET IN BRIEF* (February 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0209/DOC-337668A1.pdf.

⁷¹ Macey, *supra* note 17, at 917–18 (1994).

When statutes are obsolete, judges and agencies can interpret them in ways that occasionally preserve some usefulness. When agencies are obsolete, however, they frequently behave in ways that inflict high economic costs.⁷² 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.⁷³ Controversial, politicized regulatory enforcement displaces market activity and galvanizes congressional and pressure group defenders, while important but less controversial proceedings fall by the wayside.⁷⁴

The resilience of the FCC is particularly confounding. Congress foresaw a diminishing role for the FCC in telecommunications⁷⁵ and media markets⁷⁶ and a negligible role in regulation of the Internet.⁷⁷ It appears the FCC initially accepted those widespread norms about allowing market competition to replace regulation.⁷⁸ 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.⁷⁹ The

⁷² *Id.* at 913.

⁷³ 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 17, at 914.

⁷⁴ 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), *available at* 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).

⁷⁵ 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 (2014).

⁷⁶ 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, and Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004).

⁷⁷ 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) (2014). “Interactive computer service” is provided by ISPs. 47 U.S.C. § 230(f)(2) (2014).

⁷⁸ For instance, in its fiscal year 2000 budget request, the agency stated it would “deregulate as competition develops.” FEDERAL COMMUNICATIONS COMMISSION, FISCAL YEAR 2000 BUDGET ESTIMATES (February 1999), <https://transition.fcc.gov/Reports/fcc2000budget.pdf>.

⁷⁹ FEDERAL COMMUNICATIONS COMMISSION, STRATEGIC PLAN: A NEW FCC FOR THE 21ST CENTURY (August 1999), https://transition.fcc.gov/Bureaus/Miscellaneous/News_Releases/1999/draft_strategic_plan.pdf.

document predicted that the early years of the new millennium would see “vigorous competition that will greatly reduce the need for direct regulation.”⁸⁰ The agency also noted that the convergence of communications and media would erode the traditional regulatory silos.⁸¹

This deregulatory posture attracted notice from regulatory scholars. Joseph Kearney and Thomas Merrill noted in a seminal 1998 article that regulated industries like telecommunications, energy, and transport were undergoing a transformation.⁸² 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.⁸³

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 monopoly “bottlenecks” and toward the rhetoric of “gatekeepers,” a concept that elides the market power that Kearney and Merrill contemplate. Gatekeeper appears to mean an exclusive contractual relationship between a regulated operator and a supplier or an end user⁸⁴—what the FCC idiosyncratically called in one recent order a “monopoly on access to subscribers”—that exists even when competing providers are present.⁸⁵ Having adjudged a provider a gatekeeper, the FCC even disclaims needing to determine whether the provider has the ability to raise price.⁸⁶

⁸⁰ *Id.* at 1.

⁸¹ *Id.* at 3.

⁸² Kearney & Merrill, *supra* note 20.

⁸³ *Id.* at 1405.

⁸⁴ The “net neutrality” order uses the term “gatekeeper” dozens of times and reveals the flexibility of the term. *See* In the Matter of Protecting & Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, GN Dkt. No. 14-28, para. 78 (FCC, March 12, 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”).

⁸⁵ *Id.* at para. 80.

⁸⁶ *Id.* at para. 84 (“We therefore need not consider whether market concentration gives broadband providers the ability to raise prices”).

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's 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 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. These two services corresponded to two distinct ways people were using those technologies in the 1930s. Both were viewed as a type of public utility.⁸⁷ Telephone (and telegraph) was a wired, one-to-one, common-carrier communications service under one regulatory framework called Title II.⁸⁸ In contrast to phone companies, most broadcast infrastructure owners originated and acquired programming and exercised significant editorial functions over the messages transmitted.⁸⁹ Radio, therefore, was a wireless, broadcast,

⁸⁷ The first general counsel of the Federal Radio Commission (FRC) noted that broadcasting was a non-common-carrier public utility. Caldwell, *supra* note 24, at 327–28 n.62 (italics in original); Comment, *Old Standards in New Context: A Comparative Analysis of FCC Regulation*, 18 U. CHI. L. REV. 78, 79 (1950).

⁸⁸ HUBER, *supra* note 12, at 31.

⁸⁹ There were some early wireless common carriers when the FRC was created, such as fixed point-to-point stations. See Caldwell, *supra* note 24, at 328.

private-carrier communications service under a separate regulatory framework called Title III.⁹⁰ “Broadcast” services—that is, one-to-many, via wire—were thought economically impossible around the time of the FCC’s creation.⁹¹ This omission would fuel the quasi-common-carriage precedents, since the FCC, decades later, would struggle mightily to classify technology like cable TV that resembled neither radio broadcast nor telephony.

Telecommunications was a public utility whose focus was on nondiscrimination toward senders, and broadcast was a non-common-carrier public utility where the focus was on quality program service to listeners.⁹² Modern common carriage is derived from common-law precedents regarding public “callings,”⁹³ but identifying a consistent theory about which providers are common carriers and what obligations they have is devilishly difficult.⁹⁴ 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.⁹⁵ Perhaps the single hallmark that distinguishes common carriers from private carriers is that common carriers abandon control over the content traversing the network.⁹⁶ Telecommunications providers are

⁹⁰ HUBER, *supra* note 12, at 31.

⁹¹ Caldwell, *supra* note 24, at 319 (“Theoretically wires could be made to perform [one-to-many] services, but economically this is impossible”).

⁹² Caldwell, *supra* note 24, at 327–28 n.62.

⁹³ 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”).

⁹⁴ See 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”); Kevin Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233, 1247 (2007) (“Common law sources are also unhelpful, offering competing and largely inconsistent rationales”); Thomas B. Nachbar, *The Public Network*, 17 COMMLAW CONCEPTUS 67, 109 (2008) (“It is hard to find a specific characteristic that leads to nondiscriminatory access and rate regulation”).

⁹⁵ See James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 262 (2002); Noam, *supra* note 23, at 436 (1994).

⁹⁶ Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC, 533 F.2d 601, 608–09 (D.C. Cir. 1976) (common carriers, first, must undertake to carry all messages indifferently, and second, must transmit intelligence of customers’ own design and choosing).

common carriers and therefore function basically as “dumb pipes” that passively transmit messages.⁹⁷ Private carriers like broadcasters are not common carriers and were therefore permitted to curate content and avoid common-carriage obligations.⁹⁸

These neat distinctions between common carrier and private carrier would not last.⁹⁹ 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, common-carrier law and non-common-carrier law are merging. Telecommunications, cable TV, satellite TV, broadcast, and Internet service providers all have attributes of common carriage and private carriage—that is, they are quasi-common carriers. A quasi-common carrier controls, edits, and curates 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.¹⁰⁰ These stylized categories have almost completely broken down. 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

⁹⁷ See 47 U.S.C. § 153(50) (2014) (defining telecommunications).

⁹⁸ HUBER, *supra* note 12, at 42–43.

⁹⁹ 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 24, at 329.

¹⁰⁰ 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).

and FM radio broadcasters, have entered the telecommunications field as technology and consumer behavior has changed.

1. Broadcast. Broadcasters' control of their facilities and content is not absolute, and for decades the FCC imposed nondiscrimination burdens on licensees.¹⁰¹ By statute, broadcasters are not common carriers,¹⁰² yet common-carriage elements have crept into broadcast licensure. While the "media access" theories¹⁰³ 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,¹⁰⁴ and the FRC's initial intrusion into programming, according to the

¹⁰¹ 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.S. 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. 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); *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246 (1974) ("At present we simply do not know how to ideally resolve the conflict between diversity and freedom from regulation").

¹⁰² 47 U.S.C. § 153(11) (2014) ("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 religious groups and did not police the content aired. *Cosmopolitan Broad. Corp. v. FCC*, 581 F.2d 917 (D.C. Cir. 1978).

¹⁰³ 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, "[T]he 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).

¹⁰⁴ 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 (2014) (prohibiting FCC censorship and protecting broadcasters from free-speech interference).

commission's first general counsel, happened inadvertently.¹⁰⁵ By 1940 the FCC had made content a critical element of renewal and declared that 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."¹⁰⁶

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."¹⁰⁷ This public-trustee model planted the seeds for common carriage.

Over 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.¹⁰⁸

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.¹⁰⁹ 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.¹¹⁰ As a result, complaints about fairness and access dominated commissioners' time.¹¹¹

¹⁰⁵ 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 104, 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.

¹⁰⁶ *In re The Mayflower Broad. Corp.*, 8 FCC Rcd. 333, 340 (1940) (emphasis added).

¹⁰⁷ Report on Editorializing by Broad. Licensees, *supra* note 7, at 1251.

¹⁰⁸ 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) (2014). The Supreme Court upheld this mandate and "statutory right of access" as comporting with the First Amendment. *CBS v. FCC*, 453 U.S. 367, 397 (1981).

¹⁰⁹ 47 U.S.C. § 310(d) (2014).

¹¹⁰ *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).

¹¹¹ TUNSTALL, *supra* note 9, at 252.

Perhaps unsurprisingly, then, in a 1971 case concerning a network’s rejection of an anti-Vietnam War advertisement, the US Court of Appeals for the DC Circuit granted public-issue groups the “limited right of access to radio and television” they sought on First Amendment grounds.¹¹² The Supreme Court reversed that holding because such a ruling rendered broadcasters common carriers,¹¹³ yet even in rejecting the common-carrier status, 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.¹¹⁴

With the 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.¹¹⁵ As one media scholar noted¹¹⁶, “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”—perform a common-carrier function. In the 1970s, stations found that even their decisions to modify formats, say, from money-losing

¹¹² *Bus. Executives’ Move for Vietnam Peace v. FCC*, 450 F.2d 642, 648 (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 . . .”).

¹¹³ *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 116 (1973).

¹¹⁴ 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 103, 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”).

¹¹⁵ 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 101, 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., In re Reregulation of Radio and TV Broad.*, 69 F.C.C.2d 979, 1002–1008 (Sept. 22, 1978); *Office of Comm’n of United Church of Christ v. FCC*, 707 F.2d 1413, 1422 (D.C. Cir. 1983).

¹¹⁶ 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 CONSPECTUS* 340, 358 (2007).

classical music to rock music, required FCC permission¹¹⁷—an obligation that resembles the 214 process whereby common carriers apply to the FCC to discontinue or reduce their services.¹¹⁸

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 previously the domain of Title II common carriers. Broadcast technology advances meant more efficient use of wireless frequencies, which left excess capacity. For decades, the FCC watched uneasily as wireless services substituted for wired telecommunications and occasionally prevented blurring of Title II and Title III.¹¹⁹ Deregulation in the 1970s and 1980s, however, meant the FCC allowed radio and TV broadcasters to use these excess subchannels for ancillary services, including common-carrier services like paging and telemetry.¹²⁰ The FCC refused to classify these new services,¹²¹ leading one commenter to call this refusal “another ‘Title II ½’ action,” midway between common carriage (Title II) and broadcasting (Title III).¹²²

Perhaps the biggest breakdown in the common carrier–broadcast dichotomy came after the 1982 authorization of direct broadcast satellite (DBS) service.¹²³ Satellite carriers started

¹¹⁷ *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d 926 (1973) (reprimanding the FCC for “desir[ing] as limiting an interpretation as possible”). See also *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); *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246 (1974) (“[W]hen the format to be discontinued is apparently unique to the area served . . . a hearing on the public interest must be held”).

¹¹⁸ 47 U.S.C. § 214(a) (2014).

¹¹⁹ Radio broadcasters could lose their license if their programming resembled point-to-point messaging, including the transmission of advice to radio listeners. *Scroggin & Co. Bank, Station KFEQ, for renewal of license*, Dkt. No. 2504, 1 F.C.C. 115, 196 (1934–1935).

¹²⁰ Susan Tyler Eastman, *Policy Issues Raised by the FCC’s 1983 and 1984 Subcarrier Decisions*, 28 J. OF BROADCASTING 289, 297 (1984); Howard A. Shelanski, *The Bending Line Between Conventional “Broadcast” and Wireless “Carriage,”* 97 COLUM. L. REV. 1048, 1070 (1997).

¹²¹ The FCC in the 1950s allowed TV broadcasters to operate microwave relay facilities for temporary periods until common-carrier facilities were available. In the *Matter of Allocation of Frequencies in the Bands Above 890 Mc.*, Report and Order, Dkt. No. 11866, 27 F.C.C. 359, 412 (1959). The FCC equivocated on whether such point-to-point microwave transmissions were Title II or Title III. Comment, *Allocating Radio Frequencies Between Common Carriers and Private Users: The Microwave Problem*, 70 YALE L.J. 954, 956 (1961).

¹²² Eastman, *supra* note 120, at 295.

¹²³ Shelanski, *supra* note 120, at 1062.

out as pure common carriers of cable TV programming competing with AT&T's long-distance service, but satellite operators began deviating from common carriage by distributing their own programming tiers directly to consumers.¹²⁴ Scholars and FCC staff were struggling to decide whether new "multifunctional technologies" like DBS should be classified as a common carrier or as a broadcaster.¹²⁵ Rather than force the issue, the FCC expressly declined to slot DBS into either Title II or Title III.¹²⁶ 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 "nonbroadcast services," neither broadcast nor telecommunications.¹²⁷ Such operators are permitted use their allocations and capacity for common-carrier services and programming services.¹²⁸

2. *Telecommunications.* Whereas the blurring of private carriage and common carriage for broadcasters largely stemmed from content regulation and compulsory access to favored groups, in telecommunications the breakdown often came from deregulatory actions. In particular, regulators since the 1970s have encouraged telecommunications providers to enter non-telecommunications markets like television distribution and "information services," and the mixing of services on the same facilities makes distinctions and Title II enforcement difficult.

¹²⁴ HUBER, *supra* note 12, at 64–65.

¹²⁵ John Lyon & Mike Hammer, *Deregulatory Options for a Direct Broadcast Satellite System*, 33 FED. COMM. L.J. 185, 187 (1981).

¹²⁶ 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 . . .").

¹²⁷ See Subscription Video Services, 51 Fed. Reg. 1817, 1822 (1986).

¹²⁸ Shelanski, *supra* note 120, 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).

The withering away of common carriage in telecommunications, which professor Eli Noam warned of in the mid-1990s,¹²⁹ may have been inevitable. 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.”¹³⁰

Despite this unsettled history, the FCC attempted to quarantine common-carrier, dumb-pipe services for decades, with diminishing success. Telephone companies were constantly looking for new, nontelephone markets to serve. 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.¹³¹ This decision only briefly paused telephone company (telco) entry into non-telecommunications. First, the rise of computerization a few years later led 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.¹³² 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

¹²⁹ See Noam, *supra* note 23.

¹³⁰ Cent. Union Tel. Co. v. Swoveland, 14 Ind. App. 341, 351 (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”); State of South Carolina v. Citizens’ Tel. Co., 61 S.C. 83, 39 S.E. 257 (1901) (holding that telephone systems are quasi–common carriers); 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 . . .”); 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 . . .”).

¹³¹ United States v. W. Elec. Co., 1956 Trade Cas. (CCH) para. 68,246 (D.N.J. 1956).

¹³² 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).

processing, and the agency decided to classify such services on a case-by-case basis.¹³³ In the ensuing Computer II and Computer III proceedings, the FCC allowed common carriers to offer information services (on a highly regulated basis).¹³⁴ And while the Bell companies were at first prohibited from providing “electronic publishing” and “information services” in the 1982 breakup,¹³⁵ even that prohibition was relaxed a few years later.¹³⁶ Today, the FCC continues the impossible task of delineating between telecommunications and non-telecommunications and distinguishing between functionally similar services such as VoIP and switched telephony, or “non-broadband Internet access service” and “broadband Internet access service.”¹³⁷

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 television (CATV) started distributing TV in the 1940s and 1950s. Telephone operators recognized TV as a new revenue opportunity, and non-Bell companies made a few efforts to enter that business. The FCC stood firm at first, prohibiting cable-telephone cross ownership in 1970,¹³⁸ and in 1971 it rejected a 214 petition¹³⁹ from a New York City phone company that wanted to lease its conduit for cable-TV-like video programming in

¹³³ *Id.* at para 15.

¹³⁴ 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).

¹³⁵ *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).

¹³⁶ *U.S. v. W. Elec. Co.*, 767 F. Supp. 308 (D.D.C.), stay lifted, 1991–92 Trade Cas. (CCH) para. 69,610 (D.C. Cir.), *aff’d sub nom. Am. Newspaper Publishers Ass’n v. United States*, 112 S. Ct. 366 (1991).

¹³⁷ In the Matter of Protecting & Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, *supra* note 84, at para. 35; Brent Skorup, *Why the FCC’s Net Neutrality Rules Could Unravel*, PLAIN TEXT (March 1, 2016), <https://readplaintext.com/why-the-fcc-s-net-neutrality-rules-could-unravel-cc26c6b96418#.28udjlg3v>.

¹³⁸ 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).

¹³⁹ Section 214 provides that telephone companies must obtain FCC approval that new facilities are in the public interest. 47 U.S.C. § 214 (2014).

competition with cable systems.¹⁴⁰ Congress codified this prohibition in 1984, essentially denying telco entry into television.¹⁴¹ 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.¹⁴² 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.¹⁴³

In the 1996 Telecommunications Act, Congress erased the formal distinction between common-carrier networks and private-carrier video networks. Drawing on the controversial video dial tone proceedings and a Clinton administration proposal,¹⁴⁴ Congress reversed the 1984 law 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.¹⁴⁵ As a deregulatory measure on the telecommunications side, the law also gave the FCC authority to refrain from applying common-carrier regulations under certain conditions.¹⁴⁶ Finally, in recent years the FCC has not classified

¹⁴⁰ The FCC declined the 214 authority, citing duplication and waste. *In re Better TV, Inc., of Dutchess Co., New York*, 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 (1969); *United States v. W. Elec. Co.*, 1956 Trade Cas. (CCH) para. 68,246 (D.N.J. 1956).

¹⁴¹ *See* 47 USC § 533(b), *repealed by* Pub. L. No. 104-104 (1996).

¹⁴² *In re Tel. Co.-Cable Television Cross-Ownership Rules*, Second Report and Order, Recommendation to Cong., & Second Further Notice of Proposed Rulemaking, CC Dkt. No. 87-266, 7 FCC Rcd. 5781 (1992).

¹⁴³ 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). Its advent 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).

¹⁴⁴ *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).

¹⁴⁵ 47 U.S.C. § 573 (2014).

¹⁴⁶ 47 U.S.C. § 160 (2014).

VoIP, which is a telephone-like communications service using Internet protocol, but the agency has imposed many Title II regulations on a subset of VoIP providers.¹⁴⁷

3. *Cable TV*. The Communications Act didn't contemplate cable television, and the service has always straddled common-carrier and private-carrier classification. 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. However, cable operators eventually began inserting advertising, curating content, and originating shows.¹⁴⁸ 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.¹⁴⁹ These quasi-common-carriage requirements for cable providers¹⁵⁰ were then required by the FCC in 1972.¹⁵¹ The FCC rules were struck down by the Supreme Court a few years later because they impermissibly transformed cable into common carriers¹⁵² but were later reinstated by Congress in 1984, in part to respond to calls from media access groups.¹⁵³

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,¹⁵⁴ a condition

¹⁴⁷ These obligations include customer proprietary network information protection, 911 calling capability, and universal-service contribution. Connect Am. Fund, NPRM, 26 FCC Red. 4554, 4582 (2011).

¹⁴⁸ HUBER, *supra* note 12, at 63.

¹⁴⁹ Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 790 (1972).

¹⁵⁰ Lange, *supra* note 103, at 5 ("The result is to force cable systems to operate *pro tanto* as common carriers).

¹⁵¹ Cable Television Report and Order, 36 F.C.C.2d 143, 190–92 (1972).

¹⁵² FCC v. Midwest Video Corp., 440 U.S. 689, 708–09 (1979).

¹⁵³ 47 U.S.C. § 532 (2014). A gay-rights group that testified to Congress in 1978 held out hope that "cable could be held to a quasi-common-carrier standard and the rights of minority group access" would be improved. *The Communications Act of 1978: Hearings Before the Subcomm. on Commc'ns of the H. Comm. on Interstate & Foreign Commerce on H.R. 13015*, 95th Cong. 264 (statement of Martha Fourn & William B. Kelly, Illinois Gay Rights Task Force).

¹⁵⁴ 47 U.S.C. § 534(a) (2014).

the Supreme Court upheld despite First Amendment challenge.¹⁵⁵ Today, cable TV systems and other TV providers are thoroughly 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.¹⁵⁶ Further, as discussed above, cable providers have entered the telephone market with interconnected VoIP and are therefore obliged to follow many Title II regulations despite the uncertain classification of VoIP service.¹⁵⁷

B. Evolution to Social Regulation as a Defense against Obsolescence

Theorists have long attempted to explain various conundrums of regulatory agency longevity. The Interstate Commerce Commission is the archetype, and it persisted for decades despite no longer serving its original public-interest purpose.¹⁵⁸ Literature on the forms of regulation often begins with the distinction between social and economic regulation, and (when the discussion includes or is about events prior to the mid-1980s) three agencies are regularly cited as examples of economic regulators: the ICC, the Civil Aeronautics Board (CAB), and the FCC.¹⁵⁹ All three were agencies with a public-interest mandate which regulated such things as market entry-exit and rates, so the

¹⁵⁵ 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).

¹⁵⁶ Frieden, *supra* note 22, at 488–89 (2014).

¹⁵⁷ *Connect Am. Fund*, *supra* note 147.

¹⁵⁸ The ICC was formally abolished in the 1990s but was criticized as anticonsumer as early as the 1950s. Walter Adams, *Competition, Monopoly and Countervailing Power*, 67 Q. J. ECON. 469, 484–85 (1953) (“This Commission, created to protect the public from the abuses of a highly concentrated power group, today seems mainly to protect the railroads against effective regulation by the public”).

¹⁵⁹ See William Lilley III & James C. Miller III, *The New “Social Regulation,”* 47 THE PUB. INT. 49, 50 (1977); Yandle & Young, *supra* note 21, at 59.

persistence of the FCC, and not the other two quintessential economic regulators, is a puzzle. Lilley and Miller¹⁶⁰ predicted what Yandle and Young later confirmed:¹⁶¹ 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.¹⁶² The ICC and CAB proved to be obsolete as economic regulators and eventually went extinct. 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. For instance, social regulators serve a broader constituency. 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. 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.”¹⁶³ Social regulators also lay claim to more industries since they regulate broad functions rather than narrow markets. In this respect, the previous relationship between industry and regulator is significantly augmented by a transition from economic to social regulator. These characteristics of social regulation lead to an agency with markedly greater jurisdiction, more opportunities for custom-tailored rules,¹⁶⁴ and, therefore, greater claim to the sort of relevance that rebuts claims of obsolescence.

¹⁶⁰ Lilley & Miller, *supra* note 159, at 50.

¹⁶¹ Yandle & Young, *supra* note 21, at 59.

¹⁶² *Id.* at 66 (“Function regulation is the distinguishing feature that separates the growing from the declining agencies”).

¹⁶³ *Id.* at 63.

¹⁶⁴ *Id.*

These phenomena appear in the case of the FCC and help account for its rapid shift from a modest economic regulator of bottlenecks to its more expansive role as regulator of media gatekeepers. 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.”¹⁶⁵ The second phenomenon, 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,¹⁶⁶ and advocates today wish to import many of the FCC’s earlier social goals—like diversity of voices and democratic participation—to the Internet.

The current FCC chairman, for instance, has expressly positioned the FCC as a consumer protection agency against media and communications companies and ISPs.¹⁶⁷ Influential 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.”¹⁶⁸ In the last few years alone, the FCC’s expansion into social regulation has included rules about and investigations into cable television programming,¹⁶⁹

¹⁶⁵ ROBERT D. ATKINSON, DANIEL CASTRO, & ALAN MCQUINN, INFO. TECH. & INNOVATION FOUND., HOW TECH POPULISM IS UNDERMINING INNOVATION (2015).

¹⁶⁶ See FRIENDLY, *supra* note 50.

¹⁶⁷ 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 (April 7, 2016), <http://www.c-span.org/video/?407802-1/communicators-tom-wheeler> (starting at about 7:12).

¹⁶⁸ *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).

¹⁶⁹ FEDERAL COMMUNICATIONS COMMISSION, COMCAST-NBCU CONDITIONS, APPENDIX 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).

satellite radio programming,¹⁷⁰ Internet user privacy,¹⁷¹ ISP interconnection agreements,¹⁷² video apps,¹⁷³ and online video providers.¹⁷⁴ The FCC also recently launched an initiative to promote healthcare technologies.¹⁷⁵

Certainly the most significant proceeding was partially applying Title II rules to Internet access providers—the Open Internet or so-called net neutrality rules.¹⁷⁶ Here we see how the flexibility of quasi-common carriage allows an adaptive expansion of FCC power. Broadband Internet has long defied easy categorization,¹⁷⁷ since it carries many telecommunications-like and cable 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

¹⁷⁰ In the Matter of Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings, Inc., to Sirius Satellite Radio Inc., MB Dkt. No. 07-57, (FCC, October 19, 2010), https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-184A1.pdf (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).

¹⁷¹ Sherrese M. Smith et al., *FCC Releases Notice of Proposed Rulemaking for New Broadband ISP Privacy Rules*, LEXOLOGY, April 4, 2016, <https://www.lexology.com/library/detail.aspx?g=18d81770-47c8-4f84-b1a6-06fc55cfc9df>.

¹⁷² 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 22, at 485.

¹⁷³ The FCC tentatively concluded that the Commission has legal authority to implement its proposed television programming access rules on makers of hardware and software, including applications, that allow consumers to access multichannel video programming and other services. In the Matter of Expanding Consumers' Video Navigation Choices 12–13, MB Dkt. No. 16-42, (FCC, February 18, 2016), https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1.pdf.

¹⁷⁴ In the Matter of Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distrib. Servs., MB Dkt. No. 14-261, (FCC, December 19, 2014).

¹⁷⁵ FEDERAL COMMUNICATIONS COMMISSION, CONNECT2HEALTHFCC, <https://www.fcc.gov/about-fcc/fcc-initiatives/connect2healthfcc> (last visited Aug. 2, 2016).

¹⁷⁶ In the Matter of Protecting & Promoting the Open Internet, GN Dkt. No. 14-28 (FCC, February 26, 2015). Broadband Internet carries the services the FCC has traditionally regulated—voice communications, television, and radio—as well as relatively new services like the web, the Internet of Things, and mobile applications.

¹⁷⁷ Donald W. McClellan, Jr., *A Containment Policy for Protecting the Internet from Regulation: The Bandwidth Imperative 2*, THE PROGRESS & FREEDOM FOUNDATION (August 1997), <http://www.pff.org/issues-pubs/pops/pop4.5containment.pdf>.

telephony is deregulated.¹⁷⁸ There are now advocates calling for some sort of public utility regulation for cloud-computing platforms and services like Facebook.¹⁷⁹

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.¹⁸⁰

They emphasize that the transformation in regulated industries is predominantly a change in locus from protecting consumers to mediating disputes between firms.¹⁸¹ 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. It was the most significant FCC ruling in decades, yet the agency did not seriously grapple with economic justifications for the regulation of broadband. The economic analysis was so meager that the FCC’s chief economist called the Order “an economics-free zone,”¹⁸² and the FCC’s conclusory economic analysis received blistering criticism upon legal review.¹⁸³ This tremendously significant Order is therefore somewhat at odds with the Merrill and Kearney

¹⁷⁸ 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).

¹⁷⁹ 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”).

¹⁸⁰ Kearney & Merrill, *supra* note 20, at 1326.

¹⁸¹ *Id.* at 1349–58.

¹⁸² L. Gordon Crovitz, “*Economics-Free*” *Obamanet*, WALL ST. J. (January 31, 2016), <http://www.wsj.com/articles/economics-free-obamanet-1454282427>.

¹⁸³ *U.S. Telecom Ass’n v. FCC*, No. 15-1063, slip op. at 32 (D.C. Cir. June 15, 2016) (Williams, J., dissenting) (“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).

thesis, which focuses on market power by bottlenecks. Economics and market power play a fairly minor part of the net neutrality proceeding and signal the agency's abandonment of economic regulation for social regulation. The focus is instead on consumers and "edge providers" such as application and content providers.¹⁸⁴

The ability to adapt is as necessary to survival in the bureaucracy as it is in nature. 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 industries have faded away.

IV. Regulatory Metaphysics and Final Thoughts

The FCC's attempts for decades to keep different distributors in different regulatory silos proved ineffective and costly.¹⁸⁵ Absent more congressional and court skepticism regarding quasi-common carriage and the FCC's embrace of social regulation, we foresee a new resonance of early laments 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.¹⁸⁶

Maintaining service quarantine was difficult enough when different operators offered different services on different networks—telephone was on twisted-pair copper wire networks, broadcast

¹⁸⁴ See In the Matter of Protecting & Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, *supra* note 84, at paras. 138–43.

¹⁸⁵ As Peter Huber noted, "It 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 12, at 48.

¹⁸⁶ Caldwell, *supra* note 104, at 206.

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 “landline” company like Verizon, for instance, offers Title II phone service, Title VI television service, and Title I home-security service on the same wire. 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.¹⁸⁷

Ironically, the rise of inter- and intramodal competition in phone, video, and data services—which proponents of “the libertarian model” 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. No modern distributor appears immune from a gatekeeper designation and the resulting quasi-common-carriage obligations.¹⁸⁸ Even a wireless Internet service provider serving a handful of rural customers is subject to Open Internet rules,¹⁸⁹ and the FCC requires absolutely no finding of market power to subject distributors to quasi-common carriage.¹⁹⁰ 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. The embrace of quasi-common carriage for the Internet and modern media, like the attempts to

¹⁸⁷ JEFFREY A. EISENACH AND RANDOLPH J. MAY, COMMUNICATIONS DEREGULATION AND FCC REFORM: FINISHING THE JOB 6 (2001).

¹⁸⁸ Frieden, *supra* note 22, 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”); HUBER, *supra* note 12, at 158–59.

¹⁸⁹ Ray Nolting, *Proposed Regulations Concern Business*, FCC Commissioner, PARSONS SUN, February 21, 2015.

¹⁹⁰ See Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767 (2012).

elucidate the difference between “basic” and “enhanced” services decades ago, will degenerate into regulatory instability and incoherence.¹⁹¹

The analysis we’ve presented also contributes to the long-running debate between public-choice theorists and organizational theorists about what regulators seek to maximize.¹⁹²

Organizational theory generally predicts that agencies will develop biases toward “conservatism, risk avoidance, turf protection, and routine.”¹⁹³ Public-choice theorists, on the other hand, predict that regulators will maximize according to criteria that are easier to measure externally, like budget and influence.¹⁹⁴

We think, based on the preceding analysis, that agencies faced with obsolescence will tend to exhibit behavior more consistent with public-choice prediction.¹⁹⁵ Langevoort¹⁹⁶ recounts several of the common incentive structures facing bureaucrats, ranging from outright bribes to ego gratification. He further argues that we should expect payoffs that can be obtained individually and internally to be more commonly sought after than those that require cooperation among agency members and that are more politically risky. Essentially, bureaucrats within an agency have conflicting interests and compete among themselves for internal payoffs (e.g., greater personal compensation or a larger staff) and thus avoid having to solve the collective-action problems associated with acquiring payoffs from external sources. Langevoort’s analysis,

¹⁹¹ Noam, *supra* note 23, 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?”); Werbach, *supra* note 179, at 1778 (arguing that with regard to the regulatory classification of Internet access, “any choice the FCC makes will only be a temporary solution”); 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); Noam & Cutler, *supra* note 144, at 11 (“[C]ommon carriage will erode in time and . . . hybrid coexistence will not be stable”).

¹⁹² See Donald C. Langevoort, *The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formation*, 47 WASH. & LEE L. REV. 527 (1990).

¹⁹³ *Id.* at 529.

¹⁹⁴ Macey, *supra* note 17, at 916.

¹⁹⁵ *Id.*

¹⁹⁶ Langevoort, *supra* note 192, at 530.

however, is directed toward an agency with a well-defined, extant *raison d'être*. If an agency becomes obsolete, the potential of extinction changes the incentives facing its members. The shared desire by many in the agency to preserve it can overcome the collective-action problems organizational theorists focus on, and collective reservations about risk-taking will tend to diminish.¹⁹⁷ Indeed, the more obvious an agency's obsolescence becomes, the greater the opportunity cost of failing to overcome collective action problems becomes and, therefore, the greater the incentive to overcome them.

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.¹⁹⁸ The survivability of obsolete agencies is further augmented by the information asymmetry that exists between an agency and its legislative overseers. 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 curbing the agency's influence. 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. 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.¹⁹⁹ 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 percent penetration to 95 percent is

¹⁹⁷ Macey, *supra* note 17, at 916–17 (“But bureaucrats threatened with extinction from obsolescence are unlikely to be risk avoiders where the risks are taken in order to protect their sinecures”).

¹⁹⁸ *Id.* at 919.

¹⁹⁹ 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).

smaller and more costly than at lower levels), but the kernel of truth can make the case politically palatable to legislators.

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." For instance, the FCC's definition of broadband changes depending on whether low-capacity or high-capacity lines would give it more regulatory authority. Depending on the issue, broadband means 25 megabits per second or greater,²⁰⁰ 10 megabits per second or greater,²⁰¹ or 56 kilobits per second or greater.²⁰²

For advocates of limited government and robust First Amendment protections, the analysis we've presented suggests some undesirable predictions. As professor Rob Frieden notes,²⁰³ "Government tinkering with the common carrier model has made it all but impossible to apply core principles." Justice Clarence Thomas has called First Amendment jurisprudence for

²⁰⁰ 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, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd. 1375, para. 3 (2015) (finding that broadband, "advanced telecommunications capability," requires download speeds of at least 25 Mbps).

²⁰¹ In the Matter of Connect Am. Fund, Report and Order, WC Dkt. No. 10-90, para. 15 (FCC, December 18, 2014) (finding that broadband, "advanced telecommunications and information services," requires a minimum download speed of 10 Mbps).

²⁰² In the Matter of Protecting & Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, *supra* note 84, at para. 187 (defining broadband internet access service as any non-dialup access service).

²⁰³ Rob Frieden, *Schizophrenia Among Carriers: How Common and Private Carriers Trade Places*, 3 MICH. TELECOMM. & TECH. L. REV. 19, 37 (1997).

mass media a “doctrinal wasteland,”²⁰⁴ and 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.²⁰⁵ 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.²⁰⁶ 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 unreasonably” resemble the laborious findings²⁰⁷ from the 1970s FCC examiner proceedings about whether broadcasters acted “in the public interest.”²⁰⁸ Further, these decisions by the FCC will carry very little precedential value because, unlike Title II

²⁰⁴ *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 813 (1996) (Thomas, J., concurring).

²⁰⁵ See O. Al-Ubaydli & P. A. McLaughlin, *RegData: A Numerical Database on Industry-Specific Regulations for All United States Industries and Federal Regulations, 1997–2012* (2015), [http://data.regdata.org/?type=regulation_index&industry\[\]=515&industry\[\]=517&industry\[\]=518®ulator\[\]=299#](http://data.regdata.org/?type=regulation_index&industry[]=515&industry[]=517&industry[]=518®ulator[]=299#) (showing increases in restrictions from 1997 to 2012 ranging from 17 percent to 32 percent). Whether this increase in regulation provides ample opportunities for agency employment growth is less clear. However, because conclusions about unreasonable discrimination in media are labor intensive, there may be employment growth.

²⁰⁶ The investigations into “zero rating” of IP-based content are illustrative. See Shiva Stella, *Public Knowledge Files Comcast Stream TV Complaint with FCC to Protect Video Competition*, PUBLIC KNOWLEDGE (March 2, 2016), <https://www.publicknowledge.org/press-release/public-knowledge-files-comcast-stream-tv-complaint-with-fcc-to-protect-video-competition>.

²⁰⁷ 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 149, at 779 (1972).

²⁰⁸ 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 16, 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”).

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 relitigation and extensive agency examination.

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."²⁰⁹ The status quo—slow, piecemeal deregulation in the face of competition in an industry—appears socially costly and ineffective.²¹⁰

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 broadcast. 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 expect

²⁰⁹ Shelanski, *supra* note 46, at 99.

²¹⁰ *Id.*

and lament that delimiting and enforcing the shifting quasi-common-carriage obligations on distributors will lead to an incoherent body of law that will only entrench the FCC as its proceedings grow more inscrutable to outsiders.