STATE REGULATION OF ADVANCED COMMUNICATIONS SERVICES:

LEARNING FROM THE PAST TO UNDERSTAND THE PRESENT AND PREPARE FOR THE FUTURE

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INTRODUCTION

For much of the 20th century, states played important roles in regulating basic telephony, the provision of which was considered

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and treated as a natural monopoly service.[1] Among other things, states helped to ensure that the telephone company delivered quality service at affordable rates to every person regardless of where they lived.[2] Allocating regulatory authority among state and federal actors vis-à-vis "plain old telephone service" (POTS) was relatively simple: local POTS, whose traffic stayed within a state, fell into the regulatory purview of state public utility commissions (PUCs); long-distance service, whose traffic traversed state borders, was overseen by the Federal Communications Commission (FCC).[3] Notwithstanding occasional territorial squabbles between state PUCs and the FCC, the federal-state balance in regulating POTS was fairly stable, due in large part to the basic–and largely unchanged–nature of the underlying service.[4] Although numerous technical advancements occurred behind the scenes, basic telephony remained that–basic–for nearly a century.[5]

In theory, this federal-state balance in the regulation of communications services should be self-calibrating. As new communications platforms with fewer or no distinct intrastate characteristics emerge, the balance of regulatory federalism should tip towards a larger role for the FCC, leaving states with less jurisdiction, or no role at all. In practice, however, this has rarely been the case.

As discussed in this article, when new communications platforms have emerged, states have generally sought to regulate those services like POTS. When these attempts have been stymied, states have fought to preserve at least some role in overseeing new services. This dynamic has been evident for decades. For example, when cable television and wireless telephony emerged in the latter half of the 20th century, states attempted to extend regulatory authority over these services. In each case, these attempts were initially rebuffed by the FCC and then, eventually, by Congress. Both the FCC and Congress made clear that these more advanced offerings were to be regulated at the national level with more clearly defined–and limited–roles for states and localities.

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1. *See, e.g.*, Charles M. Davidson & Michael J. Santorelli, *Federalism in Transition: Recalibrating the Federal-State Regulatory Balance for the All-IP Era*, 29 BERKELEY TECH. L. J. 1131 (2014).

2. *See, e.g.*, JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE 33-35 (2nd ed. 2013).

3. *See, e.g.*, ROBERT BRITT HORWITZ, THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS 104-105 (1989).

4. *See, e.g.*, Davidson & Santorelli, *supra* note 1.

5. *See, e.g.*, JON GERTNER, THE IDEA FACTORY: BELL LABS AND THE GREAT AGE OF AMERICAN INNOVATION (2012).

With the relatively recent advent of Voice over Internet Protocol (VoIP) and broadband internet access service, the first part of this dynamic has repeated itself. For much of the 21st century, states have attempted to extend POTS-like regulation to these more advanced "borderless" communications services. The record of FCC attempts to rebuff these regulatory efforts, though, has been mixed, due primarily to the inability of Congress to clearly state how these services should be treated. Instead, these services remain governed by a statute whose last comprehensive update occurred in 1996 and which has been described as a "model of ambiguity."[6] With the Supreme Court having eliminated deference to administrative agencies' interpretation of ambiguous statutes like the Communications Act,[7] it is unclear whether the FCC can stop states from regulating VoIP, broadband, or other advanced communications services in the absence of clear instructions from Congress.

Why does this matter? Regulatory uncertainty imposes costs on service providers, their customers, and the wider marketplace.[8] Competition might suffer if companies elect to leave a market rather than accede to new regulations.[9] Prices might go up if service providers pass along compliance costs to their customers.[10] Use of a service might dip as a result, and innovation might slow in response to tepid demand.

To prevent undue harm to the competitive dynamics of the modern telecommunications marketplace, Congress must act to clarify the appropriate regulatory treatment of broadband, VoIP, and any other advanced services that might emerge. Indeed, the inability of Congress to act in a timely matter on other issues in the

6. AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 397 (1999).

7. Loper Bright Enter. v. Raimondo, 603 U.S. 369 (2024).

8. *See, e.g.,* Jonathan E. Nuechterlein & Howard Shelanski, *Building on What Works: An Analysis of U.S. Broadband Policy*, 73 FED. COMM. L. J. 219 (2021).

9. This occurred in New York after the state began enforcing a statute requiring ISPs to offer broadband at a specific price-point to low-income residents. *See* Emily Barnes, *AT&T ends broadband service in NY as Affordable Broadband Act begins,* LOHUD (Jan. 24, 2025, 4:49 AM ET), https://www.lohud.com/story/news/2025/01/24/att-ends-broadband-service-new-york-as-affordable-broadband-act-begins/77922989007/ [https://perma.cc/MD8S-VTMW].

10. *See, e.g., State Broadband Regulation: Impact on Investment and Competition,* CARTESIAN (May 27, 2025), https://acaconnects.org/index.php?checkfileaccess=/wp-content/uploads/2025/05/Effects-of-State-Broadband-Rate-Regulation_27May2025_v1.0.pdf [https://perma.cc/D2ZB-KQFG] (arguing that state-level broadband regulation would negatively impact competition, which, in turn, would lead to pricing increases); *Cf.* CAL. PUB. UTIL. COMM'N., BROADBAND POLICY OPTIONS TO IMPROVE AFFORDABILITY FOR LOW-INCOME CALIFORNIANS (Mar. 18, 2025), https://www.publicadvocates.cpuc.ca.gov/-/media/cal-advocates-website/files/press-room/reports-and-analyses/250318-public-advocates-office-broadband-policy-options-to-address-affordability-in-ca.pdf [https://perma.cc/KVS3-GCEP] (arguing that projected negative impacts of state-level broadband regulation are overblown).

broader technology sector has given rise to a patchwork of state-level rules for data privacy and artificial intelligence. This article underscores the need for Congress to act immediately to clarify the appropriate regulatory framework for advanced communications services. Short of that, states must take up the mantle of regulatory modernization by rolling back outdated rules and prohibiting their PUCs from trying to extend POTS rules to advanced communications services. Modern communications networks and the innovative services that are transmitted over them require modern rules that reflect modern market characteristics.

I. STATE REGULATION OF COMMUNICATIONS SERVICES: FROM POTS TO WIRELESS

To appreciate why state regulation of advanced communications services is both unnecessary and harmful, this section explores the origins of the federal-state regulatory framework for POTS and how it evolved over time in response to new technologies.

This section begins by examining the rise of regulatory federalism in the context of basic telephone service. POTS regulation is specific to a single service delivered by a single provider that, for decades, was insulated from competition. Consequently, traditional telephone regulation has long been understood to be context-specific and not generally applicable to services other than POTS. As the market for basic telephony evolved, so too did this framework. Eventually, Congress updated the telecommunications laws to account for the rise of competitive alternatives and to facilitate new entry into local markets. State authority over many aspects of POTS waned as a result.

This rubric of state action–i.e., regulation of a new service–and federal reaction–i.e., Congressional action to clarify state and federal regulatory roles to reflect the technological and market characteristics of the service–has been replicated several times, notably in the context of cable television and mobile telephony. This dynamic provides a compelling template for how Congress should respond to state attempts to regulate VoIP and broadband.

A. Foundations: The Birth of Regulatory Federalism

For the first few decades after it emerged in the late 1800s, telephone service was largely unregulated at either the state or federal level.[11] Over time, though, a regulatory framework evolved

11. To the extent regulatory responses were evident, they typically arose at the local level in the form of rules impacting the design of networks and placement of network elements. For further discussion, *see* RICHARD GABEL, AMERICAN REGULATORY

in response to issues arising from the structure of the telephone market, which pitted a large incumbent, the Bell system, against myriad independent systems that arose after Bell's initial telephone patents expired.[12] Although competition between Bell and the independents yielded some positive gains for consumers (e.g., lower telephone rates), the refusal by Bell to interconnect with its competitors created numerous problems for customers.[13] For example, if a Bell customer wished to call non-Bell customers, they were forced to purchase a separate telephone line for that purpose.[14]

Although preceded by a variety of federal and state policy responses and court decisions addressing these competitive issues, the first major Congressional response came in 1910 with the Mann-Elkins Act, which expanded the purview of the Interstate Commerce Commission (ICC) to regulate the interstate aspects of telephony as a common carrier service.[15] In response, states began to pass laws allowing their PUCs to regulate intrastate telephone service;[16] "[b]y 1921, all but three states had instituted some form of regulation of local telephone rates."[17]

Over the next few decades, the ICC proved mostly uninterested in regulating interstate telephone service.[18] States, however, moved ahead, developing formal regulatory processes like rate-making for telephone service, a task that was met with numerous lawsuits from telephone providers challenging the authority of and methods devised by states to do so.[19] Eventually, the Supreme Court weighed in, recognizing that boundaries separating intrastate and interstate telephone traffic existed and should inform how rates were set.[20]

FEDERALISM AND TELECOMMUNICATIONS INFRASTRUCTURE 20–25 (Paul E. Teske ed., 1995) [hereinafter AMERICAN REGULATORY FEDERALISM].

12. *Id.*

13. *See, e.g.*, Richard Gabel, *The Early Competitive Era in Telephone Communication, 1893-1920,* 34 L. AND CONTEMP. PROBS. 340–59 (1969) [hereinafter *Early Competitive Era*].

14. *Id.* at 341.

15. Mann-Elkins Act, ch. 309, 36 Stat. 539 (1910).

16. *Early Competitive Era*, *supra* note 13, at 357.

17. Daniel F. Spulber & Christopher S. Yoo, *Toward a Unified Theory of Access to Local Telephone Networks,* 61 FED. COMM'N L. J. 43, 46 (2008).

18. *Id.* at 47.

19. These actions stemmed from Munn v. Illinois, 94 U.S. 113 (1877), a landmark case that that upheld the authority of state PUCs to police a wide array of business activities in any sector "clothed with a public interest." It is from this case that many trace the origins of public utility regulation. *See, e.g.,* HORWITZ, *supra* note 3, at 59 ("Though vague, *Munn* established that public control could be exercised only where there was existence of a monopoly or virtual monopoly, in the sense that the public was "compelled" to make us of the services involved.").

20. Smith v. Ill. Bell Tel. Co., 282 U.S. 133 (1930).

A stronger federal role in the telecommunications arena came with the passage of the Communications Act in 1934.[21] The 1934 Act created the FCC "for the purpose of regulating interstate…communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination…a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[22] It empowered the Commission to ensure that the charges for telecommunications services were "just and reasonable" and to otherwise regulate telephone providers as common carriers.[23] Congress also enshrined state regulatory authority over intrastate aspects of telecommunications service and made clear that the Commission was not to meddle unnecessarily in those activities.[24]

The nuances of this model of dual federalism are numerous and have been explored at great length elsewhere.[25] For the purposes of this discussion, it suffices to observe that the upshot of this model was the formalization of public utility treatment of the dominant POTS provider. This was decades in the making and resulted in states applying their legislative and regulatory expertise vis-à-vis other public utilities like electric providers to telecommunications. Indeed, the regulatory framework for POTS has been described as a mashup of traditional common carrier regulation with more modern notions of utility regulation.[26] States enshrined notions common to these regimes in "carrier of last resort" (COLR) laws, which required the POTS monopolist to provide telephone service at affordable rates to every person regardless of geographic location.[27]

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21. 47 U.S.C. § 151.

22. *Id.*

23. 47 U.S.C. § 201.

24. 47 U.S.C. § 152(b). It quickly became clear, though, that the FCC possessed the ability to preempt certain state-level regulatory actions that it deemed to conflict with its own policies. *See, e.g.,* Luke J. Burton, *The Preemptive Effect of Federal Communications Act Sec.201-02 Postdetariffing*, UNIV. CHI. LEGAL FORUM 563–90 (2013).

25. *See, e.g.*, Philip J. Weiser*, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act,* 76 N.Y.U. L. REV. 1692, 1733–36 (2001); *Early Competitive Era*, *supra* note 13; AMERICAN REGULATORY FEDERALISM, *supra* note 11; Davidson & Santorelli, *supra* note 1.

26. *See, e.g.,* NUECHTERLEIN ET AL., *supra* note 2, at 33.

27. For a compelling and concise overview of the evolution of COLR laws, *see* Peter Bluhm & Phyllis Bernt, *Carriers of Last Resort: Updating a Traditional Doctrine*, NAT'L REGUL. RSCH. INST. (July 2009), https://pubs.naruc.org/pub/FA864A19-A48B-267A-3893-A310062183C4 [https://perma.cc/A3FE-QLW8].

B. Recalibration: Changes to Regulatory Federalism as the Market Matures

COLR laws and their ilk, along with the regulations developed by PUCs when implementing them, shaped the market for POTS for decades. For example, many COLR laws required POTS providers to charge urban and rural customers the same rates even though it was far more expensive to serve the latter than the former. This created an implicit subsidy system whereby the larger financial contributions of urban customers subsidized lower rates for rural customers.[28]

The newly formed FCC began to more aggressively oversee the market for interstate long-distance service. Clashes between the FCC and state PUCs occurred most frequently over disagreements about how to measure, or separate, the traffic flowing over telephone networks. Accurate measurements were critical to precisely determining local and long-distance rates and to preserving the urban-rural subsidy system without undermining the ability of the POTS monopolist to invest in its network and earn a reasonable return on those investments.[29]

State authority in the telecommunications market seemingly reached its zenith in 1996 with the enactment of the Telecommunications Act. A substantial update of the communications laws was necessary to reflect profound changes to the market for voice services, which included the dissolution of the POTS monopoly in the early 1980s and the emergence of long-distance competition.[30] These and other factors led Congress to use the 1996 Act as a vehicle for manufacturing competition in the market for local telephone service, a substantial undertaking that required cooperation between state PUCs and the FCC to facilitate entry of "competitive local exchange companies," which were permitted to lease network elements owned by incumbent providers.[31] The 1996 Act also created a national universal service program that mimicked the implicit urban-rural subsidy system that had prevailed for decades in the states,[32] as well as a formal separations process for measuring intrastate and interstate voice traffic.[33]

Notwithstanding numerous explicit grants of authority, state PUCs were not free to act as they wished when implementing the

28. *Id.* at 18.
29. Davidson & Santorelli, *supra* note 1, at 1145 n.74.
30. NUECHTERLEIN ET AL., *supra* note 2.
31. Weiser, *supra* note 25.
32. 47 U.S.C. § 254.
33. 47 U.S.C. § 225(d)(3).

1996 Act.[34] To the contrary, when faced with competing interpretations of the 1996 Act, courts tended to defer to the FCC. Indeed, the Supreme Court in 1999 stated that the 1996 Act "can be read to grant…'most promiscuous rights' to the FCC vis-à-vis the state [PUCs],"[35] making clear that the FCC possessed the authority to "construe all provisions of the Act, even those affecting local telephony," and that it could "set a single national standard if it decides one is appropriate."[36]

This dynamic—eroding state authority over various aspects of local telephony because of FCC action to centralize implementation of the 1996 Act—played out repeatedly in the first decade of the 2000s. States challenged what they viewed as jurisdictional overreach by the FCC; in many cases, they lost.[37] Many FCC actions were animated by fundamental changes to the market for voice services, which were being upended by advanced services like mobile, VoIP, and high-speed internet access. As the Commission sought to update its rules to reflect these changes and remove outdated obligations, some states sought to retain their authority to continue regulating POTS providers.

An illustrative example that serves as a neat bookend to over a century of federal-state tension in the regulation of POTS came in the early 2010s. The FCC adopted sweeping rules to modernize the federal universal service fund to support broadband access in rural areas. To do so, the FCC implemented a national framework that overrode intrastate rate structures devised by PUCs for voice service.[38] State PUCs sued, arguing that the Commission lacked authority to preempt decades of state-level ratemaking and other aspects of intrastate regulation of POTS. The states lost.[39] This outcome was consistent with numerous other circuit court decisions, which generally supported increasingly expansive FCC interpretations of its authority in the telecommunications space.[40]

34. Other parts of the 1996 Act preserved and enhanced states authority over POTS. For example, state PUCs were given the responsibility of designating "eligible telecommunications carriers," entities that qualified to receive funding to deliver voice service in high-cost areas from the newly created federal universal service fund. 47 U.S.C. § 214(e).

35. AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 397 (1999).

36. Weiser, *supra* note 25, at 1744–45.

37. *See generally* Davidson & Santorelli, *supra* note 1, at 1159–63.

38. *Connect Am. Fund*, WC Dkt. No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011).

39. *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

40. In addition to several key wins at the Supreme Court, the FCC, by one measure, had the highest winning percentage in circuit court cases involving *Chevron* deference to Commission interpretations of the telecom laws between 2003 and 2013, key years in the implementation of the 1996 Act and in the evolution of the marketplace generally. *See* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts,* 116 MICH. L. REV. 1, 7 (2017).

During this time of waning state regulatory authority over POTS, state legislatures began to revise their statutory frameworks for telecommunications. In many cases, states rolled back or removed legal provisions originally devised when there was only one option for telephone service. Over the course of the last two decades, dozens of states have engaged in such deregulatory activities by removing COLR laws and related obligations and otherwise making clear that their PUCs lack authority to regulate advanced services like wireless, VoIP, and broadband.[41] Even so, some states have continued forward with assertive regulatory frameworks for advanced services, reflecting a long legacy of states' pro-regulatory responses to new technologies.[42]

C. Adaptation: Local, State, and Federal Responses to Cable TV and Wireless Telephony

The mechanics of federal-state regulatory interaction discussed above have been replicated, albeit on relatively more compressed timelines, in other contexts, notably cable TV and mobile telephony. In both cases, initial legislative and regulatory responses to these new services were evident primarily at the local and state levels. Over time, the FCC sought to provide more uniformity in these responses as the markets for the services matured and became more national in nature. These actions led to legal disputes, the core aspects of which were eventually resolved by the passage of new federal laws clarifying the regulatory roles of the FCC, the states, and municipalities. For cable and wireless, the eventual Congressional response mimicked the 1996 Act in that it created a national regulatory framework that left states with more limited and defined roles.

1. Cable TV

Cable television was originally created to extend the reach of broadcast television signals to remote areas.[43] It was not a communications medium per se, but its technical ability to serve as both a supplement to broadcast TV and to potentially deliver "broad-band" communications in direct competition with POTS providers drew the interest of federal, state, and local

41. *See, e.g.,* SHERRY LICHTENBERG, TELECOMMUNICATIONS OVERSIGHT 2017: A STATE PERSPECTIVE, NAT'L REGUL. RSCH. INST. (2018) https://pubs.naruc.org/pub/FA86A6F8-BDE9-8DC2-606D-9DE8F2D0693D [https://perma.cc/EFM2-JTA2].

42. *See* discussion *infra* Section II.

43. Comment, *Federal and State Regulation of Cable Television: An Analysis of the New FCC Rules,* 1971 DUKE L.J. 1151 (1972).

policymakers.[44] Initially, though, cable TV was regulated primarily at the local level in the form of franchise agreements, which were used by municipalities to grant cable providers access to local rights-of-way to deploy their networks.[45] At first, state PUCs mostly abstained from regulating cable providers because of a lack of formal authority in state law at the time.[46] This dynamic changed over time as cable became more widely available, leading states to update their laws to allow for regulation of these services.[47] However, cable providers proved adept at sidestepping and challenging many state and local regulatory attempts.[48]

The FCC became more interested in cable TV in the 1960s and launched proceedings later in the decade to evaluate the need for a formal framework for this popular medium.[49] Its primary focus, however, was on ensuring that cable TV operated in the public interest by, for example, promoting diversity in the channels offered to the public.[50] Indeed, even after the Supreme Court upheld the FCC's sweeping interpretation of authority to regulate cable as reasonably ancillary to its plenary authority over broadcasting, as detailed in Title III of the 1934 Act,[51] the Commission elected not to engage in additional regulation of cable, leaving it to the states and localities to continue forging a piecemeal framework for the service.[52] The FCC continued to revisit these issues and eventually came to believe that cable technology was a "hybrid that requires identification and regulation as a separate force in communications."[53]

In the early 1980s, Congress responded to what Senator Barry Goldwater described as a "patchwork of Federal, State, and local regulations and court decisions [regarding cable]," the result of which was "an unstable regulatory environment that has been bad for the cable industry, bad for the local and State franchising

44. *Id.* at 1152.

45. *See, e.g.*, *Regulation of Community Antennae Television,* 70 COLUM. L. REV. 837 (1970).

46. *Id.* at 850–51.

47. *Id.* at 852.

48. *Id.* at 851.

49. *Amend. of Part 74, Subpart K, of the Comm'n Rules and Regul. Relative to Comty. Antenna Television Sys.; and Inquiry into the Dev. of Commc'n Tech. and Serv. to Formulate Regul. Pol'y and Rulemaking and/or Legis. Proposals,* Dkt. No. 18397, Notice of Proposed Rulemaking and Notice of Inquiry, 15 FCC 2d 417 (1968) [hereinafter *CATV Inquiry*].

50. *Id.* at 424–27.

51. United States v. Sw. Cable Co., 392 U.S. 157 (1968).

52. *Regulation of Community Antennae Television*, *supra* note 45, at 866–68.

53. *Amend. of Part 76 of the Commission's Rules and Regul. Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251,* Report and Order, 59 FCC 2d 294, 298 (1976).

authorities, and bad for consumers."[54] The Cable Act of 1984 clarified the regulatory reach of the FCC, the states, and localities. It maintained the local franchising model but set limits on how much authority localities could exert through the franchising process.[55]

Congress subsequently updated the cable regulatory framework in 1992, adopting a variety of changes reflecting the rapid evolution of cable TV programming and technology.[56] Among other things, Congress called on the FCC to develop rules impacting most aspects of the cable business model, including the regulation of rates in markets that were uncompetitive. Local franchising was preserved and remains to this day, but state regulation of cable remains scant. Both are subject to FCC oversight and intervention, which, in recent years, has sought to further narrow the regulatory roles of states and municipalities vis-à-vis cable to reflect modern technological and market characteristics.[57]

2. Wireless Telephony

Throughout the 1970s, the FCC and stakeholders in the telecommunications space engaged in rulemaking and other proceedings aimed at freeing up spectrum resources to create a "cellular mobile radio communications" system.[58] By the early 1980s, wireless telephony emerged as a viable new platform for voice communications. The first mass-market cellphone was introduced in 1983; a year later, there were just over 91,000 subscribers to what was still primarily a local and regional service.[59] By the end of the decade, there were over 5 million subscribers; by the turn of the millennium, there were over 100 million.[60]

For many years, the FCC focused its regulatory response to the rise of wireless primarily on spectrum allocation, a core duty

54. Michael I. Myerson, *The Cable Communications Policy Act of 1984: A Balancing Act on Coaxial Wires,* 19 GA. L. REV. 543, 545 (1985).

55. *Id.* at 551.

56. *See generally* Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning,* 15 HASTINGS COMM. & ENT L.J. 305 (1992).

57. For an overview of many of these FCC interventions and their legal fate, see City of Eugene v. FCC, 998 F.3d 701 (6th Cir. 2021).

58. *See, e.g.*, *Application of Ill. Bell Tel. Co.,* 63 F.C.C.2d 655 (1977).

59. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Eleventh Report, 21 FCC Rcd. 10947, Appendix A, Table 1 (adopted Sept. 26, 2006), https://docs.fcc.gov/public/attachments/FCC-06-142A1.pdf [https://perma.cc/CFU2-5QL5].

60. *Id.*

assigned to it by Congress in Title III of the 1934 Act.[61] Even though there was broad agreement that wireless telephony was fundamentally different from POTS because, among other things, it lacked readily identifiable intrastate characteristics–i.e., it was an inherently borderless service–state PUCs sought to fill the regulatory vacuum left by FCC inaction on a variety of fronts.[62] These included attempts to extend traditional POTS-like rules to these new entrants, as well as local and state oversight of the physical infrastructure of new wireless networks.[63] Some states abstained from engaging in these regulatory actions, creating a patchwork of rules and requirements confronting wireless carriers that increasingly sought to serve multiple states.[64]

Much like in the context of cable TV, Congress eventually stepped in to define the regulatory roles of federal, state, and local actors. However, unlike in the context of cable or POTS, Congressional action came much more quickly, likely owing to the rapidity with which wireless telephony had seeped into modern life. In 1993, Congress implemented a national regulatory framework for wireless that preempted state regulation of wireless services in almost every instance. Specifically, the statute states that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."[65] Coupled with changes aimed at bolstering the FCC's spectrum allocation processes, Congressional action "provided carriers with substantial regulatory certainty and facilitated the rapid deployment of nationwide wireless networks."[66]

D. Takeaways

For more than a century, states have sought repeatedly to exert regulatory authority over communications services of all ilk.

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61. Charles M. Davidson & Michael J. Santorelli, *Seizing the Mobile Moment: Spectrum Allocation Policy for the Wireless Broadband Century*, 19 COMMLAW CONSPECTUS 1, 29 (2010).

62. *See, e.g.*, Davidson & Santorelli, *supra* note 1, at 1153–54.

63. For an overview of these actions, see Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Framework That is "Hog Tight, Horse High, and Bull Strong,"* 50 FED. COMM. L.J. 547 (1998).

64. Babette E.L. Boliek, *Wireless Net Neutrality Regulation and the Problem with Pricing: An Empirical, Cautionary Tale*, 16 MICH. TELECOMM. & TECH. L. REV. 1, 28–32 (2010) ("[T]wenty-nine states had not banned regulation, either by law or by de facto bans on [wireless] regulation promulgated by their public utility commissions.").

65. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Stat. 6002(b) (codified in relevant part at 47 U.S.C. § 332(c)(3)(A)).

66. Davidson & Santorelli, *supra* note 1, at 1154.

Localities, too, have played key roles in overseeing the construction of the networks used to deliver these services. But from the standpoint of acting to control the behavior of a service provider—from granting permission to deliver service in the first place, to regulating rates, etc.—states have long looked to play lead regulatory roles. These actions have continuously created tension with federal counterparts at the FCC, yielding a dynamic of state action and federal reaction, and vice versa, that has typically resulted in legal challenges and lengthy court proceedings.

In each instance, Congress stepped in to ease this federal-state (and sometimes federal-local) tension and provide clarity on appropriate regulatory roles. The resulting federal frameworks were usually calibrated to reflect the technical and market characteristics of the services at issue. With POTS, Congress deemed it appropriate to maintain a model of dual federalism because basic telephony maintained identifiable intrastate and interstate components. But when Congress wished to introduce competition into local POTS markets, it narrowed the role of states, prioritizing FCC leadership instead.

For cable and wireless, Congress also acted after years of disputes among regulatory entities. The initial response to cable preserved a strong local role, but over time Congress, with the support of courts willing to accept expansive interpretations of Commission authority, shifted the balance more to the FCC. For wireless, Congress recognized early on that the technical characteristics of wireless demanded a national framework. In each case, Congress proved adept at recalibrating the law to reflect new technological developments and changes in the market.

II. THE NEW FEDERALISM: STATE REGULATION OF VOIP AND BROADBAND

For as much as the model described in Section II has positively impacted the provision of POTS, cable TV, and wireless telephony by offering stakeholders clarity and certainty about regulatory roles in the states and at the federal level, it has not yet been replicated for either VoIP or broadband. What is missing is Congressional action to settle longstanding disputes between states and the FCC about the appropriate level of regulation of these services. Fortunately, both VoIP and broadband services have continued to proliferate and improve notwithstanding increased state regulation of these borderless services. Competition in each segment remains robust, delivering considerable consumer welfare gains.

This section explores the evolution of state-federal tension in the regulation of VoIP and broadband and highlights how it is long past time for Congress to update the federal communications laws.

Failure to do so could result in additional state regulation of these services, creating an inefficient patchwork that would imperil continued investment and innovation in these services.

A. State and Federal Regulatory Responses to VoIP

VoIP emerged after decades of experimentation and innovation by telecommunications network engineers interested in leveraging new computing technologies to enhance voice services.[67] The FCC responded to these and related developments by launching a series of proceedings, which eventually came to be known as the Computer Inquiries, to understand the new technology and adjust its regulatory framework to support continued innovation.[68] A key finding of the Computer Inquiries, which stretched over multiple decades, was that these newer "enhanced" telecommunications services should be treated in a largely hands-off manner.[69] This finding was reflected in the 1996 Act, which recast enhanced offerings as "information services" subject to little regulation under Title I, while basic offerings like POTS would remain "telecommunications services" subject to extensive regulation under Title II of the Act.[70]

Shortly after enactment of the 1996 Act, the America's Carriers Telecommunications Association asked the FCC to formally classify VoIP as a telecommunications service given its functional equivalence to POTS.[71] The FCC agreed that a "functional" approach to classifying services made sense,[72] but in the context of VoIP, the Commission observed that underlying information processing capabilities and other technical aspects transformed the

67. *See, e.g.*, Davidson & Santorelli, *supra* note 1, at 1165–66.

68. *Regul. and Pol'y Probs. Presented by the Interdependence of Comput. and Commc'n Serv.*, Dkt. No. 16979, Notice of Inquiry, 7 FCC 2d 11 (1966) (First Computer Inquiry); *Amend. of Section 64.702 of the Commc'n Rules and Regul.,* Dkt. No. 20828, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979) (Second Computer Inquiry); *Amend. of Sections 64.702 of the Comm'n's Rules and Regul.*, CC Dkt. No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (Third Computer Inquiry) (subsequent cites omitted) (collectively the *Computer Inquiry*).

69. For an in-depth discussion of the Computer Inquiries and its impact on telecom and VoIP regulation, see Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries,* 55 FED. COMM. L.J. 168, 204 (2003).

70. *Id.* at 191.

71. *See The Provision of Interstate and Int'l Interexchange Telecomm. Serv. via the "Internet" by Non-Tariffed Uncertified Entities*, America's Carriers Telecomm. Association (ACTA) Petition for Declaratory Ruling, Special Relief, and Institution of a Rulemaking, RM 8775 (Mar. 4, 1995), http://www.fcc.gov/Bureaus/Common_Carrier/Other/actapet.html [https://perma.cc/U2F9-LVKV] [hereinafter ACTA Petition].

72. For a discussion of this "functional" way of thinking at the FCC post-1996 Act, see Robert Cannon, *State Regulatory Approaches to VoIP: Policy, Implementation, and Outcome*, 57 FED. COMM. L.J. 479, 480 (2005).

service from basic telecommunications, which is essentially pure transmission of voice traffic from one point to another, into an enhanced service.[73]

This determination, though, was not a formal classification by the FCC. Rather, it came in the context of a report to Congress in 1998. Without clear guidance, states began to explore whether and how to regulate VoIP. Some states, like Florida, took a deregulatory view of VoIP and opted not to pursue regulatory action.[74] Other states, though, sought to extend POTS-like regulation to the emerging service. The Minnesota PUC took this route and attempted to apply telephone rules to over-the-top (aka nomadic) VoIP carriers. It was preempted by the FCC, which reasoned that, because VoIP traffic "cannot be separated into interstate and intrastate communications for compliance with Minnesota's requirements without negating valid federal policies and rules," the proposed state regulation of VoIP could not stand.[75] On appeal, the Eighth Circuit Court of Appeals agreed with the FCC and found that the Commission can "preempt state regulation of a service which would otherwise be subject to dual federal and state regulation where it is impossible or impractical to separate the service's intrastate and interstate components, and the state regulation interferes with valid federal rules or policies."[76]

Even so, the FCC has yet to formally classify VoIP as an information service. It opened a docket on the matter in 2004, but as of November 2025, it had still not issued a final ruling on the matter.[77] On several occasions, however, the Commission has adopted rules that apply POTS-like requirements to VoIP providers. These have included requirements for interconnecting VoIP to E911, protecting customer proprietary network information, complying with various disability access requirements, and making telephone numbers portable.[78]

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73. *Federal-State Joint Bd. on Universal Serv.*, CC Dkt. No. 96-45, Report to Congress, FCC 98-67, 30–46 (1998).

74. *See* ANDREW COLLINS ET AL., FLA. PUB. SERV. COMM'N, WHITE PAPER ON INTERNET PRICING: REGULATORY IMPLICATIONS AND FUTURE ISSUES (2000), https://www.floridapsc.com/pscfiles/website-files/PDF/Publications/Pai/internetpricing.pdf [https://perma.cc/RYB7-HSDE].

75. *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Ord. of the Minn. Pub. Utils. Comm'n*, WC Dkt. No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd. 22404, 1–2 (2004) https://docs.fcc.gov/public/attachments/FCC-04-267A1.pdf [https://perma.cc/TL85-AWBQ] [hereinafter *Vonage Order*].

76. Minn. Pub. Utils. Comm'n v. FCC, 483 F.3d 570, 575 (8th Cir. 2007) (discussing 47 U.S.C. § 152(b) (2012)).

77. *See IP-Enabled Serv.*, WC Dkt. No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004).

78. *See Tel. No. Requirements for IP-Enabled Serv. Providers*, WC Dkt. Nos. 07-243, 07-244, 04-36, CC Dkt. Nos. 95-116, 99-200, Report and Order, Declaratory Ruling,

Many states have adopted legislation that prohibits their PUCs from regulating VoIP.[79] A small number of states, though, have continued to explore the outer bounds of their regulatory authority over VoIP, creating a patchwork of inconsistent state-level approaches to this service. Efforts in Vermont and California illustrate the complexities and significant stakes implicated by these attempts.

Vermont opened an inquiry into the appropriate regulatory status of VoIP in 2007.[80] In 2010, the PUC concluded that VoIP was a telecommunications service under state law.[81] This finding was appealed to the Vermont Supreme Court, which, in 2013, upheld the PUC's classification but remanded the case to the PUC to determine whether VoIP was also a telecommunications service under federal law.[82] Before the PUC could apply state-level POTS regulation to VoIP, it had to ensure that its actions did not conflict with federal policy. In 2018, the PUC determined that VoIP was a telecommunications service under federal law, opening the door to the application of state-level regulation of VoIP.[83]

However, shortly after issuing that opinion, parties asked the PUC to reconsider its interpretation of federal law given two developments. First, the Eighth Circuit Court of Appeals had issued another VoIP ruling in 2018, which found that VoIP is most appropriately classified as an information service.[84] Second, the FCC filed an amicus brief in the Eighth Circuit case stating that it "considers classifying VoIP as a telecommunications service to be inconsistent with the federal regulatory scheme of targeted regulations," echoing actions taken by the FCC at that time to

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Order on Remand, and Notice of Proposed Rulemaking, FCC 07-188 (2007); *IP-Enabled Serv.*, WC Dkt. No. 04-36, WT Dkt. No. 96-198, CG Dkt. No. 03-123, CC Dkt.
No. 92-105, Report and Order, 22 FCC Rcd. 11275, 11283–91 (2007); *Implementation of the Telecomm Act of 1996*, Dkt. No. 96-115, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 6927 (2007); *IP-Enabled Serv. E911 Requirements for IP-Enabled Serv. Providers*, WC Dkt. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 10245 (2005).

79. Davidson & Santorelli, *supra* note 1, at 1170.

80. *Investigation into Regul. of Voice Over Internet Protocol ("VoIP") Serv.,* Dkt. No. 7316, Order Opening Investigation and Notice of Prehearing Conference (Vt. Pub. Util. Comm'n May 16, 2007).

81. *Investigation into Regul. of Voice Over Internet Protocol ("VoIP") Serv.,* Dkt. No. 7316, Board Order Re Phase I (Vt. Pub. Util. Comm'n Oct. 28, 2010).

82. *Investigation into Regul. of Voice Over Internet Protocol ("VoIP") Serv.*, 70 A.3d 997, 1006–08 (Vt. 2013).

83. *Investigation into Regul. of Voice Over Internet Protocol ("VoIP") Serv.,* Dkt. No. 7316, Order (Vt. Pub. Util. Comm'n Feb. 7, 2018).

84. Charter Advanced Servs. (MN), LLC v. Lange, 903 F.3d 715, 717 (8th Cir. 2018), *cert. denied*, 589 U.S. 1038 (2019).

unwind net neutrality rules for broadband.[85] Accordingly, the Vermont PUC shelved plans for regulating VoIP lest its rules clash with federal law.

In California, the state PUC in 2004 recommended against applying POTS rules to VoIP, a finding that informed a legislative ban on regulating this service that lasted until 2020, when the statutory prohibition expired.[86] After the law lapsed, the PUC opened a proceeding in 2022 to explore whether it was necessary to extend POTS-like obligations to VoIP providers.[87] A primary basis for the inquiry was the state's codification of a functional approach to regulating voice services, i.e., "the means by which [voice] service is provided, whether it be traditional landline, wireless technology, or IP-enabled, does not affect whether the provider meets the definition of a public utility telephone corporation."[88]

In 2024, the California PUC adopted a sweeping order that brought all VoIP providers under the full regulatory authority of the PUC, subjecting them to a host of POTS-like rules.[89] This marked the first time that a PUC had formally adopted a POTS-like regulatory framework for VoIP. As of November 2025, the state PUC was engaged in a follow-on proceeding to address "technical and implementation issues that have arisen in the application of the new regulatory framework for interconnected VoIP service providers. . ."[90]

Parties to the California PUC proceeding made many arguments against the proposed rules that highlight the significant potential impacts of regulating VoIP like POTS. Several parties argued that applying rules devised for a monopoly market to VoIP would have "far-reaching ramifications,"[91] including "harm[ing] consumers [and] deter[ring] competition for voice services."[92]

Can the FCC preempt the new VoIP rules in California? Parties to the proceeding argued that, if adopted, the rules would

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85. *Investigation into Regul. of Voice Over Internet Protocol ("VoIP") Serv.*, Dkt. No. 7316, Order Modifying Final Order, 1, 16 (Vt. Pub. Util. Comm'n Apr. 5, 2021) (FCC actions regarding net neutrality are discussed *infra*).

86. *Establishing Regul. Framework for Telephone Corp. Providing Interconnected Voice Over Internet Protocol Serv.*, R.22-08-008, Decision, 24-11-003, 4–7 (Cal. Pub. Util. Comm'n Nov. 7, 2024) [hereinafter *CPUC VoIP Decision*].

87. *See generally Order Instituting Rulemaking Proceeding to Consider Changes to Licensing Status and Obligations of Interconnected Voice Over Internet Protocol Providers*, R.22-08-008 (Cal. Pub. Util. Comm'n filed Aug. 25, 2022).

88. *Id.* at 4 (citing CAL PUB. UTIL. CODE § 234).

89. *CPUC VoIP Decision*, *supra* note 86, at 113.

90. *Assigned Comm'r Amended Scoping Memo and Ruling*, R.22-08-008 1, 3 (Cal. Pub. Util. Comm'n filed Apr. 3, 2025).

91. *Opening Comments of Consol. Commc'n of Cal.*, R.22-08-008 1, 1 (Cal. Pub. Util. Comm'n filed Oct. 17, 2022).

92. *Response of USTelecom – The Broadband Ass'n*, R.22-08-008 1, 8, (Cal. Pub. Util. Comm'n filed Oct. 17, 2022).

conflict with the deregulatory regulatory framework for VoIP developed by the FCC over the last few decades.[93] Indeed, the Court of Appeals for the Eighth Circuit upheld FCC preemption of a similar action by the Minnesota PUC in 2004 validating the Commission's approach to VoIP in at least one judicial circuit.[94] A coalition representing VoIP providers petitioned the FCC in early 2025 to preempt the California PUC on these grounds.[95] However, in its order adopting POTS-like rules for VoIP, the California PUC explained that it interpreted prior FCC action on these issues narrowly, tailored its rules in response to the Eighth Circuit's 2004 ruling by acknowledging that certain rules would only apply to so-called "fixed" VoIP connections and not nomadic ones,[96] and relied on the Commission's failure to formally classify VoIP as either a telecommunications service or an information service as a basis for moving ahead with its rules.[97]

B. State and Federal Regulatory Responses to Broadband

For much of the last two decades, discussions about whether and how to regulate broadband have been closely enmeshed with the net neutrality debate. This debate has long centered on whether formal rules are needed to govern how ISPs manage the internet traffic that flows over their networks. Those in favor of net neutrality rules have argued that, in the absence of rules, ISPs will act on incentives to prioritize certain traffic and block others.[98] Those opposed to net neutrality rules have observed that there is little evidence that ISPs would engage in this behavior, an

93. *See, e.g.*, *Reply Comments of the Advanced Commc'n Law & Pol'y Inst. at N.Y. Law School,* R.22-08-008 (Cal. Pub. Util. Comm'n filed Oct. 25, 2024).

94. *Vonage Order*, *supra* note 75, at 6.

95. Cloud Communications Alliance and Cloud Voice Alliance Petition for Declaratory Ruling, *State Regul. Framework for Interconnected VoIP Serv. Established by the Cal. Pub. Util. Comm'n in Decision 24-11-003* (filed Jan. 27, 2025) https://commlawgroup.com/wp-content/uploads/2025/01/CCA-CVA-Petition-for-Declaratory-Ruling-01-27-2025.pdf [https://perma.cc/3FQB-D8SL].

96. *CPUC VoIP Decision*, *supra* note 86, at 20 ("Whether interconnected VoIP service providers must obtain a CPCN, register pursuant to Section 1013, or follow some other process determined by the Commission in order to operate in California depends on whether the interconnected VoIP service is "fixed" or "nomadic," terms which have generally been applied by the FCC in the context of regulatory obligations defined at the federal level for interconnected VoIP service. Despite both services facilitating voice communications, the FCC's 2004 Vonage Order requires us to make this distinction for state licensing purposes.").

97. *Id.* at 74.

98. *See, e.g.*, Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141 (2003).

argument bolstered by the dearth of examples of such actions by ISPs over the last 25 years.[99]

This debate grew out of a dispute between cable broadband providers and municipalities in the late 1990s and early 2000s. Before the FCC formally classified broadband as either a Title I or Title II service, several municipalities attempted to use their franchising authority to require cable ISPs to open their networks to competitors, much like the 1996 Act required incumbent POTS providers to do.[100] Those in favor of this condition argued that, without it, consumers would have limited options for accessing information on the internet.[101] In its ruling settling a dispute between a cable provider and Portland, Oregon, regarding this issue, the Ninth Circuit Court of Appeals held that, while the city overreached in its imposition of the open access condition, cable broadband was best classified as a "telecommunications service."[102] The FCC had previously indicated that it viewed broadband more as an enhanced information service; so, over the next few years, the Commission formalized this classification for every type of broadband access service – cable, DSL, wireless, etc. – subjecting them to a hands-off national regulatory framework under Title I of the Communications Act.[103] These actions effectively precluded municipal and state-level broadband regulation.

The FCC during the Obama administration revisited the information services designation for broadband in the context of adopting binding network neutrality rules on ISPs. Twice before, the FCC had tried and failed to apply net neutrality rules to ISPs within the Title I framework. The first involved an attempt by the Commission in 2008 to sanction an ISP for throttling traffic on its network, an action that the FCC argued violated its Internet Policy

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99. *See, e.g.*, Christopher S. Yoo, *Network Neutrality, Consumers, and Innovation*, 2008 U. CHI. LEGAL F. 179 (2008).

100. AT&T Corp. v. City of Portland, 216 F.3d 871, 874 (9th Cir. 2000).

101. *Id.; see* Mark A. Lemley and Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era,* 48 UCLA L. REV. 925 (2001) (further discussion of the open access debate at the turn of the 21st century).

102. *AT&T Corp.*, 216 F.3d at 879.

103. *See generally Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* GN Dkt. No. 00-185, CS Dkt. No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002), *aff'd sub nom.* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967 (2005) (classifying cable modem broadband service); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Dkt. Nos. 95-20, 98-10, 01-337, 02-33, WC Dkt. Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (2005) (classifying DSL); *Appropriate Regul. Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd. 5901 (2007) (classifying wireless broadband); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Serv. as an Information Serv.*, WC Dkt. No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd. 13281 (2006) (classifying broadband over power lines).

Statement.[104] On appeal, the D.C. Circuit found that the Commission exceeded its authority because its proposed action was not "reasonably ancillary to the. . . effective performance of its statutorily mandated responsibilities."[105] In other words, the Commission could not enforce a mere policy statement. In response, the FCC adopted formal net neutrality rules in 2010 that sought to prevent ISPs from blocking, throttling, or otherwise unreasonably managing the traffic flowing over their network.[106] However, those rules were largely vacated by the D.C. Circuit in 2014, which held that the Commission could not impose POTS-like rules on Title I services.[107]

As a result of these legal setbacks, the FCC in 2015 reclassified broadband as a telecommunications service, a move it considered necessary to ensuring that its net neutrality rules survived legal challenge.[108] The Commission ultimately elected to forbear from applying most of the Title II rules to broadband except for those it deemed supportive of its net neutrality framework.[109] The D.C. Circuit, following its own prior rulings on FCC attempts to implement net neutrality rules, as well as Supreme Court precedent on the matter, deferred to the FCC's expertise in deciding how best to classify (or reclassify) the service and upheld this determination.[110]

Thus began a decade-long fight involving the FCC, ISPs, consumer groups, and the courts over the proper classification of broadband, an issue that many had thought was settled after the Commission maintained its information services designation for more than a decade. In 2018, the FCC changed the classification of broadband back to an information service.[111] This decision was largely upheld again by the D.C. Circuit in *Mozilla v. FCC*, which found that this latest reclassification was a reasonable (re)interpretation of the Communications Act.[112]

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104. *Formal Complaint of Free Press and Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, WC Dkt. No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd. 13028, 13032 (2008).

105. Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010) (quoting Am. Library Ass'n v. FCC, 406 F.3d 689, 693 (D.C. Cir. 2005)).

106. *Preserving the Open Internet Broadband Indus. Prac.*, GN Dkt. No. 09-191, WC Dkt. No. 07-52, Report and Order, 25 FCC Rcd. 17905 (2010).

107. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

108. *Protecting and Promoting the Open Internet*, GN Dkt. No. 14-28, Order on Remand, Order, Declaratory Ruling, 30 FCC Rcd 5601, 5614 (2015).

109. *Id.* at 5724, 5805–08.

110. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 707 (D.C. Cir. 2016).

111. *Restoring Internet Freedom*, WC Dkt. No. 17-108, Declaratory Ruling, Order, Report and Order, 33 FCC Rcd. 311, 312 (2018).

112. Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019).

A distinguishing feature of the 2018 Order was the Commission's attempt to "preempt any state or local measures that would effectively impose rules or requirements that [it] repealed or decided to refrain from imposing. . . or that would impose more stringent requirements for any aspect of broadband service."[113] This included preemption of "so-called 'economic' or 'public utility-type' regulations."[114] The FCC argued that this approach was necessary to ensure that broadband was "governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements."[115]

This aspect of the 2018 Order was struck down by the D.C. Circuit, which observed that, "in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law."[116] In other words, "the ability of the FCC to apply preemption to competing laws at the state or local level required the agency to identify an applicable statutory delegation of regulatory authority," which the D.C. Circuit found the Commission had failed to do.[117]

Dozens of states interpreted this outcome as an invitation to explore adopting their own net neutrality laws.[118] Indeed, many sought to follow the lead of California, which had adopted a net neutrality law in 2018 that enshrined many aspects of the FCC's 2015 rules.[119] Legal challenges to the California law were playing out alongside those involving the FCC's 2018 Order. Eventually, in 2022, the Court of Appeals for the Ninth Circuit, in *ACA Connects v. Bonta*, upheld the California net neutrality law.[120] In response to arguments that the law should be struck down because it conflicted with federal policy, the Ninth Circuit observed that "[b]y reclassifying broadband services under Title I, the FCC gave up its authority to regulate broadband services as common carriers and hence surrendered the authority it had to adopt federal net neutrality rules."[121] This meant that those arguing for preemption

113. *See Restoring Internet Freedom*, *supra* note 111, at 426–32.

114. *Id.* at 427–28.

115. *Id.* at 426.

116. *Mozilla Corp.*, 940 F.3d at 75.

117. Christopher R. Terry & Scott Memmel, *Harlem Shake Meets the Chevron Two Step: Net Neutrality Following Mozilla v. FCC*, 15 WASH. J.L. TECH. & ARTS 160, 187 (2020).

118. *See, e.g.,* Heather Morton, *Net Neutrality 2020 Legislation*, NCSL (Jan. 19, 2021), www.ncsl.org/technology-and-communication/net-neutrality-2020-legislation [https://perma.cc/Z24G-D2NQ]; Heather Morton, *Net Neutrality 2022 Legislation*, NCSL (May 4, 2022), https://www.ncsl.org/technology-and-communication/net-neutrality-2022-legislation [https://perma.cc/F599-SHTV].

119. CAL. CIV. CODE § 3100 (enacted by Stats. 2018, ch. 976).

120. ACA Connects v. Bonta, 24 F.4th 1233 (9th Cir. 2022).

121. *Id.* at 1241.

were essentially "contend[ing] that the state regulation conflicts with the absence of federal regulation."[122] However, the court observed that a long line of Supreme Court cases, as well as *Mozilla*, has consistently held that federal agencies like the FCC cannot "preempt state law without the authority to regulate" the service at issue.[123]

To date, only a handful of states, including California, have enacted net neutrality laws.[124] But some states have sought to go further. Notably, in 2021, New York enacted the Affordable Broadband Act (ABA), which required ISPs operating in the state to offer broadband service to qualifying low-income households at a price of no more than fifteen dollars per month.[125] The law was immediately challenged in court, with the petitioners arguing that the law was tantamount to rate regulation, which is only permissible under Title II, and was thus preempted by federal law "as interpreted by the FCC and embodied in [its] 2018 [net neutrality] Order."[126] The U.S. District Court for the Eastern District of New York granted the petitioners' request for a preliminary injunction, indicating that the court took seriously the preemption arguments notwithstanding contrary rulings from others circuit (e.g., *Bonta* and *Mozilla*). For a variety of reasons, the parties agreed to stipulate a final judgment, yielding a permanent injunction on enforcement of the ABA but preserving the right of New York State to appeal.[127]

Eventually, New York State appealed to the Second Circuit and won. In an opinion issued in April 2024, the Second Circuit rejected each of the petitioners' preemption arguments by, among other things, agreeing with the rationales put forward by the D.C. Circuit in *Mozilla* and the Ninth Circuit in *Bonta*: i.e., that "absent the power to act, the FCC has no power to preempt broadband rate regulation."[128] The New York ABA was allowed to stand.[129]

Around the same time, new leadership at the FCC appointed by President Biden restarted for the third time in ten years the process of reclassifying broadband. In April 2024, the Biden FCC adopted an Order that was very similar to the one adopted in 2015 and hinged on reclassifying broadband as a telecommunications

122. *Id.*
123. *Id.*
124. These include Colorado, Maine, New Jersey, Oregon, Vermont, and Washington.
125. N.Y. GEN. BUS. § 399-zzzzz (Consol. 2023).
126. N.Y. State Telecom. Ass'n v. James, 544 F. Supp. 3d 269, 280 (E.D.N.Y 2021) (granting a preliminary injunction).
127. N.Y. State Telecomms. Ass'n v. James, 101 F.4th 135, 142 (2nd Cir. 2024).
128. *Id.* at 155 (omitting citations).
129. *Id.* at 101.

service.[130] Once again, the Order was immediately challenged in court, although this time the venue was the Sixth Circuit.[131]

Shortly after litigation began, the Supreme Court issued its ruling in *Loper Bright Enterprises v. Raimondo.*[132] There, the Court overruled *Chevron v. NRDC*, ending decades of judicial deference to agency interpretations of the statutes they were charged with administering. As noted above, the FCC benefited immensely from so-called *Chevron* deference, especially in the context of classifying broadband. Indeed, in his concurrence in *Loper Bright*, Justice Gorsuch cited the Commission's shifting classifications of broadband as illustrative of the harms that undue deference to agencies had wrought: "Rather than promoting reliance by fixing the meaning of the law, *Chevron* deference engenders constant uncertainty and convulsive change even when the statute at issue itself remains unchanged."[133] In its place, the Court relocated to the courts the responsibility of providing the "best reading" of a statute, noting that, even when "a statute. . . delegates discretionary authority to an agency, the role of the reviewing court [is] to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[134]

In the aftermath of *Loper Bright*, the Sixth Circuit requested supplemental briefing from parties on the potential impacts of the ruling on the pending net neutrality case.[135] Oral argument was held in October 2024; the Sixth Circuit issued a ruling in January 2025. In its opinion, the court applied *Loper Bright* and offered its best reading of the Communications Act, which was that broadband is an information service.[136] As such, the FCC "exceeded its authority" when it reclassified broadband as a telecommunications service.[137] Thus, after decades of debate and "vacillation," the Sixth Circuit had finally settled the question of broadband classification.[138]

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130. *Safeguarding and Securing the Open Internet*, WC Dkt. Nos. 23-320, 17-108, Declaratory Ruling, Order, Report, and Order, and Order on Reconsideration, 39 FCC Rcd. 4975 (2024).

131. The 2024 Order was challenged in seven circuits. Per 8 U.S.C. 2112(a)(3), the appeals were consolidated in the Sixth Circuit. Several parties, including the FCC, requested that the case be transferred to the D.C. Circuit given its long history in deciding previous net neutrality cases. The Sixth Circuit denied that request *In re* MCP No. 185, No. 24-7000, 2024 WL 3517673 (6th Cir. June 28, 2024). Several weeks later, it stayed enforcement of the rules given the petitioners' likelihood of success on the merits challenging the Order. *See In re* MCP No. 185, 124 F.4th 993 (6th Cir. Jan. 2, 2025).

132. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

133. *Id.* at 438 (Gorsuch, J., concurring).

134. *Id.* at 395.

135. *In re* MCP No. 185, No. 24-7000, 2024 WL 3650468 (6th Cir. Aug. 1, 2024).

136. *In re* MCP No. 185, 124 F.4th 993, 1001 (6th Cir. 2025).

137. *Id.*

138. *Id.* at 1000.

The question of whether the FCC can preempt state regulation of broadband remains unsettled. The Second, Ninth, and D.C. Circuits have each found that, under the framework articulated in the FCC's 2018 net neutrality order, which was ultimately validated by the Sixth Circuit, states can act where the FCC has chosen not to. Whether courts in other circuits might come to a different conclusion if presented with an opportunity remains to be seen. Moreover, Supreme Court and circuit court precedent addressing a host of related telecommunications issues has underscored that the FCC cannot preempt state laws without specific statutory authority.[139]

C. Takeaways

In the immediate aftermath of the 1996 Act, when the markets for both VoIP and broadband were nascent, it appeared that the FCC was on a path towards adopting a regulatory framework for these and other advanced communications services that would be primarily national and light-touch in nature. This fit well with the "information services" designation enshrined in the Act, which itself was derived from decades of FCC inquiries into the proper regulatory treatment of "enhanced services."

For much of the early 2000s, the Commission took significant strides towards formalizing this framework. It classified all broadband platforms as information services and seemed to be on track to do the same with VoIP. These efforts, though, were quickly derailed by the net neutrality debate, which forced successive Commissions over the next two decades to grapple with shifting classifications of broadband. At the same time, the Commission failed to formally classify VoIP as an information service, opening the door to state regulatory attempts.

The current state of regulation for both services is thus far removed from where things began in the late 1990s. State regulation of both VoIP and broadband is ascendent, and the ability

139. *See, e.g.,* Lawrence J. Spiwak, *Can the Federal Communications Preempt State AI Laws? A Review of the Communications Act and Interpreting Caselaw,* PHOENIX CTR. POL'Y PAPER SERIES, no. 63, Nov. 2025, at 1, https://phoenix-center.org/pcpp/PCPP63Final.pdf [https://perma.cc/3E6H-WWHG] (reviewing caselaw addressing prior FCC attempts to preempt state laws). *Cf.* Comments of America's Communications Association on the Notice of Inquiry, *Build America: Eliminating Barriers to Wireline Deployments*, WC Dkt. No. 25-253, 28–31 (Nov. 18, 2025), https://acaconnects.org/filings/fcc-comments-re-inquiry-concerning-build-america-eliminating-barriers-to-wireline-deployments/ [https://perma.cc/62MK-VL7S] (arguing that 47 U.S.C. § 253 provides the Commission with sufficient authority to preempt state broadband laws like the low-cost requirement in New York because such laws have "a prohibitive impact on deployment of wireline networks capable of providing telecommunications services" and thus "materially inhibit[] the provision of telecommunications services in violation of Section 253(a).").

of the FCC to preempt state actions on both fronts is unclear. Moreover, the FCC can no longer rely on judicial deference of its interpretations of the Communications Act, the provisions of which are increasingly outdated.

CONCLUSION: WHERE DO WE GO FROM HERE?

It is at this point in the story when, given how things have played out in the past, one would expect Congress to intervene to provide the FCC, states, localities, service providers, and consumers with clarity about appropriate regulatory roles for VoIP and broadband. As discussed in Section II, Congressional action helped to address a variety of jurisdictional, competitive, technical, and practical issues in the POTS, cable, and wireless arenas. But the last time Congress updated the communications laws in a comprehensive manner was in 1996. Certain aspects of that law remain relevant, but even from the start, much of the law was deemed ambiguous. Fortunately for the Commission, courts were usually willing to defer to increasingly expansive FCC interpretations of those vague provisions in most contexts. However, with *Chevron* deference no longer available to the Commission, the need for Congressional action has only been heightened. Without Congressional intervention to specify exactly how it wishes the FCC to classify and regulate advanced communications services, and what roles, if any, it wishes the states to have, the status quo will harden and could encourage additional state-level regulatory and legislative action.

Continued state regulation of advanced communications services would create a patchwork of rules that FCCs of all political ilk have sought to prevent over the last two decades. No FCC has actively encouraged state regulation of VoIP or broadband. Instead, FCCs run by both Democratic and Republican chairs have repeatedly sought to narrow, if not eliminate, state regulatory roles for these services. This has stemmed from a recognition that inherently borderless services like VoIP and broadband are best governed by national regulatory frameworks of varying complexity: in general, Republican FCCs have pursued light-touch regulation; Democratic FCCs have pursued more hands-on regulation.

Congress, though, has proven unwilling and unable to address these issues. In the interim, state legislatures could proactively preclude their state PUCs from regulating VoIP and broadband. State legislatures could also continue revisiting and modernizing their existing rules for legacy services like POTS, clearing away the regulatory underbrush and removing outdated notions like COLR from their rolls. This is something that only about half the states have done to date, leaving significant room for legislative action.

Adopting "deregulatory" laws would not eliminate other important roles that states and localities play in the advanced communications space. To the contrary, these actors must continue to play helpful roles facilitating the deployment of modern networks across the country. There is much work to be done on this front, from providing more clarity and uniformity in how localities administer their rights-of-way to adopting better pole attachment policies.

In sum, regulating the provision of VoIP and broadband services is best left to the FCC. Achieving that goal requires Congressional intervention. Short of that, states should not view the absence of FCC action in these spaces as an invitation to fill a perceived regulatory vacuum. Instead, states are best positioned to create more hospitable environments for investing in and building advanced networks.