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# STATE NET NEUTRALITY

Daniel A. Lyons\*

## INTRODUCTION

For nearly a century, state regulators played an important role in telecommunications regulation. The 1934 Communications Act gave the Federal Communications Commission authority to regulate interstate telephone service, but explicitly left intrastate calls—which comprised 98% of Depression-era telephone traffic—to state public utility commissions.<sup>1</sup> Although the 1996 Telecommunications Act updated this structure to fit a post-monopoly environment, Congress continued to rely significantly on state regulators to bring its vision of local competition to fruition.<sup>2</sup>

Changes in the competitive and technological landscape over the past two decades have nonetheless rendered these regulators largely obsolete. The traditional distinction between local and long-distance service disappeared, eradicating the portion of the telephone market traditionally entrusted to state public utility commissions.<sup>3</sup> Further, an increasingly competitive market for voice service prompted many states to voluntarily relinquish what residual regulatory authority remained over rates and terms of service.<sup>4</sup> Then, the Internet displaced the telephone

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\* Professor, Boston College Law School. Thanks to Tom Barnico, the Hon. D. Michael Fisher, Crystal Lyons, Randolph May, Geoff Manne, Geoffrey Why, and participants at the University of Pittsburgh Law Review Net Without Neutrality Symposium for their helpful comments and suggestions.

<sup>1</sup> Federal Communications Act of 1934, ch. 652, § 2, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. § 151 (1996)); see Daniel A. Lyons, *Technology Convergence and Federalism: Who Should Decide the Future of Telecommunications Regulation?*, 43 UNIV. MICH. J.L. REF. 383, 389 (2010).

<sup>2</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

<sup>3</sup> See Philip J. Weiser, *The Forgotten Core of the Telecommunications Act of 1996*, 68 FED. COMM. L.J. 71, 72 (2016) (noting the 1996 Act is “a foreign concept to those who no longer think of telecommunications markets in terms of local or long distance services”).

<sup>4</sup> The California Public Utilities Commission’s 2006 decision to deregulate telephone service is illustrative. Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the

system as America's primary telecommunications network.<sup>5</sup> Unlike telephony, the Internet was born as an inherently national network, marked by a light-touch federal regulatory regime that left little room for the states.<sup>6</sup> Landline telephony faded to obscurity, taking with it most traditional state regulatory authority over telecommunications. By the late 2000s, scholars and policymakers alike recognized that the era of comprehensive state telecommunications regulation had largely come to an end.<sup>7</sup>

Perhaps surprisingly, however, the first years of the Trump Administration have seen a resurgence in state telecommunications regulation—driven not by state institutional concerns, but by policy disagreements over net neutrality. In 2017, the Federal Communications Commission (“the Commission” or “FCC”) repealed an earlier Order classifying broadband providers as common carriers and regulating their network management practices.<sup>8</sup> The Commission's decision prompted a flurry of activity in governors' mansions and legislatures nationwide, activity which sought to restore at the state level regulations that had been repealed at the federal level.

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Regulation of Telecommunications Utilities, Calif. Pub. Utilities Comm'n, Dec. No. 06-08-030 (2006) (noting that “dramatic changes have occurred in the voice communications market” rendering it “far more competitive” than in previous eras. The Commission eliminated most rate regulation and tariff requirements, relying instead on competitive forces to provide just and reasonable rates.)

<sup>5</sup> See, e.g., Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 874 (2009) (“Just as telephony replaced telegraphy, access to the Internet has replaced telephony as the new basic, general-purpose communications network.”).

<sup>6</sup> See, e.g., 47 U.S.C. § 230(b) (2018) (“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.”); see also WILLIAM E. KENNARD, *CONNECTING THE GLOBE: A REGULATOR'S GUIDE TO BUILDING A GLOBAL INFORMATION COMMUNITY*, at IX-2 (1999) (observing that “[g]overnment policy can have a profound impact on Internet development; it can either foster it or hinder it. To date, the Internet has flourished in large part due to the absence of regulation. A ‘hands-off’ approach allows the Internet to develop free from the burdens of traditional regulatory mechanisms.”).

<sup>7</sup> See, e.g., Charles J. Cooper & Brian Stuart Koukoutchos, *Federalism and the Telephone: The Case for Preemptive Federal Deregulation in the New World of Intermodal Competition*, 6 J. TELECOMM. & HIGH TECH. L. 293, 317 (2008); Douglas C. Sicker, *The End of Federalism in Telecommunications Regulations?*, 3 NW. J. TECH. & INTEL. PROP. 130, 132 (2005).

<sup>8</sup> In the Matter of Restoring Internet Freedom, 33 FCC Rcd. 311 (2018).

Through executive orders<sup>9</sup> and new statutes,<sup>10</sup> states aggressively re-entered the telecommunications policy arena. These efforts were challenged in turn by the Commission,<sup>11</sup> whose 2017 order had ostensibly preempted state broadband regulations<sup>12</sup> (as had the 2015 Open Internet Order that it replaced).<sup>13</sup>

This Article addresses the broader federalism questions raised by this net neutrality clash. Part I provides an overview of telecommunications federalism from the 1934 Communications Act through the present day, looking at the division of federal and state jurisdiction over traditional telephone service, wireless telephony, and information services. Part II examines the various steps that states have taken to regulate broadband providers' network management practices in response to the Commission's Restoring Internet Freedom Order and assesses the likelihood that these initiatives will survive a federal preemption challenge. Part III looks more broadly at the question of state authority to regulate broadband network management practices. It discusses the statutory and constitutional limits on state power to regulate broadband providers. Once the sphere of potential authority is defined, Part IV addresses how states should exercise this power and highlights alternative tools available for states that wish to shape the net neutrality debate.

## I. STATE REGULATION AND FEDERAL PREEMPTION IN TELECOMMUNICATIONS

States have long played a role in telecommunications regulation. But the contours of that role have differed somewhat over time, as Congress and the Commission drew different jurisdictional lines in response to changes in technology

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<sup>9</sup> See Haw. Exec. Order No. 18-02 (2018); Mont. Exec. Order No. 3-2018 (2018); N.J. Exec. Order No. 9 (2018); N.Y. Exec. Order No. 175 (2018); R.I. Exec. Order No. 18-02 (2018); Vt. Exec. Order No. 2-18 (2018).

<sup>10</sup> S.B. 822, 2018 Gen. Assemb. (Cal. 2018); H.B. 4155, 79th Leg. Assemb., Reg. Sess. (Or. 2018); S. 289 (Vt. 2018); H.B. 2282, 65th Leg., Reg. Sess. (Wash. 2018).

<sup>11</sup> See, e.g., Complaint for Declaratory and Injunctive Relief, *United States v. California*, No. 2:18-at-01539 (E.D. Cal. Sept. 30, 2018).

<sup>12</sup> *Restoring Internet Freedom*, 33 FCC Rcd. at 427-29 ("Just as the Title II Order promised to 'exercise our preemption authority to preclude states from imposing regulations on broadband service that are inconsistent' with the federal regulatory scheme, we conclude that we should exercise our authority to preempt any state or local requirements that are inconsistent with the federal deregulatory approach we adopt today.").

<sup>13</sup> Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5804 (2015) ("[W]e announce our firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt in this Order.").

and marketplace dynamics. This section traces that evolution over three communications networks: traditional landline telephone regulation, wireless telephony, and information services (including broadband networks).

### A. Landline Telephone Regulation

Traditional telephone regulation first developed at the state level, reflecting the nature of early telephony as a primarily local service. In the late nineteenth century, local exchanges developed as a method of coordinating telephone traffic among members of a community. But communication among communities was limited, in part because local exchanges refused to interconnect with one another and in part because Bell Telephone, the nation's first telephone company, held key patents on technology to transmit calls over longer distances.<sup>14</sup> At the same time, states were experimenting with public utility commissions to regulate new industries "affected by the public interest" that arose in response to the second Industrial Revolution.<sup>15</sup> By the early twentieth century, these agencies included telephone service within their portfolio. On the eve of the founding of the Federal Communications Commission, forty-five of the forty-eight states regulated local telephony via public utility commissions.<sup>16</sup>

Over time, federal regulators also began asserting jurisdiction over telephone service, partly in response to concerns about anticompetitive behavior by Bell Telephone, the dominant player in the industry. Congress initially gave the Interstate Commerce Commission ("ICC") jurisdiction over interstate telephone networks under the 1910 Mann Elkins Act, though the agency was preoccupied by monitoring the nation's railroad industry and did little to oversee Bell.<sup>17</sup> An early federal antitrust case scored more moderate success, yielding a 1913 agreement by Bell (known as the Kingsbury Commitment) to interconnect its long-distance network to non-Bell local telephone companies and to accept ICC oversight of its merger and acquisition activity.<sup>18</sup>

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<sup>14</sup> See Lyons, *supra* note 1, at 387–88; 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, 1141 (2014).

<sup>15</sup> Davidson & Santorelli, *supra* note 14, at 1141–42.

<sup>16</sup> See Lyons, *supra* note 1, at 389.

<sup>17</sup> *Id.* at 388 n.16.

<sup>18</sup> PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW §§ 1.3.3, 3.2.2. (2d ed. 1999).

In 1934, Congress transferred this authority to a new, sector-specific regulator, the Federal Communications Commission. The Communications Act (the “Act”) charged this new Commission with regulating interstate and international telephone service pursuant to a statutorily-mandated common carriage regime.<sup>19</sup> Under the Act, Bell Telephone had to offer its service at just and reasonable rates pursuant to tariffs filed with the Commission and could not unreasonably discriminate among customers in the provision of that service.<sup>20</sup>

To ameliorate concerns among state regulators, the Act contained an important state savings provision. Section 2 granted the Commission jurisdiction over “all interstate and foreign communication by wire or radio” but provided that “nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service.”<sup>21</sup> This proviso was significant, as it blunted a potential assault on state authority that some feared when jurisdiction rested with the ICC.<sup>22</sup> In the *Shreveport Rate Case*, the Supreme Court permitted the ICC to set intrastate railroad rates if the agency found that intrastate rates affected interstate commerce, thus allowing the ICC to preempt decisions that were traditionally the prerogative of state public utility commissions.<sup>23</sup> Section 2 of the Communications Act explicitly prevented the Federal Communications Commission from making a similar jurisdictional power grab over intrastate telephone rates.<sup>24</sup>

The Act thus codified the existing Dual Federalism regime over domestic telephone service. As the Supreme Court explained, Congress sought “to divide the world of domestic telephone service neatly into two hemispheres—one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate services, over which the states would retain exclusive

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<sup>19</sup> Federal Communications Act of 1934, ch. 652, § 2, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. § 151).

<sup>20</sup> 47 U.S.C. §§ 201–03 (2018).

<sup>21</sup> Federal Communications Act, §§ 221(b), 406 (codified at 47 U.S.C. § 152 (2018)).

<sup>22</sup> Davidson & Santorelli, *supra* note 14, at 1143–44.

<sup>23</sup> *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914).

<sup>24</sup> 47 U.S.C. § 152(b).

jurisdiction.”<sup>25</sup> The preservation of state autonomy over intrastate service made sense, given the state of the industry: as noted above, intrastate calls comprised 98 percent of all telephone traffic, so regulation should reside primarily at the local level.<sup>26</sup> At the same time, the existence of a federal regulator with explicit jurisdiction over interstate traffic thwarted the errant attempt by a state to regulate beyond its boundaries. As the Court discussed in *Smith v. Illinois Bell* (a pre-Communications Act case), “The separation of the intrastate and interstate property, revenues and expenses of the company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation.”<sup>27</sup> Of course, this tidy distinction was not always so neat in practice. Intrastate and interstate service often relied on the same facilities and were often provided by divisions within the same company, leading to disputes about how to divide jurisdiction at the margins over questions such as depreciation methods for shared equipment.<sup>28</sup> But overall, the interstate/intrastate divide would define the boundary between federal and state authority over traditional telephone service for the next six decades.

The Act’s division of jurisdictional authority mirrored that contained in many other New Deal-era regulatory statutes. The Federal Power Act, for example, gave the Federal Power Commission (now the Federal Energy Regulatory Commission) jurisdiction over interstate transmission of electricity and interstate wholesale electricity sales, but explicitly barred the Commission from exercising jurisdiction over local distribution or intrastate electricity transmission.<sup>29</sup> The Natural Gas Act makes a similar distinction between interstate and intrastate gas transportation and sale.<sup>30</sup> Like the Communications Act, these statutes contemplated “a harmonious, dual system of regulation . . . [with] federal and state regulatory bodies operating side by side, each active in its own sphere . . . without any confusion of functions.”<sup>31</sup>

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<sup>25</sup> *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 360 (1986). Section two prohibited the Commission from regulating intrastate communications, but states were prohibited from regulating interstate calls.

<sup>26</sup> Federal Communications Act of 1934 § 2; *see Lyons, supra* note 1, at 389.

<sup>27</sup> *Smith v. Ill. Bell Tel. Co.*, 282 U.S. 133, 148 (1930).

<sup>28</sup> *La. Pub. Serv. Comm’n*, 476 U.S. at 360.

<sup>29</sup> 16 U.S.C. § 824(b)(1) (2018). For a history of this clause, *see Daniel A. Lyons, Protecting States in the New World of Energy Federalism*, 67 EMORY L.J. 921, 930 (2018).

<sup>30</sup> 15 U.S.C. § 717(b) (2018).

<sup>31</sup> *Pub. Utils. Comm’n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 467 (1943).

As in many of these other regulated industries,<sup>32</sup> shifting technological and legal developments eventually prompted Congress to replace this Dual Federalism model with a Cooperative Federalism regime. Beginning in the late 1970s, the Commission began pushing interstate service in a more competitive direction, first by facilitating entry of new long-distance providers such as MCI and Sprint,<sup>33</sup> and ultimately by breaking up the Bell Monopoly in 1982.<sup>34</sup> Local service was still largely monopolistic, however, due partly to economic factors and partly to state legislation protecting incumbents from competition. Through the 1996 Telecommunications Act,<sup>35</sup> Congress sought to create competition in local telephone service, by preempting state-granted local monopolies and requiring incumbent local providers to make their networks available for new competitors to lease at regulated rates.<sup>36</sup> This manufactured competition was a federally mandated scheme, to be executed in part by state regulators against a backdrop of federal guidelines set by the Commission.<sup>37</sup> States were to review interconnection agreements between local carriers and arbitrate disputes between negotiating parties to facilitate such agreements.<sup>38</sup> States also retained regulatory authority over local providers to promote universal service, protect consumers, and manage local rights-of-way.<sup>39</sup>

The 1996 Telecommunications Act both reflected and exacerbated a more fundamental fault line between federal and state regulators. Federalism disputes during the Dual Federalism Era largely reflected somewhat mundane issues such as depreciation schedules or jurisdictional separation rules.<sup>40</sup> But as Dual Federalism gave way to Cooperative Federalism, clashes between federal and state regulators

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<sup>32</sup> See, e.g., Lyons, *supra* note 29, at 931–41.

<sup>33</sup> See, e.g., *In re Applications of Microwave Comm., Inc.*, 18 F.C.C.2d 953 (1969), *reh'g denied*, 21 F.C.C.2d 190 (1970); see Lyons, *supra* note 1, at 389–90.

<sup>34</sup> *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 135 (D.D.C. 1982). The settlement became effective on January 1, 1984. See Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 HASTINGS L.J. 1395, 1396 (1999).

<sup>35</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

<sup>36</sup> 47 U.S.C. §§ 251, 253 (2018); see Lyons, *supra* note 1, at 393–94.

<sup>37</sup> Lyons, *supra* note 1, at 393.

<sup>38</sup> 47 U.S.C. § 252 (2018).

<sup>39</sup> *Id.* § 253.

<sup>40</sup> See, e.g., *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

reflected a larger dispute over the goal of communications policy. Congress and the FCC sought to promote efficiency and competition, while state regulators remained focused on traditional concerns about equity, affordability, and redistribution.<sup>41</sup>

Federal authorities ultimately won this policy battle against their state counterparts. Even before the 1996 Act, courts blessed many of the Commission's efforts to promote competition even when doing so pushed federal regulators into the state's sphere. For example, the Fourth Circuit ruled that the Commission may preempt state authority where it was impossible to separate the intrastate and interstate effects of a federal policy<sup>42</sup>—a decision that the Supreme Court later cited with approval.<sup>43</sup> In the 1996 Act context, federal supremacy reached its peak in *AT&T Corp. v. Iowa Utilities Board*,<sup>44</sup> where the Supreme Court recognized that the Commission had broad discretion to enact rules to further the Act's goals, even when those rules directed state regulators on how to exercise authority explicitly delegated to them under the Act.<sup>45</sup>

Since the 1996 Act, technological and marketplace developments have rendered traditional state telephone regulation largely obsolete. Beginning in the early 2000s, customers stopped recognizing local telephone service as a separate, standalone product. A series of mergers established Verizon and AT&T as national networks that offered local and long-distance service bundled together, reducing intrastate service to a throw-in portion of a broader, competitive telecommunications bundle.<sup>46</sup> At the same time, wireless communication, Voice-over-Internet-Protocol ("VoIP") service, and other communications offerings developed as popular substitutes for traditional landline telephone service.<sup>47</sup> The number of residential

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<sup>41</sup> Eli Noam, *Federal and State Roles in Telecommunications: The Effects of Deregulation*, 36 VAND. L. REV. 949, 956 (1983).

<sup>42</sup> See, e.g., *N.C. Util. Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976); *N.C. Util. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977).

<sup>43</sup> See *La. Pub. Serv. Comm'n*, 476 U.S. at 376 n.4 (recognizing the impossibility exception but finding it inapplicable to the case at bar).

<sup>44</sup> *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999).

<sup>45</sup> *Id.* at 374; see Davidson & Santorelli, *supra* note 14, at 1160.

<sup>46</sup> See, e.g., Robert C. Atkinson, *Digital Age Communications Law Reform: Telecom Regulation for the 21st Century: Avoiding Gridlock, Adapting to Change*, 4 J. TELECOMM. & HIGH TECH. L. 379, 386 (2006).

<sup>47</sup> *Id.* at 390.

landlines declined from a high of 146.7 million in 2000<sup>48</sup> to only 22.5 million in 2017.<sup>49</sup> Recognizing this decline and the increased consumer choice offered by these technological developments, many states began deregulating local telephone communications by the mid-2000s.<sup>50</sup> That is not to suggest that states have abandoned the telecommunications field completely. In addition to retaining traditional consumer protection authority, many public utility commissions remain active on issues such as universal service, local rights-of-way, and public safety.<sup>51</sup> But most have abandoned the comprehensive oversight that historically marked state telephone regulation.

### B. *Wireless Telephony*

The Act draws a different jurisdictional line regarding wireless telephone service, not on the basis of geography, but regulatory activity. Section 332(c), adopted as part of the Omnibus Budget Reconciliation Act of 1993,<sup>52</sup> provides that “no state or local government shall have any authority to regulate the entry or the rates charged by any commercial mobile service or any private mobile service.”<sup>53</sup> But like Section 2, Section 332 also contains a savings clause: “this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.”<sup>54</sup> The Act also explicitly preserves state and local zoning authority

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<sup>48</sup> Press Release, Fed. Commc’ns Comm’n, Fed. Commc’ns Comm’n Releases Latest Data on Local Tel. Competition (May 21, 2001). For Pre-2013 data, see *Local Telephone Competition Reports*, FED. COMMS. COMMISSION (Feb. 24, 2014), <https://www.fcc.gov/general/local-telephone-competition-reports>. Note that this figure may be slightly inflated, as it includes residential and small business lines.

<sup>49</sup> FED. COMMC’NS COMM’N, FCC 18-181, IN THE MATTER OF COMMUNICATIONS MARKETPLACE REPORT, para. 67 (2018); INDUS. ANALYSIS & TECH. DIV. WIRELINE COMPETITION BUREAU, FED. COMMC’NS COMM’N, VOICE TELEPHONE SERVICES: STATUS AS OF JUNE 30, 2017 (2018).

<sup>50</sup> See, e.g., Calif. Pub. Util. Comm’n, Dec. No. 06-08-030, Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the Regulation of Telecommunications Utilities (2006).

<sup>51</sup> See, e.g., NAT’L ASS’N OF REGULATORY UTIL. COMM’RS, RESOLUTIONS PASSED BY BOARD OF DIRECTORS AT THE 2019 WINTER POLICY SUMMIT OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS (2019) (passing resolution urging prompt resolution of National Lifeline Verifier database).

<sup>52</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b), 107 Stat. 312, 392 (codified in scattered sections of 47 U.S.C. (1994)).

<sup>53</sup> 47 U.S.C. § 332(c)(3)(A) (2018). The Act also amended Section 2 to clarify that wireless service does not fall within the state savings clause. *Id.* § 152(b).

<sup>54</sup> *Id.*

over the placement of wireless facilities such as cell phone towers, subject to federal judicial review for unreasonable discrimination.<sup>55</sup>

Congress displaced state authority because it recognized that, unlike traditional landline service, wireless service was an inherently national service that would benefit from uniformity. The House Report on the bill explained that preemption would “foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.”<sup>56</sup> Cell phones are mobile, making it more difficult to distinguish with certainty between intrastate and interstate calls. Moreover, unlike traditional landline telephony, wireless service was born as a competitive enterprise. The original allocation of spectrum licenses contemplated multiple providers in each territory, and the infrastructure of distributed cell sites was easier to deploy than landlines, reducing the need for local consultation and regulatory oversight as a bulwark against suspected monopolization.<sup>57</sup> Thomas Hazlett showed that wireless preemption proved to be efficient, with per-minute prices falling 80% in the decade following preemption due to competitive entry and national network consolidation that allowed firms to offer nationwide plans.<sup>58</sup>

Moreover, courts have interpreted the scope of Section 332’s preemption provision broadly, reducing states primarily to a consumer protection role. The robustness of this provision was tested in *Cellco Partnership v. Hatch*.<sup>59</sup> In that case, Minnesota passed a statute prohibiting providers from implementing changes in a wireless contract that “could result” in increased rates or an extended contract term, without first undertaking a 60-day waiting period and receiving affirmative consent from the customer.<sup>60</sup> The court concluded that the statute effectively fixed rates by preventing freezing rates during the waiting period (and longer for customers who

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<sup>55</sup> *Id.* § 332(c)(7).

<sup>56</sup> H.R. REP. NO. 103-111, at 260 (1993); see Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework that is “Hog Tight, Horse High, and Bull Strong,”* 50 FED. COMM. L.J. 547, 560 (1998).

<sup>57</sup> See Kennedy & Purcell, *supra* note 56, at 560.

<sup>58</sup> Thomas W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?*, 56 FED. COMM. L.J. 155, 221 (2003).

<sup>59</sup> *Cellco P’ship v. Hatch*, 431 F.3d 1077 (2005).

<sup>60</sup> *Id.* at 1079.

did not opt in to the change).<sup>61</sup> Minnesota argued that its regulation merely enforced traditional contract law in ways that regulated consumer protection in the wireless space, and therefore fell into the “other terms and conditions” safe harbor.<sup>62</sup> But the court rejected this argument because the regulation did not reflect a rule applied to the interpretation of contracts generally—instead, it created a unique duty on providers of wireless telecommunications services.<sup>63</sup> Moreover, the regulation directly impacted the rate that carriers could charge and therefore was more properly classified as an impermissible state regulation of rates.<sup>64</sup>

### C. Information Services

The Commission took a similar approach to information services; it preempted state regulation in order to impose a nationwide deregulatory regime. Information services (originally called “enhanced services”) are defined as services that “offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”<sup>65</sup> In the pre-Internet era, this category would have included services such as remote database access and voicemail, which use communications networks to engage in a data processing function.<sup>66</sup> In the *Computer II* proceeding, the Commission chose not to regulate information services, finding that “regulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market.”<sup>67</sup> In *Computer III*, the Commission went further, preempting state regulation of enhanced services that would “necessarily thwart or impede federal regulation.”<sup>68</sup> Mirroring Congress’s conclusions about wireless markets, the Commission found that “[t]he enhanced services market generally is national or regional in scope, and a degree of certainty

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<sup>61</sup> *Id.* at 1082.

<sup>62</sup> *Id.* at 1083.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 47 U.S.C. § 153(24) (2018).

<sup>66</sup> See Cooper & Koukoutchos, *supra* note 7, at 327–28.

<sup>67</sup> In the Matter of Amendment of Section 64.702 of the Comm’n’s Rules & Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 434 (1980).

<sup>68</sup> In the Matter of Computer III Remand Proceedings, 6 FCC Rcd. 174, 181 (1990).

and uniformity may be necessary to enable the enhanced services market to develop in the way that both state commissions and this Commission desire.”<sup>69</sup>

As the Internet developed, the Commission “formalize[d a] policy of nonregulation” of information services “to ensure that Internet applications remain[ed] insulated from unnecessary and harmful economic regulation at both the federal and state levels.”<sup>70</sup> It rested this policy on both the *Computer III* inquiry and the Telecommunications Act of 1996, in which Congress expressed a national policy “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.”<sup>71</sup> The Commission explained that “[p]assage of the 1996 Act increases substantially the likelihood that any state attempt to impose economic regulation of [Internet-based information services] would conflict with federal policy.”<sup>72</sup>

When challenged, the Commission has successfully defended this preemptive deregulation policy. In 2003, the Minnesota Public Utilities Commission ordered VoIP provider Vonage to comply with state regulations governing the provision of intrastate telephone service.<sup>73</sup> Like most VoIP providers, Vonage provided a voice communication product that communicated over the Internet rather than through traditional telephone lines, and therefore operated as a substitute for traditional telephone service.<sup>74</sup> Vonage successfully petitioned the FCC to preempt the Minnesota order.<sup>75</sup> The Commission held that, if Vonage’s VoIP product was an information service, preemption was appropriate under the “impossibility exception,” which allows the Commission to preempt state regulation where it is impossible or impractical to separate a service into interstate and intrastate components, and where the state regulation interferes with a valid federal rule or

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<sup>69</sup> *Id.*

<sup>70</sup> In the Matter of Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor Telecommunications Service, 19 FCC Rcd. 3307, 3307 (2004).

<sup>71</sup> 47 U.S.C. § 230(b)(2) (2018). This is one of very few times the 1996 Act mentioned the Internet at all.

<sup>72</sup> *Pulver.com*, 19 FCC Rcd. at 3318.

<sup>73</sup> *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 576 (8th Cir. 2007). VoIP provides voice service using packet-switching technology conveyed via the Internet, rather than circuit-switching over the traditional telephone network.

<sup>74</sup> *Id.* at 574–76.

<sup>75</sup> *Id.* at 576.

policy.<sup>76</sup> In this case, the Commission explained that any state regulation of an information service would conflict with the federal policy of nonregulation.<sup>77</sup> The Eighth Circuit upheld this decision, finding that “[c]ompetition and deregulation are valid federal interests the FCC may protect through preemption of state regulation.”<sup>78</sup> As late as 2018, the court reiterated its holding (in another Minnesota VoIP case) that “any state regulation of an information service conflicts with the federal policy of nonregulation, so that such regulation is preempted by federal law.”<sup>79</sup>

#### D. Broadband Regulation

##### 1. Classifying and Reclassifying Broadband Service

The net neutrality saga is inextricably intertwined with the Commission’s indecision about the proper regulatory classification of broadband service. In the late 1990s, telephone-based Digital Subscriber Line (“DSL”) service and cable modem service emerged as competitive alternatives to traditional dial-up Internet access.<sup>80</sup> DSL was saddled with unbundling restrictions, vestigial remains of the *Computer II* and *Computer III* eras that required the telephone company to offer basic transport to nonfacilities-based Internet service providers.<sup>81</sup> Other than these requirements, however, the Commission deliberately chose not to classify broadband access under the Communications Act,<sup>82</sup> preferring to allow this new technology to develop free from regulatory burdens. The city of Portland, Oregon rushed to fill this regulatory void in 1998, classifying cable modem service as “cable service” under the Act so as to attach an open access condition to AT&T Broadband in connection with the city’s

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<sup>76</sup> *Id.* The Commission declined to decide whether VoIP is properly classified as a Title II telecommunications service or a Title I information service, as either way, state regulation would interfere with a valid federal objective. *Id.* The court agreed. *Id.* at 574.

<sup>77</sup> *Id.* at 580.

<sup>78</sup> *Id.*

<sup>79</sup> *Charter Advanced Servs. (MN) LLC v. Lange*, 903 F.3d 715, 718 (8th Cir. 2018) (quoting *Minn. Pub. Utils. Comm’n*, 483 F.3d at 580). In this case, the court acknowledged the FCC’s deliberate ambiguity regarding whether VoIP is a telecommunications or information service, and conducted its own analysis to determine that information service was more appropriate. *Id.* at 719.

<sup>80</sup> *See Applications for Consent to Transfer Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp. Transferee*, 15 FCC Rcd. 9816, 9862–63 (discussing the state of competition in 2000).

<sup>81</sup> *See In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853, 14869 (2005) (discussing prior regulatory framework).

<sup>82</sup> *See AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000) (“We note at the outset that the FCC has declined, both in its regulatory capacity and as *amicus curiae*, to address the issue before us.”).

approval of a merger between that company and Tele-Communications Incorporated (“TCI”).<sup>83</sup> On appeal, the Ninth Circuit invalidated this classification, finding that cable modem service did not fit the Act’s definition of “cable service” and was better classified as a Title II telecommunications service.<sup>84</sup>

Its hand having thus been forced, the Commission issued a declaratory ruling classifying cable modem service as a Title I information service.<sup>85</sup> The Supreme Court upheld this distinction in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,<sup>86</sup> finding under the *Chevron*<sup>87</sup> doctrine that the statute was ambiguous regarding whether cable modem service should be classified as an information service or a telecommunications service, and that the agency’s determination was reasonable.<sup>88</sup> The agency then quickly classified DSL service,<sup>89</sup> wireless broadband,<sup>90</sup> and broadband over power lines<sup>91</sup> as information services as well, to promote regulatory parity.

At the same time, the Commission took steps to signal that its classification did not signal an abandonment of consumer protection measures. The 2005 DSL reclassification decision included a nonbinding policy statement guaranteeing consumers the right to access content, applications, and services of their choice, using the device of their choice.<sup>92</sup> It also stated that consumers are entitled to competition among service providers.<sup>93</sup> In 2010, the Commission imposed net

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<sup>83</sup> *Id.* at 875.

<sup>84</sup> *Id.* at 876, 878.

<sup>85</sup> In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802–03 (2002).

<sup>86</sup> See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

<sup>87</sup> *Chevron U.S.A., Inc. v. Nat’l Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>88</sup> *Id.* at 974.

<sup>89</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14853 (2005).

<sup>90</sup> See *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14986 (2005).

<sup>91</sup> In the Matter of United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service, 21 FCC Rcd. 13281 (2006).

<sup>92</sup> *Appropriate Framework for Broadband Access*, 20 FCC Rcd. at 14986.

<sup>93</sup> *Id.*

neutrality conditions on broadband providers using its Title I authority,<sup>94</sup> which was later struck down by the D.C. Circuit in *Verizon v. FCC*.<sup>95</sup> The court found that net neutrality restrictions, most notably the Commission's prohibitions on blocking and paid prioritization, amounted to common carriage, which the Communications Act prohibited the agency from placing on noncommon-carrier networks.<sup>96</sup> The Commission responded in 2015 by reclassifying broadband service as a Title II telecommunications service (thus making broadband a common-carrier network under the Act) and re-imposing net neutrality restrictions on broadband providers, a decision upheld by the D.C. Circuit in *United States Telecom Ass'n v. FCC*.<sup>97</sup> Two years later, the Commission repealed that Order, restoring the pre-2015 classification of broadband providers as information services.<sup>98</sup>

## 2. Broadband Regulation and Preemption Provisions

While the Commission flip-flopped on the proper regulatory classification for broadband, it has been consistent in its stance that broadband regulation is a matter for federal, not state, authorities. The 2010 Order explained that the Commission had authority to preempt state regulations that interfere with valid federal objectives and announced that it would consider preemption issues on a case-by-case basis.<sup>99</sup> The 2015 Order was more explicit: although the order reclassified broadband service as a Title II telecommunications service, thus subjecting broadband to the shared-jurisdiction regulatory scheme governing telephony, the Commission “announce[d] our firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt in this Order.”<sup>100</sup> The Commission warned that it “has used preemption to protect federal interests when a state regulation conflicts with federal rules or policies, and we intend to exercise this authority to preempt any

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<sup>94</sup> In the Matter of Preserving the Open Internet: Broadband Industry Practices, 25 FCC Rcd. 17905 (2010).

<sup>95</sup> *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

<sup>96</sup> *Id.* at 655; see 47 U.S.C. § 153(51) (2018) (“A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.”).

<sup>97</sup> *U.S. Telecomm. Ass'n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016).

<sup>98</sup> In the Matter of Restoring Internet Freedom, 33 FCC Rcd. 311, 312 (2018).

<sup>99</sup> *Preserving the Open Internet*, 25 FCC at 17970 n.374.

<sup>100</sup> In the Matter of Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5804 (2015). The order also explicitly preempted state attempts to impose USF contribution requirements on broadband providers. *Id.* at 5803.

state regulations which conflict with this comprehensive regulatory scheme or other federal law,” and cited in particular hypothetical state efforts to “restrict entry into the broadband market through certification requirements or regulate the rates of broadband Internet access service through tariffs.”<sup>101</sup>

This language seems designed to assuage fears that the imposition of common carriage would bring a Bell-era regulatory structure to broadband providers, including potentially significant state-level oversight. The Commission was concerned about the accusation that it was “regulating the Internet,” and this may have been a way to signal its desire to create a Title II-lite regime that would merely provide a firm legal basis to impose the net neutrality restrictions that the D.C. Circuit had blocked in *Verizon*.<sup>102</sup>

Notably, this preemption provision might not have been bulletproof. By reclassifying broadband under Title II, the Commission opened the door to two potential realms of state authority that, statutorily, the agency could not reach. First, under Section 2(b), the Commission is forbidden from regulating purely intrastate transmissions.<sup>103</sup> An enterprising state regulator could have attempted to identify and regulate purely intrastate broadband communications or services. This would have been complicated, however, by the Commission’s finding that intrastate service could not be separated from interstate service and, therefore, that regulation of intrastate traffic was preempted by the impossibility exemption. Second, Section 332(c) preserves state regulatory authority over “other terms and conditions” of commercial mobile radio service.<sup>104</sup> This would have given states some jurisdiction to regulate wireless broadband service in particular, if the regulation could be classified as consumer protection or could otherwise fit the statutory carveout. While these potential founts of authority were theoretically available, state regulators did not take advantage of the opportunity to exercise this authority during the two years that broadband was classified as a Title II service.<sup>105</sup>

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<sup>101</sup> *Id.* at 5804.

<sup>102</sup> See *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

<sup>103</sup> 47 U.S.C. § 152(b) (1934).

<sup>104</sup> 47 U.S.C. § 332(c)(3)(a) (2018).

<sup>105</sup> At a trade show in 2016, I personally asked a panel of state regulators whether they had ever discussed using this new authority made available by reclassification. I received several glances ranging from puzzlement to bemusement, and a uniform assurance that such possibilities were not being seriously considered.

Like the 2015 Open Internet Order, the 2017 Restoring Internet Freedom Order expressly preempts “any state or local measures that would effectively impose rules or requirements” that the order repealed or rules that would otherwise be “inconsistent with the federal deregulatory approach” taken in the Order.<sup>106</sup> Specifically, the Order preempts “any so-called ‘economic’ or ‘public utility-type’ regulations, including common-carriage requirements akin to those found in Title II” of the Communications Act.<sup>107</sup> Notably, it also contains a savings clause: the Order “do[es] not disturb or displace the states’ traditional role in generally policing such matters as fraud, taxation, and general commercial dealings, so long as the administration of such general state laws does not interfere with federal regulatory objectives.”<sup>108</sup>

## II. STATE NET NEUTRALITY INITIATIVES

This section analyzes the response by state lawmakers to the 2017 Restoring Internet Freedom Order. The Trump-era FCC’s decision to repeal the 2015 Open Internet Order prompted a significant backlash among net neutrality supporters. The notice of proposed rulemaking drew over 22 million comments, the largest by far in any agency proceeding, although there is significant doubt about the veracity of many of these submissions.<sup>109</sup> The weeks leading up to the final vote were marked by both fever-pitch advocacy on social media and an unfortunate campaign of personal attacks on FCC Chairman Ajit Pai and his family.<sup>110</sup> The final vote was

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<sup>106</sup> In the Matter of Restoring Internet Freedom, 33 FCC Rcd. 311, 427 (2018).

<sup>107</sup> *Id.* at 428.

<sup>108</sup> *Id.*

<sup>109</sup> See Glenn Fleishman, *FCC Chair Ajit Pai Admits Millions of Russian and Fake Comments Distorted Net Neutrality Repeal*, FORTUNE (Dec. 5, 2018), <http://fortune.com/2018/12/05/fcc-fraud-comments-chair-admits/>. Specifically, over a half-million submissions were traced to Russian email accounts, while nearly 8 million nearly identical comments were likely submitted by spambots. *Id.* Even discounting the total figure by 75%, however, this would still be the largest number of comments ever filed in an agency proceeding. *Id.*

<sup>110</sup> See, e.g., April Glaser, *Racist, Threatening Attacks on FCC Chair Ajit Pai Won’t Save Net Neutrality*, SLATE (Nov. 27, 2017), <https://slate.com/technology/2017/11/racist-threatening-attacks-on-fcc-chair-ajit-pai-won-t-save-net-neutrality.html>. One man later pleaded guilty to threatening Chairman Pai and his family by email. See John Eggerton, *Pai Hails Guilty Plea Over Threats to His Family*, MULTICHANNEL NEWS (Sept. 4, 2018), <https://www.multichannel.com/news/pai-hails-guilty-plea-over-threats-to-his-family>. He cited opposition to net neutrality as his motivation for making the threat. *Id.*

briefly delayed when a bomb threat was phoned in to the Commission during its monthly open meeting.<sup>111</sup>

After the order repealing net neutrality passed, advocates looked for new ways to challenge the agency's decision, and they found willing allies in state governors' offices and legislatures. Over the next nine months, a series of state-level initiatives were developed to restore net neutrality at the state level, despite the seemingly robust preemption provision contained in the Order. This section summarizes those initiatives and handicaps their chances of success in the Restoring Internet Freedom litigation.

### A. Executive Orders

State net neutrality initiatives have come in two basic flavors, the first being executive orders. Governors in six states—Montana,<sup>112</sup> New York,<sup>113</sup> New Jersey,<sup>114</sup> Vermont,<sup>115</sup> Rhode Island,<sup>116</sup> and Hawaii<sup>117</sup>—issued executive orders in early 2018 mandating that state agencies purchase Internet access only from broadband providers that adhere to net neutral principles. These executive orders attempted to get around the Commission's preemption provision by substituting the power of the purse for direct regulation.<sup>118</sup> The executive orders did not mandate that broadband providers obey, but required them to voluntarily comply in exchange for eligibility to receive a government contract.<sup>119</sup>

The six executive orders share many common factors. Perhaps most importantly, they all link future government contracts to commitments that Internet

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<sup>111</sup> See John Eggerton, *Man Who Made Bomb Threat Against FCC Pleads Guilty*, MULTICHANNEL NEWS (Nov. 13, 2018), <https://www.multichannel.com/news/man-who-made-bomb-threat-against-fcc-pleads-guilty>.

<sup>112</sup> Mont. Exec. Order, *supra* note 9.

<sup>113</sup> N.Y. Exec. Order, *supra* note 9.

<sup>114</sup> N.J. Exec. Order, *supra* note 9.

<sup>115</sup> Vt. Exec. Order, *supra* note 9.

<sup>116</sup> R.I. Exec. Order, *supra* note 9.

<sup>117</sup> Haw. Exec. Order, *supra* note 9.

<sup>118</sup> See Haw. Exec. Order, *supra* note 9; Mont. Exec. Order, *supra* note 9; N.J. Exec. Order, *supra* note 9; N.Y. Exec. Order, *supra* note 9; R.I. Exec. Order, *supra* note 9; Vt. Exec. Order, *supra* note 9.

<sup>119</sup> See Haw. Exec. Order, *supra* note 9; Mont. Exec. Order, *supra* note 9; N.J. Exec. Order, *supra* note 9; N.Y. Exec. Order, *supra* note 9; R.I. Exec. Order, *supra* note 9; Vt. Exec. Order, *supra* note 9.

Service Providers (“ISPs”) abide by some version of the 2015 Open Internet Order’s prohibitions against blocking lawful Internet traffic, throttling traffic, and prioritizing traffic in exchange for consideration.<sup>120</sup> And, in each order, the operative provisions are preceded by a lengthy recitation of “whereas clauses” highlighting the importance of an open Internet for both the state and its residents.<sup>121</sup>

But there are some important differences as well—most significantly, to whom the broadband provider must guarantee net neutral conduct. Montana, New Jersey, and Rhode Island require that the broadband provider adhere to net neutrality principles “with respect to any consumer in the State . . . including,” but not limited to, the State itself.<sup>122</sup>

By comparison, while the New York Executive Order contains similar language about ensuring net neutrality protections for all New Yorkers, the operative clause seems to apply only to services provided directly to the state: “Affected State Entities are hereby directed to amend their procurement procedures to ensure that Affected State Entities only enter into contracts with ISPs that adhere to net neutrality principles and to ensure that internet services provided to Affected State Entities, include net neutrality protections.”<sup>123</sup>

The Vermont and Hawaii orders are ambiguous regarding whether they reach beyond the state’s own broadband contracts to require net neutrality commitments to consumers as well. Like New York, Vermont requires that “[a]ll State Agency contracts with Internet service providers shall include net neutrality protections.”<sup>124</sup> But it goes on to require that these contracts “specifically state that Internet service providers shall not . . . [e]ngage in paid prioritization . . . to *any Internet*

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<sup>120</sup> See Haw. Exec. Order, *supra* note 9; Mont. Exec. Order, *supra* note 9; N.J. Exec. Order, *supra* note 9; N.Y. Exec. Order, *supra* note 9; R.I. Exec. Order, *supra* note 9; Vt. Exec. Order, *supra* note 9.

<sup>121</sup> See Haw. Exec. Order, *supra* note 9; Mont. Exec. Order, *supra* note 9; N.J. Exec. Order, *supra* note 9; N.Y. Exec. Order, *supra* note 9; R.I. Exec. Order, *supra* note 9; Vt. Exec. Order, *supra* note 9.

<sup>122</sup> See Mont. Exec. Order, *supra* note 9, at 2 (“After July 1, 2018, to receive a contract from the State of Montana for the provision of telecommunications services, a service provider must not, with respect to any consumer in the State of Montana (including but not limited to the State itself) . . . .”); N.J. Exec. Order, *supra* note 9, at 3 (“For purposes of this Order, adherence to ‘net neutrality’ principles means that an ISP shall not, with respect to any consumers in New Jersey (including but not limited to State entities) . . . .”); R.I. Exec. Order, *supra* note 9, at 3 (“For purposes of this Order, adherence to ‘net neutrality principles’ means that a service provider shall not, with respect to any consumer in the State of Rhode Island (including the state itself) . . . .”).

<sup>123</sup> N.Y. Exec. Order, *supra* note 9, at 2.

<sup>124</sup> Vt. Exec. Order, *supra* note 9, at 1.

*customer.*<sup>125</sup> Because the Order does not define “customer,” it is unclear whether this restriction requires that the ISP guarantee only that it will not engage in paid prioritization with regard to State Agency traffic, or whether it instead requires the ISP to certify that it does not engage in paid prioritization with regard to service to any Vermont resident (or indeed, any customer worldwide).<sup>126</sup> Similarly, Hawaii’s Executive Order directs “all State government agencies to contract Internet-related services only with ISPs who demonstrate and contractually agree to support and practice net neutrality principles where all Internet traffic is treated equally,” but does not clarify whether those contractual commitments are limited to the state’s own contracts or extend to individual consumer contracts as well.<sup>127</sup>

The six executive orders also differ with regard to what ISP conduct is prohibited. All six executive orders require commitments that ISPs not block or throttle lawful Internet traffic or engage in paid prioritization, and four of the six include the FCC’s prohibition against unreasonably interfering with or disadvantaging the ability of consumers and edge providers to communicate with one another.<sup>128</sup> Montana and New Jersey also require ISPs to publicly disclose their network management practices and performance metrics sufficient for consumers to make an informed choice among providers.<sup>129</sup> New York and Hawaii prohibit all prioritization, not just paid prioritization,<sup>130</sup> which could affect the state’s ability to participate in FirstNet, a nationwide telecommunications network that prioritizes First Responder traffic in the event of emergencies.<sup>131</sup> New York also prevents ISPs from requiring “that end users pay different or higher rates to access specific types of content or applications,” which could eliminate practices such as zero-rating.<sup>132</sup>

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<sup>125</sup> *Id.* at 2 (emphasis added).

<sup>126</sup> *Id.*

<sup>127</sup> Haw. Exec. Order, *supra* note 9, at 2.

<sup>128</sup> See Haw. Exec. Order, *supra* note 9; Mont. Exec. Order, *supra* note 9; N.J. Exec. Order, *supra* note 9; N.Y. Exec. Order, *supra* note 9; R.I. Exec. Order, *supra* note 9; Vt. Exec. Order, *supra* note 9.

<sup>129</sup> Mont. Exec. Order, *supra* note 9, at 2; N.J. Exec. Order, *supra* note 9, at 3–4.

<sup>130</sup> Haw. Exec. Order, *supra* note 9, at 3; N.Y. Exec. Order, *supra* note 9, at 2.

<sup>131</sup> See Stephen Klein, *Rural Response: The Need for an Effective Rural FirstNet Network*, 69 FED. COMM. L.J. 53, 62 (2017) (“The priority nature of FirstNet is designed to prevent the general public from using the network during an emergency, allowing first responders to use the network without the aforementioned overload issues.”).

<sup>132</sup> N.Y. Exec. Order, *supra* note 9, at 2.

Hawaii requires that ISPs “treat all data on the Internet the same,” which could have significant unintended consequences beyond zero-rating.<sup>133</sup>

These executive orders differ slightly in miscellaneous other ways as well. For example, Vermont and Rhode Island explicitly state that their executive orders shall not be construed to supersede any federal law, suggesting those states do not intend to challenge the Restoring Internet Freedom Order directly.<sup>134</sup> They also contain procedures by which an individual ISP may seek waiver of the order’s requirements.<sup>135</sup>

### B. State Legislation

Net neutrality advocates have also found a favorable reception in some state legislatures. Four states—California, Oregon, Washington, and Vermont—have adopted statutes to regulate broadband providers’ network management practices.<sup>136</sup> The Oregon and Vermont statutes resemble the executive orders discussed above in that they attempt to do an end-run around the Restoring Internet Freedom Order by using procurement law to entice broadband providers to adopt net-neutral practices.<sup>137</sup> The Washington and California statutes, however, represent direct assaults on the Commission, imposing requirements more burdensome than (and in direct contravention of) the Commission’s Restoring Internet Freedom Order.<sup>138</sup> In fact, California’s SB822 imposes duties that even the 2015 Open Internet Order refrained from mandating.<sup>139</sup> These statutes are summarized below.

#### 1. Oregon

Oregon HB 4155, signed into law on April 10, 2018, prohibits any “public body” from contracting with a broadband provider that blocks or throttles lawful Internet traffic, engages in paid prioritization, or unreasonably interferes with or

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<sup>133</sup> Haw. Exec. Order, *supra* note 9, at 3.

<sup>134</sup> Vt. Exec. Order, *supra* note 9, at 2; R.I. Exec. Order, *supra* note 9, at 5. Rhode Island also provides that the order shall not supersede an ISP’s obligations to public safety and law enforcement. *Id.* at 4.

<sup>135</sup> Vt. Exec. Order, *supra* note 9, at 2; R.I. Exec. Order, *supra* note 9, at 4.

<sup>136</sup> See S.B. 822, Sen. Reg. Sess. (Ca. 2018); H.B. 4155, 79th Leg. Assemb., Reg. Sess. (Or. 2018); S. 289, Gen. Assemb., Reg. Sess. (Vt. 2018); H.B. 2282, 65th Leg. Sess. (Wa. 2018).

<sup>137</sup> See H.B. 4155, 79th Leg. Assemb., Reg. Sess. (Or. 2018); S. 289, Gen. Assemb. Reg. Sess. (Vt. 2018).

<sup>138</sup> See S.B. 822, Sen. Reg. Sess. (Ca. 2018); H.B. 2282, 65th Leg. Sess. (Wa. 2018).

<sup>139</sup> See text accompanying notes 151–55, *infra*.

disadvantages efforts by end users and edge providers to reach one another.<sup>140</sup> Interestingly, the act applies not only to subdivisions of the state government, but also to local governments throughout the state.<sup>141</sup> To soften the impact on rural governments, the act contains an exception if the broadband provider is the sole fixed broadband provider in the geographic area to be covered by the contract.<sup>142</sup> It also allows the state public utility commission to certify exceptions to the blocking, throttling, and unreasonable interference prohibitions (but not the paid prioritization ban) for reasonable network management as defined by the statute—an approach that parallels the exceptions that were available under the 2015 Open Internet Order.<sup>143</sup>

## 2. Vermont

Vermont's S289 similarly conditions government broadband contracts on a commitment to abide by net neutral principles. Under the act, state government contracts for Internet access must include a certification from the Secretary of Administration that the broadband provider discloses its network management practices and does not engage in blocking, throttling, paid prioritization, unreasonable interference, or deceptive or misleading marketing practices in the state.<sup>144</sup> The certification process allows the state to waive the paid prioritization prohibition if the Secretary finds that the practice would provide a significant public benefit and would not harm the Open Internet in Vermont.<sup>145</sup> The act also requires the Attorney General to conduct a net neutrality study and creates a connectivity initiative to prioritize and fund broadband buildout into unserved and underserved areas.<sup>146</sup>

## 3. Washington

Washington's statute, HB2282, effectively enacts much of the repealed 2015 Open Internet Order for service within the state of Washington. The act prohibits broadband providers in the state from blocking or throttling lawful Internet traffic, subject to reasonable network management, and from engaging in paid

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<sup>140</sup> H.B. 4155, 79th Leg. Assemb., Reg. Sess. § 1(3) (Or. 2018).

<sup>141</sup> *Id.*; see ORS 174.109 (defining “public body”).

<sup>142</sup> H.B. 4155, 79th Leg. Assemb., Reg. Sess. § 4(a) (Or. 2018).

<sup>143</sup> *Id.* § 3(d); see *In the Matter of Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015).

<sup>144</sup> S. 289, Gen. Assemb., Reg. Sess. § 2(b)(1)(A–E) (Vt. 2018).

<sup>145</sup> *Id.* § 2(c).

<sup>146</sup> *Id.* §§ 9–10.

prioritization.<sup>147</sup> Interestingly, the bill did not import the Open Internet Order's unreasonable interference/disadvantage standard. The act also requires broadband providers to disclose their network management practices to facilitate informed choices by consumers and small business owners.<sup>148</sup>

#### 4. California

The California Internet Consumer Protection and Net Neutrality Act is the most aggressive state net neutrality statute passed in 2018.<sup>149</sup> Like Washington, the California statute effectively requires broadband providers within the state to adhere to the 2015 Open Internet Order's prohibitions on blocking, throttling, and paid prioritization.<sup>150</sup> Unlike Washington, California also codified the Open Internet Order's unreasonable interference/disadvantage standard.<sup>151</sup> But the California statute goes further, adopting several requirements that the Open Internet Order had declined to enact. These include:

- **Zero-Rating:** California prohibits broadband providers from zero-rating content (exempting some Internet traffic from a customer's monthly data allowance) for consideration, and from zero-rating some Internet content or applications but not an entire category.<sup>152</sup> The 2015 Open Internet Order declined to address zero-rating (which it called "sponsored data"), preferring instead to examine issues on a case-by-case basis under the unreasonable interference/disadvantage standard.<sup>153</sup>
- **Interconnection:** California prohibits broadband providers from entering into traffic exchange agreements that have the purpose or effect of evading the statute's restrictions.<sup>154</sup> It also prohibits payment from an edge provider in exchange for delivery of traffic to end-users (or to avoid having its service blocked or degraded), effectively setting a rate of zero

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<sup>147</sup> H.B. 2282, 65th Leg. Sess. § 1(a)–(c) (Wa. 2018).

<sup>148</sup> H.B. 2282, 65th Leg. Sess. § 1 (Wa. 2018).

<sup>149</sup> S.B. 822, Sen. Reg. Sess. (Ca. 2018).

<sup>150</sup> *Id.* § 3101(a)(1); *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601.

<sup>151</sup> S.B. 822, Sen. Reg. Sess. § 3101(a)(7)(A) (Ca. 2018); *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601.

<sup>152</sup> S.B. 822, Sen. Reg. Sess. § 3101(a)(6) (Ca. 2018).

<sup>153</sup> *Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5668.

<sup>154</sup> S.B. 822, Sen. Reg. Sess. § 3101(a)(9) (Ca. 2018).

for direct interconnection agreements (such as a broadband provider might enter into with Netflix's Open Connect content delivery network).<sup>155</sup> By comparison the Open Internet Order explicitly declined to apply its rules to Internet traffic exchange agreements, choosing instead to review interconnection complaints against broadband providers under a just and reasonable standard.<sup>156</sup>

### III. LIMITS ON STATE BROADBAND REGULATION

As the history of telecommunications federalism suggests, these state regulatory efforts are likely to encounter opposition from their federal counterparts. Indeed, Vermont and California have already been sued to enjoin their net neutrality efforts.<sup>157</sup> This section examines the limits that federal law places on state efforts to regulate broadband networks.

#### A. *Express Preemption Under the Restoring Internet Freedom Order*

In the Vermont and California litigation, the plaintiffs assert that the Restoring Internet Freedom Order expressly preempts the statutes and executive order in question.<sup>158</sup> As discussed above, the Commission's Order preempts "any state or local measures that would effectively impose rules or requirements" that the Order repealed, that would "impose more stringent requirements for any aspect of broadband service" than addressed in the Order, or that would otherwise be "inconsistent with the federal deregulatory approach that we adopt today."<sup>159</sup> Specifically, the Order preempts "any so-called 'economic' or 'public utility-type' regulations, including common-carriage requirements akin to those found in Title II" of the Communications Act.<sup>160</sup>

Given the scope of this preemption provision, it is difficult to argue that these state initiatives do not "effectively impose rules or requirements" that the FCC

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<sup>155</sup> *Id.* § 3101(a)(3).

<sup>156</sup> *Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5693.

<sup>157</sup> See *ACA v. Scott*, No. 2:18-cv-00167 (D. Vt., filed Oct. 18, 2018); *United States v. California*, No. 2:18-at-01539 (E.D. Cal., filed Sept. 30, 2018).

<sup>158</sup> *Scott*, No. 2:18-cv-00167, at 6; *California*, No. 2:18-at-01539, at 2.

<sup>159</sup> *In the Matter of Restoring Internet Freedom*, 33 FCC Rcd. 311, 427 (2018).

<sup>160</sup> *Id.* at 428.

“repealed or decided to refrain from imposing.”<sup>161</sup> This is particularly true of the Washington and California statutes, which directly regulate broadband access.<sup>162</sup> Both statutes codified the blocking, throttling, and prioritization provisions (and, in California, the unreasonable interference/disadvantage standard) that the Restoring Internet Freedom Order explicitly abolished.<sup>163</sup> Moreover, California’s interconnection and zero-rating restrictions “impose more stringent requirements” on broadband service than mandated by either the current or prior FCC Orders, and the statute also imposes significant duties on non-broadband services provided over the same broadband network.<sup>164</sup> Indeed, the states have largely admitted as much. For example, Vermont’s statute includes a finding that the Restoring Internet Freedom Order “is unlikely to achieve the intended results in Vermont” and explicitly endorsed instead the Open Internet Order, which the Commission has disavowed.<sup>165</sup> Similarly, the Senate Committee Report on the California bill acknowledged that the act both “codif[ies] portions of the recently-rescinded [FCC] rules,” and imposes additional obligations beyond event the 2015 Order.<sup>166</sup>

The Hobbs Act prevents the states from challenging the validity of the FCC’s preemption clause in the existing Vermont and California cases. The Hobbs Act vests exclusive jurisdiction in the Circuit Courts of Appeal to “enjoin, set aside, suspend (in whole or in part), or to determine the validity of” FCC orders.<sup>167</sup> This means that “[p]roperly promulgated FCC regulations currently in effect must be presumed valid,” as district courts “lack[] jurisdiction to pass on the validity” of FCC orders.<sup>168</sup> Relying on the Hobbs Act, the plaintiffs (several trade groups representing broadband providers in the Vermont case, and the United States in the California case) have moved for summary judgment or sought to enjoin the state provision at

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<sup>161</sup> *Id.*

<sup>162</sup> See S.B. 822, Sen. Reg. Sess. (Ca. 2018); H.B. 2282, 65th Leg. Sess. (Wa. 2018).

<sup>163</sup> See S.B. 822, Sen. Reg. Sess. § 3101 (Ca. 2018); H.B. 2282, 65th Leg. Sess. § 2 (Wa. 2018); *Restoring Internet Freedom*, 33 FCC Rcd. at 312.

<sup>164</sup> S.B. 822, Sen. Reg. Sess. § 3102(a) (Ca. 2018).

<sup>165</sup> S. 289, Gen. Assemb., Reg. Sess. § 1(10) (Vt. 2018).

<sup>166</sup> CAL. SENATE JUDICIARY COMM., 2017–2018 REG. SESS., COMMUNICATIONS: BROADBAND INTERNET ACCESS SERVICE 1, 19 (2018) (analysis of S.B. 822).

<sup>167</sup> *Jurisdiction of Court of Appeals*, 28 U.S.C. § 2342(1) (2012).

<sup>168</sup> *U.S. West Commc’ns, Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002); see also *FCC v. ITT World Commc’ns, Inc.*, 466 U.S. 463, 468 (1984) (“Litigants may not evade” the Hobbs Act by arguing in district court that “FCC action is ultra vires.”).

issue, prompting both states voluntarily to stay the implementation of their net neutrality statutes.<sup>169</sup>

This satellite litigation does not, however, answer the important question of whether the Commission's preemption provision is valid. It merely shifts the venue to the D.C. Circuit, where 22 states have joined a host of private petitioners challenging the validity of the Restoring Internet Freedom Order.<sup>170</sup> At first glance, the Order's preemption provision seems consistent with the Commission's longstanding policy of preemptive deregulation of information services, as discussed above. As early as the *Computer II* inquiry, the Commission recognized that regulation of information services would "restrict[] this fast-moving, competitive market,"<sup>171</sup> and in *Computer III* preempted state law that would interfere with this deregulatory project.<sup>172</sup> In the 2004 Pulver Free World Dialup inquiry, the Commission acknowledged this long-standing "policy of nonregulation to ensure that Internet applications remain insulated from unnecessary and harmful economic regulation at both the federal and state levels"<sup>173</sup> and formally preempted *any* state regulation of information services that would "conflict with our policy of nonregulation."<sup>174</sup> As noted above, the Eighth Circuit upheld this policy in 2007, explaining that "deregulation" is a "valid interest[] the FCC may protect through preemption of state regulation,"<sup>175</sup> a conclusion it reiterated last year.<sup>176</sup>

But the state petitioners have challenged whether this general policy is sufficient to support the specific preemption clause contained in the Restoring

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<sup>169</sup> See Maura Dolan, *California Agrees to Put Its New Net Neutrality Law Temporarily On Hold*, L.A. TIMES (Oct. 26, 2018), <https://www.latimes.com/local/lanow/la-me-ln-net-neutrality-court-20181026-story.html>; Jon Brodtkin, *ISPs Strike Deal with Vermont to Suspend State Net Neutrality Law*, ARS TECHNICA (Mar. 15, 2019), <https://arstechnica.com/tech-policy/2019/03/isps-strike-deal-with-vermont-to-suspend-state-net-neutrality-law/>.

<sup>170</sup> *Mozilla v. FCC*, No. 18-1051 (D.C. Cir., filed Aug. 20, 2018).

<sup>171</sup> *In the Matter of Amendment of Section 64.702 of the Comm'n's Rules & Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 434 (1980).

<sup>172</sup> *In the Matter of Computer III Remand Proceedings*, 6 FCC Rcd. 174, 181 (1990).

<sup>173</sup> *In the Matter of Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor Telecommunications Service*, 19 FCC Rcd. 3307, 3307 (2004).

<sup>174</sup> *Id.* at 3316 (emphasis added).

<sup>175</sup> *Minn. Pub. Utilities Comm'n, v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007).

<sup>176</sup> *Charter Advanced Servs. (MN) LLC v. Lange*, 903 F.3d 715, 718 (8th Cir. 2018) (quoting *Minn. Pub. Utilities Comm'n*, 483 F.3d at 580).

Internet Freedom Order.<sup>177</sup> Their argument is that in the Order, the Commission interpreted the Communications Act to prevent the agency from regulating broadband service altogether.<sup>178</sup> The Order disclaims authority to regulate broadband under Title II, which provided legal jurisdiction for the 2015 Open Internet Order.<sup>179</sup> While the Communications Act provides the Commission with general jurisdiction under Title I over all interstate communication via wire or radio, the Supreme Court has held that the Commission can only rely on this jurisdiction to enact rules that are “reasonably ancillary to the effective performance of the Commission’s various responsibilities” under the Communications Act.<sup>180</sup> In the 2010 Open Internet Order, the Commission found that Title I broadband regulation was reasonably ancillary to its authority under Section 706 to promote the rapid deployment of broadband, but the Restoring Internet Freedom Order found that Section 706 is not, in fact, a grant of regulatory authority to the Commission.<sup>181</sup> Petitioners argue that, having disclaimed authority under Section 706, the agency failed to identify a jurisdictional hook upon which to hang its Title I ancillary authority to regulate broadband—and therefore that it similarly lacks jurisdiction to preempt state broadband regulation.<sup>182</sup>

The Order anchors its preemption authority in two provisions, but neither are fully convincing.<sup>183</sup> First, the Commission argues that under Section 2, it may preempt state law when it is impossible or impracticable to regulate the intrastate portion of a service without affecting the interstate component.<sup>184</sup> While the impossibility exception has a lengthy pedigree in telecommunications federalism, it applies only when “state regulation would conflict with federal rules or policies.”<sup>185</sup>

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<sup>177</sup> See Proof Brief for Government Petitioners, *Mozilla v. FCC*, No. 18–1051, at 39 (D.C. Cir. filed Aug. 20, 2018), <https://www.courthousenews.com/wp-content/uploads/2018/08/mozilla-fcc.pdf>.

<sup>178</sup> *Id.*

<sup>179</sup> *In the Matter of Restoring Internet Freedom*, 33 FCC Rcd. 311, 312 (2018).

<sup>180</sup> *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968).

<sup>181</sup> *Restoring Internet Freedom*, 33 FCC Rcd. at 316, 470.

<sup>182</sup> See *Mozilla v. FCC Brief*, *supra* note 177, at 39.

<sup>183</sup> While there may be other arguments available to support the agency’s preemption clause, the agency is generally prohibited from offering alternative rationales for its action that are not contained in the agency’s order. See *SEC v. Cheney Corp.*, 318 U.S. 80 (1943).

<sup>184</sup> *Restoring Internet Freedom*, 33 FCC Rcd. at 429; see *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 360–61 (1986) (recognizing impossibility exception).

<sup>185</sup> *Minn. Pub. Util. Comm’n v. FCC*, 483 F.3d 570, 574 (8th Cir. 2007).

Because the test requires the Commission to identify a federal rule or policy, it seems that it cannot itself serve as a rule or policy for purposes of express preemption.

Second, the Commission relies on the federal policy of nonregulation of information services.<sup>186</sup> But that is likely insufficient under D.C. Circuit law to constitute an assertion of Title I authority to support express preemption. In *Comcast Corp. v. FCC*, the court struck down the Commission's attempt to fine Comcast for interfering with BitTorrent traffic in violation of its Internet policy statement.<sup>187</sup> The court held that the agency could not assert its Title I ancillary authority to regulate broadband practices unless it could tie the action to enforcement of a statutorily mandated responsibility—and that statements of policy were insufficient.<sup>188</sup> Similarly, it is unlikely that the assertion of a general policy of nonregulation of information services, untethered to a statutorily mandated responsibility elsewhere in the statute, will constitute an exercise of Title I ancillary authority to support express preemption. As a result, the state petitioners have a strong argument that the Order's express preemption clause is invalid.<sup>189</sup>

### B. *Conflict Preemption With the Restoring Internet Freedom Order*

Even if the state petitioners succeed in striking the Order's express preemption clause, individual state net neutrality regulations would nonetheless be vulnerable to conflict preemption. Whereas express preemption turns on congressional intent, conflict preemption focuses on the effect of dual sovereigns pursuing different objectives in an area of shared regulatory authority.<sup>190</sup> Conflict preemption occurs when it is impossible for a party to comply with state and federal law, or when a state law "frustrate[s] the accomplishment of a federal objective."<sup>191</sup> In these cases, the

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<sup>186</sup> *Restoring Internet Freedom*, 33 FCC Rcd. at 431.

<sup>187</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>188</sup> *Id.* at 644.

<sup>189</sup> While the agency may have other arguments that could support express preemption, for purposes of the D.C. Circuit case it is limited to arguments that it articulated in its decision below. See *SEC v. Chenery Corp.*, 318 U.S. 80 (1947).

<sup>190</sup> See Mary J. Davis, *On Preemption, Congressional Intent, and Conflict of Laws*, 66 U. PITT. L. REV. 181, 183 (2004).

<sup>191</sup> *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000).

Supremacy Clause itself nullifies the state law—meaning that conflict preemption can occur even in the absence of an express preemption statement.<sup>192</sup>

To conduct a conflict preemption analysis, one must properly frame the federal action in question. The Restoring Internet Freedom Order is best understood as an exercise of the agency’s judgment regarding the appropriate federal objective for broadband regulation. In *Brand X*,<sup>193</sup> the Supreme Court held that the Telecommunications Act’s definitions were ambiguous, and therefore the Commission was free to classify broadband Internet access service as either a Title I information service or a Title II telecommunications service.<sup>194</sup> The scope of the agency’s Title I power ranges, based upon how the agency interprets ambiguous grants of authority like Section 706 and what rules the agency determines are helpful to execute even its clearly defined statutory powers. Similarly, the scope of Title II varies, as the statute gives the agency the power to forbear from applying particular provisions if the agency determines that “enforcement of the regulation or provision is not necessary” or if forbearance is otherwise “consistent with the public interest.”<sup>195</sup>

This flexibility creates a broad menu of potential regulatory options for the agency to choose from, all of which are permissible under the Communications Act as interpreted by *Brand X*.<sup>196</sup> On one end of the spectrum, the agency could opt for a policy of complete nonregulation, disclaiming any interest in broadband whatsoever. On the other end, it could apply the full panoply of Title II obligations to broadband providers, up to and including rate regulation pursuant to tariffs filed with the Commission. Between these poles lie a host of potential regulatory bundles, including minimalist Title I requirements, a more robust common-law regulatory structure constructed using a more intensive Title I process, or a Title II-lite regime that waives most, some, or virtually none of that chapter’s traditional common carriage requirements.<sup>197</sup>

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<sup>192</sup> *Id.* at 873.

<sup>193</sup> Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005).

<sup>194</sup> *Id.*

<sup>195</sup> 47 U.S.C. § 160 (2018).

<sup>196</sup> *See Brand X*, 545 U.S. 967.

<sup>197</sup> *See, e.g.,* Daniel A. Lyons, *Net Neutrality and Nondiscrimination Norms in Telecommunications*, 54 ARIZ. L. REV. 1029, 1041 n.64 (2012) (discussing Title II-lite regime).

The Restoring Internet Freedom Order represents the agency's policy judgment regarding the optimal regulatory bundle from among these options. Contrary to petitioners' claim in the *Mozilla* litigation, the Order did not completely forswear any jurisdiction over broadband access.<sup>198</sup> Rather, the agency opted to classify broadband as an information service and subject it to specific transparency and disclosure obligations.<sup>199</sup> But it decided against more intensive common carrier-like economic restrictions, because, in its judgment, general consumer protection and antitrust remedies provide adequate protection for consumers and more intrusive regulations could have adverse effects on consumers and innovation.<sup>200</sup>

Courts are likely to find that state net neutrality initiatives "frustrate the accomplishment of a federal objective" by imposing duties that the Commission explicitly repealed and reducing the flexibility that the Commission recognized as important to future growth.<sup>201</sup> Where, as here, an agency has adopted a careful regulatory scheme that balances trade-offs between more and less onerous requirements, states may not upset that balance.

This case is analogous to *Geier v. American Honda Motor Company*.<sup>202</sup> To promote greater highway safety, the Department of Transportation adopted a regulation requiring auto manufacturers to equip some, but not all, of their vehicles with passive restraints such as airbags.<sup>203</sup> The standard deliberately sought a mix of different restraints to be phased in over time, and rejected an all-airbag standard because of concerns about public backlash.<sup>204</sup> The plaintiff, injured in an automobile crash, alleged that failure to provide an airbag violated state tort law despite being in compliance with the federal standard.<sup>205</sup> The Court held that the state tort claim was preempted, because a "rule of state tort law imposing a duty to install airbags in cars such as petitioners' would have presented an obstacle to the variety and mix of

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<sup>198</sup> See *Mozilla v. FCC* Brief, *supra* note 177.

<sup>199</sup> In the Matter of Restoring Internet Freedom, 33 FCC Rcd. 311, 396, 404, 435 (2018).

<sup>200</sup> *Id.* at 396–97.

<sup>201</sup> See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000).

<sup>202</sup> See *id.*

<sup>203</sup> *Id.* at 864–65.

<sup>204</sup> *Id.* at 879.

<sup>205</sup> *Id.* at 865.

devices that the federal regulation sought and to the phase-in that the federal regulation deliberately imposed.”<sup>206</sup>

Significantly, this conflict preemption does not depend upon the existence of an express preemption clause. The regulatory scheme in *Geier* included a provision expressly preempting inconsistent state safety standards.<sup>207</sup> The Court held this express clause was inapplicable to *Geier*’s suit because a tort action is not a safety standard.<sup>208</sup> But the Court explained that the existence of an inapplicable preemption provision, “by itself, does not foreclose (through negative implication) ‘any possibility of implied [conflict] pre-emption.’”<sup>209</sup> Similarly, even if the *Mozilla* court invalidates the Restoring Internet Freedom Order’s express preemption provision, individual state net neutrality efforts would be subject to a conflict preemption analysis.<sup>210</sup>

Moreover, when conducting this analysis, a court will give weight to the agency’s own views regarding when state initiatives conflict with the federal objective in question. As the Supreme Court explained, “[t]he agency is likely to have a thorough understanding of its own regulation and its objectives and is ‘uniquely qualified’ to comprehend the likely impact of state requirements.”<sup>211</sup> The Restoring Internet Freedom Order clarified that “common-carriage requirements akin to those found in Title II,” as well as any other obligation equivalent to “rules or requirements that we repeal or refrain from imposing today,” would “pose an obstacle to or place an undue burden on the provision of broadband Internet access service” and would therefore “conflict with the deregulatory approach we adopt today.”<sup>212</sup> “In these circumstances,” the *Geier* Court held, “the agency’s own views should make a difference.”<sup>213</sup>

Nor can states avoid preemption by substituting the power of the purse for the power to regulate directly, as various executive orders and the Oregon and Vermont

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<sup>206</sup> *Id.* at 863.

<sup>207</sup> *Id.* at 867.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 869 (alteration in original) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)).

<sup>210</sup> *In the Matter of Restoring Internet Freedom*, 33 FCC Rcd. 311, 427 (2018).

<sup>211</sup> *Geier*, 529 U.S. at 883 (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 496 (1996)).

<sup>212</sup> *Restoring Internet Freedom*, 33 FCC Rcd. at 428.

<sup>213</sup> *Geier*, 529 U.S. at 883.

statutes seek to do.<sup>214</sup> The market participant doctrine allows states to attach conditions to services that it purchases for its own use.<sup>215</sup> But, “courts have found preemption when government entities seek to advance general societal goals rather than narrow proprietary interests through the use of their contracting power.”<sup>216</sup> For example, the Supreme Court held that a Wisconsin statute was preempted by federal law where the statute in question prohibited the state from contracting with certain repeat violators of the National Labor Relations Act, on the ground that the additional penalty increased, and therefore conflicted with, the remedial scheme provided under the Act.<sup>217</sup> The Court found it immaterial that “Wisconsin has chosen to use its spending power rather than its police power.”<sup>218</sup> That would suggest that executive orders such as New York’s (and those of Vermont and Hawaii, if interpreted narrowly) would survive a preemption analysis, as they only seek to dictate the terms of service within the state’s own contracts with broadband providers.<sup>219</sup> Efforts to leverage the state’s bargaining power to affect the terms of contracts between broadband providers and third parties would, however, be preempted.

*Crosby v. National Foreign Trade Council* is also instructive.<sup>220</sup> In the late 1990s, the federal government enacted a measured set of economic sanctions against Burma.<sup>221</sup> Massachusetts enacted its own statute that effectively prohibited the state from contracting with companies that did business with Burma, even if those companies were in compliance with the federal regime.<sup>222</sup> Like the net neutrality executive orders, the goal was to put pressure on companies to adopt voluntary practices that federal law refused to impose directly. Yet the Court unanimously held that the Massachusetts law was preempted because it “conflict[ed] with federal law

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<sup>214</sup> See *supra* text accompanying notes 120–21.

<sup>215</sup> *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 691 (5th Cir. 1999) (“The Supreme Court has found that when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute regulation subject to preemption.”).

<sup>216</sup> *Id.* at 692; see also *Wis. Dep’t of Indus., Labor and Human Relations v. Gould*, 475 U.S. 282 (1986).

<sup>217</sup> *Gould*, 475 U.S. at 289.

<sup>218</sup> *Id.*

<sup>219</sup> N.Y. Exec. Order, *supra* note 9; Vt. Exec. Order, *supra* note 9; Haw. Exec. Order, *supra* note 9.

<sup>220</sup> See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

<sup>221</sup> *Id.* at 368.

<sup>222</sup> *Id.* at 376.

at a number of points by penalizing individuals and conduct that Congress ha[d] explicitly exempted or excluded from sanctions” in “clear contrast to the congressional scheme.”<sup>223</sup>

Importantly, it is unlikely that the *Mozilla* court will make a blanket determination that state net neutrality initiatives are preempted due to conflicts with the Restoring Internet Freedom Order. Conflict preemption requires a finding that the state rule in question frustrates a federal objective—a determination that the court cannot make unless faced with an actual state statute to compare to the federal scheme. This means that even if the states succeed, and the *Mozilla* court strikes down the express preemption provision, the Commission or affected parties may nonetheless challenge individual state net neutrality initiatives on conflict preemption grounds in separate litigation—and the state petitioners conceded as much in the *Mozilla* oral argument.

### C. *The Scope of State Authority Under the Communications Act if the Restoring Internet Freedom Order is Vacated*

The analysis thus far assumes that the Restoring Internet Freedom Order will survive judicial review. But what would happen to state net neutrality initiatives if the *Mozilla* court strikes down the order on other grounds—for example, by finding the order arbitrary and capricious without reaching the preemption question—or if a future Commission repeals the order? The answer depends in part upon the effect of three federal laws: the 2015 Open Internet Order, the mixed-jurisdiction rules, and Section 332.<sup>224</sup>

#### 1. Open Internet Order

A repeal of the Restoring Internet Freedom Order would effectively reclassify broadband as a Title II service and reimpose the 2015 Open Internet Order. As discussed briefly above, the Open Internet Order contains its own preemption provision, which “preclude[s] states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt in this Order.”<sup>225</sup> This preemption provision would not affect the core protections contained in most existing state net neutrality regimes, including the prohibitions on blocking, throttling, and prioritization, and the unreasonable interference/disadvantage

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<sup>223</sup> *Id.* at 378.

<sup>224</sup> See *In the Matter of Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015); 47 U.S.C. § 332 (2018).

<sup>225</sup> *Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5601, 5804.

standard, all of which states imported from the Open Internet Order. But it would strike down those portions of state rules that reach more broadly than the 2015 Order—most notably California’s regulation of zero-rating practices, interconnection, and non-broadband services.<sup>226</sup> It would also provide a narrowing construction for those state initiatives that are ambiguous but could be read to impose more intensive requirements than the Open Internet Order—such as Hawaii’s prohibition on all forms of prioritization and its requirement that broadband providers “treat all data on the Internet the same.”<sup>227</sup>

## 2. Mixed-Jurisdiction Rules

The Commission has consistently found that broadband Internet access is jurisdictionally interstate for regulatory purposes. Although “broadband Internet access traffic may include an intrastate component,”<sup>228</sup> “the Internet’s inherently global and open architecture enables edge providers to serve content through a multitude of distributed origination points, making end-to-end jurisdictional analysis extremely difficult—if not impossible—when the services at issue involve the Internet.”<sup>229</sup> Because it is not possible to separate the interstate and intrastate aspects of the service, the service is considered jurisdictionally interstate for regulatory purposes, a finding that the Commission made when broadband was classified as a Title I service<sup>230</sup> and which it explicitly affirmed when it reclassified the services under Title II.<sup>231</sup>

The classification of broadband as an interstate service does not preclude all state regulation of the service.<sup>232</sup> But it prevents state regulators from assuming

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<sup>226</sup> *Id.*; S.B. 822, Sen. Reg. Sess. (Ca. 2018).

<sup>227</sup> *Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5601, 5804; Haw. Exec. Order, *supra* note 9.

<sup>228</sup> *In the Matter of Nat’l Ass’n of Regulatory Util. Comm’rs Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data*, 25 FCC Rcd. 5051, 5054 n.24 (2010).

<sup>229</sup> *Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5803.

<sup>230</sup> *See, e.g., Nat’l Ass’n of Regulatory Util. Comm’rs*, 25 FCC Rcd. at 5054, 5054 n.24.

<sup>231</sup> *Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5803.

<sup>232</sup> *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71 (1st Cir. 2006) (alteration in original) (“A matter may be *subject* to FCC jurisdiction, without the FCC having exercised that jurisdiction and preempted state regulation.”).

plenary authority over intrastate broadband transmissions under Section 2(b).<sup>233</sup> And under conflict preemption rules, it preempts any state regulations that would be incompatible with federal efforts or stand as an obstacle to the implementation of valid federal policies.<sup>234</sup> The Commission discussed this delicate balance in connection with a 2010 petition by the National Association of Regulatory Utility Commissioners (“NARUC”).<sup>235</sup> NARUC sought a declaratory ruling that no FCC order limits state authority to collect data from broadband providers.<sup>236</sup> The Commission reiterated that broadband is jurisdictionally interstate but noted that this designation did not “by itself preclude mandatory State data-gathering efforts.”<sup>237</sup> It suggested that data-gathering did not “inevitably” conflict with a federal objective as long as these efforts “supplement, rather than interfere with federal information collection efforts,” though it “decline[d] to address the extent of such State authority.”<sup>238</sup>

This analysis suggests that the mixed jurisdiction rules would allow states to enforce laws that hew closely to federal requirements—effectively serving as supplementary authorities to augment federal enforcement efforts. If the Commission reclassifies broadband providers as Title II common carriers, the mixed jurisdiction rules would not preclude states from enforcing requirements similar to those the Commission acknowledged as necessary to carry out the federal regime. If, however, the Commission retains broadband’s classification as a Title I information service and does not soften its long-standing deregulatory policy toward information services, most state regulatory efforts are likely to be preempted.<sup>239</sup>

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<sup>233</sup> See *Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5803 (“As a general matter, mixed-jurisdiction services are typically subject to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service’s intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies.”).

<sup>234</sup> *Nat’l Ass’n of Regulatory Util. Comm’rs*, 25 FCC Rcd. at 5053.

<sup>235</sup> *Id.* at 5051.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 5054.

<sup>238</sup> *Id.* at 5055.

<sup>239</sup> See *Charter Advanced Servs. (MN) LLC v. Lange*, 903 F.3d 715, 718 (8th Cir. 2018) (quoting *Minn. Pub. Util. Comm’n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007)).

### 3. Section 332

Section 332 places additional restrictions on state regulation of mobile broadband service.<sup>240</sup> Whether mobile broadband is classified as a commercial mobile radio service (as under the Open Internet Order) or a private mobile radio service (as under the Restoring Internet Freedom Order), Section 332 expressly preempts attempts to regulate entry or rates charged by mobile providers.<sup>241</sup> At a minimum, state net neutrality efforts regulate rates, by mandating a charge of zero for prioritization. California also regulates rates for zero-rating practices and interconnection.<sup>242</sup> More generally, mobile providers have a colorable argument that laws mandating broadband providers comply with blocking and throttling rules as a condition of doing business in the state regulate entry in violation of Section 332. States may argue that blocking and throttling restrictions constitute consumer protection measures that could fall under Section 332's carve out for state regulation of "other terms and conditions."<sup>243</sup> But this is unlikely to be upheld, as they affect rates and, as industry-specific requirements, they go beyond the "neutral application of state contractual or consumer fraud laws," which the FCC has indicated, and courts have upheld, as the touchstone for this carve out.<sup>244</sup>

#### *D. Dormant Commerce Clause*

Independent of the Communications Act, state regulation of the Internet may also run afoul of the Dormant Commerce Clause. The Dormant Commerce Clause doctrine prevents states from imposing undue burdens on interstate commerce. It is a judge-made doctrine, derived from the negative implication of the Constitution's grant to Congress of the power to regulate commerce between the states.<sup>245</sup> Its "central rationale . . . is to prohibit state or municipal laws whose object is local economic protectionism."<sup>246</sup> Thus, state laws that explicitly discriminate against

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<sup>240</sup> 47 U.S.C. § 332 (2018).

<sup>241</sup> *Id.* § 332(e)(3)(a).

<sup>242</sup> S.B. 822, Sen. Reg. Sess. (Ca. 2018).

<sup>243</sup> *Cellco P'ship v. Hatch*, 431 F.3d 1077, 1082–83 (8th Cir. 2005).

<sup>244</sup> *See id.* at 1083.

<sup>245</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>246</sup> *C&A Carbone v. Town of Clarkstown, NY*, 511 U.S. 383, 390 (1994).

interstate commerce face “a virtually per se rule of invalidity.”<sup>247</sup> But even a facially nondiscriminatory state law may nonetheless run afoul of the doctrine if it unduly burdens interstate commerce. Courts evaluate such claims under the test announced in *Pike v. Bruce Church*: “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>248</sup>

The *Pike* balancing test played an important role in shaping early Internet regulation, because of concern about spillover effects when states regulate online conduct. In the prominent case of *American Library Association v. Pataki*, a district court struck down a New York law that prohibited the intentional use of the Internet to send pornographic messages that would be “harmful to minors.”<sup>249</sup> The court conceded that shielding New York minors from pornography constituted a legitimate state interest.<sup>250</sup> But it found this interest was outweighed by the significant chilling effect the law would have on wholly out-of-state conduct.<sup>251</sup> Because information posted to the Internet is available everywhere simultaneously, those who disseminate information online could face liability for posting content that arguably ran afoul of New York’s law, even if they had no intention of communicating with New York residents.<sup>252</sup> And this, in turn, would chill communication to recipients in states where the content was legal, thus imposing an undue burden on interstate commerce far in excess of what little local benefits were likely to result from enforcement.<sup>253</sup>

Like many balancing tests, the doctrine is somewhat unpredictable, turning on the facts of individual cases. Many state regulations create spillover effects; the Dormant Commerce Clause only invalidates those that, in the court’s judgment, impose a greater burden on interstate commerce than they reap in local benefit—which can differ from case to case. For example, in *National Federation of the Blind*

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<sup>247</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (quoting *Granholm v. Heald*, 544 U.S. 460, 476, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005)).

<sup>248</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>249</sup> *American Library Ass’n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

<sup>250</sup> *Id.* at 177.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 179–80.

v. *Target Corp.*,<sup>254</sup> Target argued that California’s disability law burdened interstate commerce by requiring it to modify a nationwide website to meet California requirements—which effectively imposed California law on the company’s transactions with all customers, even those outside California.<sup>255</sup> The court found this argument was premature at the motion to dismiss stage, explaining that Target could develop a California-specific website, and even if it chose not to do so, its decision to develop one product for a nationwide market does not necessarily implicate the Commerce Clause.<sup>256</sup> At a minimum, factual development was necessary to determine the “practical effect” of the law on interstate commerce before the court could decide the Dormant Commerce Clause issue.<sup>257</sup>

*National Federation of the Blind’s* focus on practical effects reflects the insights of Professors Jack Goldsmith and Alan Sykes, whose seminal *Yale Law Journal* article, *The Internet and the Dormant Commerce Clause*, brought some clarity to this somewhat confusing corner of the law.<sup>258</sup> Goldsmith and Sykes highlight that the primary justification for the Dormant Commerce Clause is to “ensure[] free trade among the states and thereby secure[] the associated economic benefits.”<sup>259</sup> They thus support the consideration of economic efficiency as the lodestar for such claims: “[T]he appropriate statement of the extraterritoriality concern is that states may not impose burdens on out-of-state actors that outweigh the in-state benefits.”<sup>260</sup>

A full application to broadband regulation is beyond the scope of this article. But it is worth noting that like early state attempts to regulate online conduct, state-level network traffic management regulations are susceptible to a Dormant Commerce Clause challenge. The Internet is a national (indeed, global) network, meaning that attempts to regulate the flow of traffic on that network are likely to have extraterritorial effects. If state net neutrality rules survive a preemption analysis, states should be ready for the claim that such regulations unreasonably burden

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<sup>254</sup> 452 F. Supp. 2d 946 (N.D. Cal. 2006).

<sup>255</sup> *Id.* at 961.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 962.

<sup>258</sup> Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 *YALE L.J.* 785 (2001).

<sup>259</sup> *Id.* at 795.

<sup>260</sup> *Id.* at 804.

interstate commerce and, therefore, contravene the Dormant Commerce Clause doctrine.

The party challenging the law bears the burden of showing the impact on interstate commerce.<sup>261</sup> As an initial matter, it is not clear that the existing state-level net neutrality initiatives are limited to in-state conduct. For example, Vermont's executive order prevents state agencies from contracting for broadband service unless the broadband provider certifies that it does not "engage in paid prioritization . . . to *any Internet customer*."<sup>262</sup> Similarly, Hawaii requires agencies to contract only with providers that "demonstrate and contractually agree to support and practice net neutrality principles where *all Internet traffic* is treated equally."<sup>263</sup> Facially, these restrictions can be read to apply not only to contracts with in-state consumers, but with all consumers nationwide (or indeed worldwide).<sup>264</sup>

But even if the court construes these restrictions to apply only to contracts with in-state consumers, such regulations can disrupt the orderly flow of interstate traffic. Permissible network management practices would differ from state to state, depending on whether and how each state chose to regulate. Even if all states adopted facially identical statutes, fragmentation is likely to occur over time as fifty different sovereigns may reasonably disagree on enforcement. For example, what constitutes "reasonable network management" may differ from state to state. Broadband providers are thus left with two alternatives: operate a nationwide network that meets the standards of the most stringent state—meaning that state's law burdens out-of-state communications that would otherwise be legal—or balkanize the network and make the delivery of network traffic less efficient, which burdens the delivery of out-of-state communications. Similar burdens on out-of-state traffic undergirded the *Pataki* decision, and while *National Federation of the Blind* was less sympathetic to such claims, it did not discard them outright—rather, the court withheld judgment until the magnitude of the burden could be quantified.

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<sup>261</sup> See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

<sup>262</sup> Vt. Exec. Order, *supra* note 9.

<sup>263</sup> Haw. Exec. Order, *supra* note 9.

<sup>264</sup> It is worth noting that the executive orders, and two of the four statutes, do not regulate broadband providers directly, but instead require them to commit to net neutral practices as a condition of receiving government contracts. This is an attempt to fit these regulations into the market participant doctrine, which is an exception to the Dormant Commerce Clause doctrine. But because most of these initiatives reach beyond the terms of the state's own contracts, and instead attempt to regulate contracts between broadband providers and third-party consumers, they fall outside the market participant doctrine, as discussed above. See text accompanying notes 214–23, *supra*.

Once plaintiffs have established that a law burdens interstate commerce, the burden shifts to the state to establish the local benefit.<sup>265</sup> Many states have been careful to rehearse the benefits they claim from net neutrality regulations. The Vermont statute, for example, explains that because the Green Mountain State is “a rural state with many geographically remote locations . . . many Vermonters do not have the ability to choose easily between Internet Service Providers (ISPs). This lack of a thriving competitive market, particularly in isolated areas, disadvantages the ability of consumers and businesses to protect their interests sufficiently,” thus warranting government regulation.<sup>266</sup> Similarly, California’s legislature found that “[a]most every sector of California’s economy, democracy, and society is dependent on the open and neutral Internet that supports vital functions” such as police and emergency services, health services, utilities, and education.<sup>267</sup>

But these states may struggle to quantify these claimed benefits. As one court noted, “to determine what the ‘practical effects’ of the regulation are, courts should inquire into the actual effects of the legislation rather than the effects intended by the legislature.”<sup>268</sup> Similarly, net neutrality skeptics have often cited the dearth of evidence that net neutrality rules are necessary to protect consumers from real harm—the history of broadband development before the 2015 *Open Internet Order* and since its 2018 repeal suggest otherwise. And while proponents claim that regulation can promote other values—such as the 2015 *Open Internet Order*’s claim of a “virtuous cycle” that net neutrality will promote edge investment, which in turn will stimulate demand for greater network investment—the evidence supporting these claims is equally thin, as Judge Williams noted in his dissent in *US Telecom Association*.<sup>269</sup> On the other hand, the majority gave the FCC the benefit of the doubt in that case because of the “highly deferential” standard of review governing agency

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<sup>265</sup> *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1281 (2d Cir. 1995).

<sup>266</sup> S. 289, Gen. Assemb. Reg. Sess. (Vt. 2018).

<sup>267</sup> S.B. 822, Sen. Reg. Sess. (Cal. 2018).

<sup>268</sup> *National Federation of the Blind*, 452 F. Supp. 2d at 960; see also *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989) (“The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”). While the court in that instance was discussing the need to quantify the burden on interstate commerce, a proper cost-benefit analysis requires a similar quantification of the offsetting benefit, as the *Pataki* court discusses in depth.

<sup>269</sup> See *US Telecom Ass’n v. FCC*, 825 F.3d 674, 754 (2016) (Williams, J., dissenting).

predictive judgments in administrative settings, and courts may extend similar deference to state legislatures' conclusion as well.<sup>270</sup>

These observations suggest that opponents of state net neutrality initiatives have at least a colorable argument that such efforts violate the Dormant Commerce Clause. The Internet is a national (indeed, global) network, meaning that state attempts to regulate the flow of traffic on that network are likely to have extraterritorial effects that burden interstate commerce. As a result, claims that these rules contravene the Dormant Commerce Clause could prove an additional obstacle for state attempts to resurrect net neutrality restrictions.

#### IV. FUTURE OF STATE BROADBAND REGULATION

##### A. *Optimal Jurisdiction Analysis*

The Dormant Commerce Clause analysis illuminates a broader policy question posed by state net neutrality efforts and by federalism issues generally: when is state-by-state regulation beneficial to consumers, and when is the public best served by a single national regulatory model? The answer to this question turns upon the relative strengths of federal and local regulation. As Charles Cooper and Brian Koukoutchos note, “[o]ne does not lightly displace the regulatory powers of sovereign states.”<sup>271</sup> The recognition of state governments as co-sovereigns is a key feature of “Our Federalism”<sup>272</sup> and promotes important values such as policy experimentation, responsiveness to local concerns, and accountability by public figures who are closer to the subjects they govern.<sup>273</sup> On the other hand, the existence of the Commerce Clause reminds us that there were important policy reasons why the founders adopted the Constitution rather than continuing to languish under the defunct Articles of Confederation: “[t]he Constitutional Convention was held in 1787 precisely because the states had shown themselves to be, by their very nature as separate and competing sovereigns, incompetent to regulate interstate and foreign commerce.”<sup>274</sup> An optimal

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<sup>270</sup> Cf. *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (“In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress. Our sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.”).

<sup>271</sup> See Cooper & Koukoutchos, *supra* note 7, at 299.

<sup>272</sup> See *Younger v. Harris*, 401 U.S. 37, 44 (1971).

<sup>273</sup> See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 53–62 (2004).

<sup>274</sup> Cooper & Koukoutchos, *supra* note 7, at 300–01.

jurisdiction analysis should try to capture the benefits of decentralization while minimizing the negative effects that Our Federalism can otherwise generate.<sup>275</sup>

Federalism scholars have recognized several reasons supporting a move toward centralized authority, two of which are most relevant here. First, preemption brings uniformity: it replaces a patchwork of inconsistent standards with a single legal regime that operates the same way nationwide.<sup>276</sup> Uniformity reduces the transaction costs of government compliance, as a company has a single federal interface to seek regulatory action, guidance, or exemption, rather than having to lobby fifty or more independent decisionmakers.<sup>277</sup> Uniformity also reduces uncertainty: a company can enter a regional or national market knowing the legal framework that will govern the service throughout the market, with less fear that the law will suddenly shift in part, but not all, of the service area.<sup>278</sup>

The second rationale favoring preemption is the elimination of spillover effects that occur when a regulator's activities have effects beyond the scope of the regulator's jurisdiction. As Judge Michael McConnell explains:

Externalities present the principal countervailing consideration in favor of centralized government: if the costs of government action are borne by the citizens of State C, but the benefits are shared by the citizens of States D, E, and F, State C will be unwilling to expend the level of resources commensurate with the full social benefit of the action.<sup>279</sup>

This is one principle animating the Court's Dormant Commerce Clause jurisprudence, but has policy salience even beyond that constitutional boundary. To minimize spillover effects, decisionmaking authority must be vested at a high enough

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<sup>275</sup> See Hazlett, *supra* note 58, at 177 ("Selection of the optimal jurisdiction largely reduces to a search for the smallest unit of government (lowest tier) that substantially avoids 'beggar thy neighbor' outcomes from decentralized policy making.").

<sup>276</sup> See Daniel A. Lyons, *Federalism and the Rise of Renewable Energy: Preserving State and Local Voices in the Green Revolution*, 64 CASE W. RES. L. REV. 1619, 1646 (2014).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1495 (1987).

level that the decisionmaker can account for the full costs and benefits of a proposed action.<sup>280</sup>

Of course, this uniformity and predictability does not come without cost. A uniform federal scheme has difficulty adapting to the demands of unique local circumstances. Federal decisionmakers often lack local knowledge regarding when a broad rule needs to be tailored to the idiosyncrasies of a local market, and, even if armed with this knowledge, they may lack the incentive to do so. Because state and local governments are responsible for a smaller polity than their federal counterparts, they are in a better position to know and respond to local concerns.<sup>281</sup> A decentralized approach is most helpful when important policy matters turn on questions of local knowledge that federal regulators are in a poor position to understand.

There are unquestionably some benefits to be gained from allowing states to speak out on net neutrality. To the extent that the residents of Vermont, California, Oregon, or Washington feel more strongly in favor of net neutrality protections than consumers in other parts of the country, the states' willingness to enact a rule, risk a federal preemption challenge, and expend public time and resources on enforcement keeps the political issue alive and signals the strength of their interest to national lawmakers, influencing the national debate. In this sense, it is perhaps unsurprising that the primary catalysts of state net neutrality rules are not state public utility commissioners but governors and state legislators, who are directly elected by their constituents and, therefore, are well placed to read their constituents' preferences and communicate them nationally. State legislation can also provide a model for eventual federal action, though other than California, most state initiatives thus far mostly mimic the FCC's Open Internet Order.

These benefits of decentralization are nonetheless outweighed by the spillover effects that state-by-state regulation of network management practices can have on national networks. Thomas Hazlett explained that in network industries such as telecommunications, preemption is often appropriate when inconsistent state laws generate spillover effects that prevent companies from achieving interstate

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<sup>280</sup> Lyons, *supra* note 276, at 1646.

<sup>281</sup> *Id.* at 1653, 1653 n.164 (quoting Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 395 (1997) ("Officials ought to look their constituents in the eye on the street and see them in the grocery store.")).

economies of scale.<sup>282</sup> Economies of scale allow a company to deliver a good cheaper and more efficiently by expanding its scale of production. Through expansion, the company can spread its fixed costs over a larger volume of sales, which reduces the average cost of each unit and therefore lowers the price of its goods for consumers. State regulators often undervalue interstate economies of scale and can enter inconsistent regulations that prevent companies from achieving efficient growth.<sup>283</sup>

This concern underlies much of the arc of telecommunications federalism history. Time after time, federal authorities have preempted state regulatory authority over networks and services that they perceive as being national in scope, because of concerns about uniformity and the risk of inconsistent state-by-state regulation. As discussed above, the FCC preempted state regulation of enhanced services upon finding that “[t]he enhanced services market generally is national or regional in scope, and a degree of certainty and uniformity may be necessary to enable the enhanced services market to develop in the way that both state commissions and this Commission desire.”<sup>284</sup> Similarly, Congress preempted state regulation of mobile entry and rates because preemption would “foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.”<sup>285</sup> Hazlett showed empirically that this preemption was efficient.<sup>286</sup> Comparing the mobile markets before and after the 1993 statute was enacted, he showed that per-minute prices fell 80% in the decade following preemption, due to competitive entry and national network consolidation that allowed firms to offer nationwide plans efficiently.<sup>287</sup>

Similar concerns apply to state-level regulation of network traffic management practices. State-specific restrictions can balkanize the Internet by requiring carriers

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<sup>282</sup> See Hazlett, *supra* note 58, at 177 (citing David F. Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the “Gray” Behind the “Green,”* 81 CALIF. L. REV. 991, 1004 (1993)).

<sup>283</sup> See *id.* at 176 (“Importantly, it occurs not just when property rights are ill-defined (the Coasian sense of ‘externality’), but when economies of scale extend across states. Then the highly complementary nature of supplying consumers in multiple political jurisdictions produces costs and benefits which may largely go unnoticed by regulatory authorities.”) (footnote and citation omitted).

<sup>284</sup> In the Matter of Computer III Remand Proceedings, 6 FCC Rcd. 174, 181 (1990).

<sup>285</sup> H.R. REP. NO. 103-111, at 260 (1993), as reprinted in 1993 U.S.C.C.A.N. 378, 587; see Kennedy & Purcell, *supra* note 56.

<sup>286</sup> See Hazlett, *supra* note 58.

<sup>287</sup> See *id.*

to adopt different rules for different regimes. Carriers may have to adopt different traffic protocols for consumers in different jurisdictions. And particularly given that state initiatives do not (and perhaps cannot) distinguish between intrastate and interstate communications, state-level restrictions limit the services that carriers can offer nationally. Importantly, this has a negative effect not only on contracts with end-user consumers, but also with services like prioritization or zero-rating that can otherwise be marketed to edge providers. As the Commission has noted, edge markets are primarily national in scope.<sup>288</sup> For congestion-sensitive applications such as streaming video or real-time video conferencing, prioritization can be a mechanism by which edge providers can deliver a better product to consumers without adversely affecting noncongestion-sensitive services.<sup>289</sup> Similarly, the ability to zero-rate a particular offering can help expand the planes of competition among edge providers and allow smaller providers a chance to gain an advantage over rivals.<sup>290</sup> If broadband providers cannot market such services nationally, they are less likely to achieve national economies of scale and will be provided less efficiently. At the extreme, the inability to offer prioritization or zero-rating nationally may deter edge providers from purchasing such services at all—meaning these consumer-friendly offerings will be unavailable even in states where consumers want them and regulators have not banned them.

Even in the unlikely event that every state adopted similar net neutrality regulations, there remains the risk of inconsistent interpretation and enforcement. For example, many state net neutrality initiatives contain exceptions for network traffic management, and reserve the right to review, on a case-by-case basis, particular practices that constitute unreasonable interference with the ability of edge providers and consumers to reach one another.<sup>291</sup> “Reasonable” and “unreasonable” are not rules but standards: they provide general guidance but allow the adjudicator significant discretion to determine how the general principle should apply in a specific case. As noted above, this means that even if every state adopts a textually identical exception for “reasonable network management,” they may disagree regarding whether a particular traffic management practice is reasonable.

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<sup>288</sup> See *Restoring Internet Freedom*, 33 FCC Red. 311, 430–31 (2018).

<sup>289</sup> See Daniel A. Lyons, *Paid Prioritization: Debunking the Myth of Fast and Slow Lanes*, AM. ENTERPRISE INST. (Apr. 2, 2018), <http://www.aei.org/publication/paid-prioritization-debunking-the-myth-of-fast-and-slow-lanes/>.

<sup>290</sup> See Daniel A. Lyons, *Innovations in Mobile Broadband Pricing*, 92 DENV. U. L. REV. 453, 466–76 (2012).

<sup>291</sup> See, e.g., S.B. 822 (Cal. 2018).

Accordingly, even to the extent that state regulation of network management practices is permissible under the Communications Act and the Dormant Commerce Clause, it is nonetheless likely to be inadvisable as a policy matter. The risk of spillover effects undermines national economies of scale and thus undermines Congress's overall objective of providing telecommunications services to the largest number of people at the lowest cost.

*B. Ongoing State Participation in the Broadband Sphere*

But this does not suggest that states should abandon the field entirely when it comes to broadband policy. While state economic regulation of broadband networks is likely inefficient, decentralized authority is best where issues are primarily local in scope; or in Professor Hazlett's terms, "the advantage of differentiation lies in the informational efficiencies local regulators enjoy relative to the advantages of scale economies they sacrifice (or disrupt)."<sup>292</sup> The Communications Act's wireless preemption regime is instructive: state economic regulation is preempted, in order to promote national economies of scale in wireless networks.<sup>293</sup> But states continue to play a role in consumer protection, reflecting the fact that consumer protection issues may arise due to the idiosyncratic vulnerabilities of a particular segment of the population that could escape the notice of a national regulatory body.<sup>294</sup>

It follows that concurrent state jurisdiction is appropriate over consumer protection issues in the broadband sphere, as long as the action does not serve as a backdoor to rate regulation. This would justify state disclosure and transparency obligations, which hew more closely to traditional contract principles as applied to the broadband industry. Although the Restoring Internet Freedom Order preempts state disclosure obligations that exceed those in the Order, earlier Commission decisions left room for states to adopt disclosure requirements that supplement, but do not contradict, federal efforts.<sup>295</sup>

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<sup>292</sup> See Hazlett, *supra* note 58, at 175.

<sup>293</sup> 47 U.S.C. § 332 (2018).

<sup>294</sup> See Lyons, *supra* note 1, at 427–28 (discussing California Public Utility Commission rule requiring carriers to provide customer service in various languages, as example of state regulators' local knowledge about the unique needs of the state's particularly diverse population).

<sup>295</sup> In the Matter of Nat'l Ass'n of Regulatory Util. Comm'rs Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data, 25 FCC Rcd. 5051, 5054–55 (2010).

State buildout initiatives can also be beneficial to consumers. The Vermont statute's Connectivity Initiative is an excellent example.<sup>296</sup> The Initiative seeks to identify areas of the state that are unserved or underserved by existing broadband offerings and work with broadband providers to subsidize new capital deployment to these areas.<sup>297</sup> State regulators can capitalize on superior local knowledge about the conditions throughout the state to augment the FCC's own Connect America Fund efforts.<sup>298</sup> The FCC experimented with this approach in 2017, when it granted New York's request to allow the state to award CAF-II funding earmarked for the state, in conjunction with the state's own broadband subsidy program.<sup>299</sup>

## V. CONCLUSION

Ultimately, state net neutrality initiatives are driven largely by policy disagreements with the Trump Administration. Given that the conflict is largely political, it is appropriate for state lawmakers to respond through political processes. It is unsurprising to see states participating in the legal challenge to the Restoring Internet Freedom Order. It would also be unsurprising for them to file comments in Commission proceedings, or to lobby federal policymakers in favor of legislation that would correct what they see as mistakes by the agency. In each of these instances, the states could use existing legal and political channels to defend their interests and provide local information to federal decisionmakers in the judiciary, the agency, and the legislature.

But the executive orders and statutes passed in response to the Restoring Internet Freedom Order likely exceed the states' power to make their voices heard in this area. Broadband networks are inherently interstate, placing them beyond the traditional realm of state telecommunications regulation. The initiatives are likely preempted by federal law, and even if the legal challenge to the Restoring Internet Freedom Order is successful, the principles of conflict preemption dictate that these state initiatives can, at most, supplement federal policy in this area. As the Restoring Internet Freedom Order notes, states can and will continue to play a role in broadband regulation by enforcing general consumer protection laws alongside the FCC and the Federal Trade Commission.<sup>300</sup> But preemption doctrines rightly prevent the states

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<sup>296</sup> VT. STAT. ANN. tit. 30, § 7515b (2017).

<sup>297</sup> *Id.*

<sup>298</sup> Cf. Daniel A. Lyons, *Narrowing the Digital Divide: A Better Broadband Universal Service Program*, 52 U.C. DAVIS L. REV. 803, 849–52 (2018) (recommending greater cooperation between FCC and state regulators to administer rural buildout subsidies).

<sup>299</sup> *In re Connect America Fund*, 32 FCC Rcd. 968, 968 (2017).

<sup>300</sup> *In the Matter of Restoring Internet Freedom*, 33 FCC Rcd. 311, 395–96 (2018).

from balkanizing the Internet according to the dictates of multiple regulatory regimes in ways that interfere with the policy judgments of the federal government's primary communications regulatory agency.