

LSU Journal of Energy Law and Resources

Volume 11
Issue 2 *Spring 2023*

6-30-2023

Weak Signal: How Federal Preemption of Broadband Regulation Can Counter the Digital Divide

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Repository Citation

Sam Biddick, *Weak Signal: How Federal Preemption of Broadband Regulation Can Counter the Digital Divide*, 11 LSU J. of Energy L. & Resources (2023)

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Weak Signal: How Federal Preemption of Broadband Regulation Can Counter the Digital Divide

Sam Biddick*

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* The author extends his sincerest gratitude to Professor Lecia Vicente and Professor Heidi Thompson for their time, guidance, and endless encouragement and the Journal of Energy Law and Resources Volume IX and Volume X board members for their careful edits and insightful comments. Additionally, the author extends his gratitude to his family and friends for all of their love and support.

INTRODUCTION

Municipalities were essential to deploy electricity across America a century ago.¹ In the 1930s, fewer than 10% of American farms had electricity,² prompting President Franklin Roosevelt to use the Public Works Administration and the Rural Electrification Act to grant local governments access to federal loans for rural electricity projects.³ In his “Portland Speech,” Roosevelt called inexpensive public power a “yardstick” against which private utilities’ rates and services could be judged, and a “birch rod” to compel private utilities to compete for lower prices.⁴ This yardstick proved effective and, by the 1950s, nearly all of rural America had electric power.⁵ The proliferation of electricity across the nation was hailed as the great infrastructure achievement of the 20th century.⁶

Broadband internet access will be the next great infrastructure challenge of the 21st century.⁷ In the past few decades, the internet has changed from a luxury service to a basic necessity. As technology rapidly develops, more essential activities require internet access. The internet has

1. Dena Reavis, *The History of Economic Thought Surrounding the Public Utility Holding Company Act of 1935*, HISTORIA (2007), <https://www.eiu.edu/historia/Historia2008Reavis.pdf> [perma.cc/QS9W-VCTT].

2. Carl Kitchens, *US Electrification in the 1930s*, VOXEU: CTR. FOR ECON. POL’Y RSCH. (Jan. 29, 2014), <https://voxeu.org/article/us-electrification-1930s> [https://perma.cc/P3AG-URF3].

3. Reavis, *supra* note 1.; 7 U.S.C. § 901.

4. Gerhard Peters & John T. Wooley, *Franklin D. Roosevelt: Campaign Address in Portland, Oregon on Public Utilities and Development of Hydro-Electric Power*, THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/campaign-address-portland-oregon-public-utilities-and-development-hydro-electric-power> [https://perma.cc/E4BK-RD54] (last visited Jan. 15, 2023).

5. Kitchens, *supra* note 2.

6. Brandon McBride, *Celebrating the 80th Anniversary of the Rural Electrification Administration*, USDA (Feb. 21, 2017), <https://www.usda.gov/media/blog/2016/05/20/celebrating-80th-anniversary-rural-electrification-administration> [https://perma.cc/D8J7-EYPJ].

7. *Connecting America: The National Broadband Plan*, FED COMM’NS COMM’N xi (2010), <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf> [https://perma.cc/P9L3-8YNS].

become necessary for business,⁸ government,⁹ education,¹⁰ healthcare,¹¹ and more. However, not all internet is created equal. Across America, access to the internet varies from high-speed service to no internet service at all. The difference between those with adequate, future-proof internet speeds,¹² and those without has been termed the digital divide.¹³ This divide bisects American society across several lines, separating rural and urban,¹⁴ rich and poor,¹⁵ white and non-white.¹⁶ Rural, poor, and non-white populations are less able to access the Internet, rendering these populations less able to access other necessary resources such as education, job applications, government programs, telehealth appointments, and remote work.¹⁷ Rural communities in particular

8. Karen Mracek, *What Is the Impact of the Digital Divide?*, FED. RSRV. BANK OF ST. LOUIS (Nov. 6, 2018), <https://www.stlouisfed.org/open-vault/2018/november/impact-of-digital-divide> [<https://perma.cc/QQK3-M7ZA>].

9. Andrew J. Yawn, *Louisiana Town Has Fifth Slowest Speed in the Nation: Report*, THE ADVOCATE, <https://www.theadvertiser.com/story/news/2020/01/06/ville-platte-louisiana-slow-internet-economy/2738142001/> [<https://perma.cc/7E-V8-UWWJ>] (last updated Jan. 6, 2020, 3:45 PM).

10. K. N. HAMPTON ET AL., BROADBAND AND STUDENT PERFORMANCE GAPS 11 (2020).

11. Allee Mead, *Broadband in Rural America: Faster Speeds for Home and Healthcare*, RURAL HEALTH INFO. HUB: THE RURAL MONITOR (Apr. 28, 2021), <https://www.ruralhealthinfo.org/rural-monitor/broadband/> [<https://perma.cc/23L-N-MHGX>].

12. WRAL Digital Solutions, *Why Fiber-optic Internet Is a Long Term, Future-Proof Solution*, WRAL TECHWIRE (July 8, 2021), <https://www.wraltechwire.com/2021/07/08/why-fiber-optic-internet-is-a-long-term-future-proof-solution/> [<https://perma.cc/LQ9N-E9DC>] (future-proof refers to technology that will be able to handle the higher data transmission speeds needed as internet usage changes and increases).

13. Grace M. Mills, *The Digital Divide: Left Behind on the Other Side*, 30 U. LA VERNE L. REV. 381, 382 (2009).

14. Zippy Duvall, *Investing in Rural Broadband, an Investment in the Future*, AM. FARM BUREAU FED'N (Aug. 11, 2021), <https://www.fb.org/viewpoints/investing-in-rural-broadband-an-investment-in-the-future> [<https://perma.cc/Q7VX-QDRH>].

15. Becky Chao et al., *The Cost of Connectivity 2020*, OPEN TECH. INST., <https://www.newamerica.org/oti/reports/cost-connectivity-2020/> [<https://perma.cc/CAB5-QFPK>] (last updated July 15, 2020).

16. S. DEREK TURNER, DIGITAL DENIED: THE IMPACT OF SYSTEMIC RACIAL DISCRIMINATION ON HOME-INTERNET ADOPTION 4 (2016).

17. Golda Arthur, *Lack of Internet Access Makes Climb Out of Poverty Harder*, AL JAZEERA AM. (Oct. 24, 2015, 5:00 AM), <http://america.aljazeera>

struggle to induce private providers to develop advanced internet infrastructure in their areas due to the high costs and low profits associated with serving those localities.¹⁸ Urban areas are not completely free from this problem either. City dwellers also suffer from unaffordable internet rates and inadequate infrastructure.¹⁹ The total costs of the digital divide are immeasurable; however, as much as \$1 trillion in economic growth may be delayed due to the number of Americans lacking internet access.²⁰

There are two main causes for the digital divide. First, inadequate internet infrastructure results in no internet access or inadequate speeds to support basic online activities. A 2019 report estimated that 6.4% of Americans lacked access to any broadband internet service.²¹ The second cause of inadequate infrastructure is the lack of competition among internet service providers. Nearly 50 million Americans have access to only one broadband service provider.²² This means that even when access may be available, internet service providers have little incentive to lower prices or provide higher quality services.

The answer to the digital divide is universal service—the principle that all Americans should have access to affordable, adequate communications services.²³ Under the Telecommunications Act of 1996, the agency with authority to regulate broadband service providers is the Federal Communications Commission (FCC).²⁴ The FCC has the goal of achieving universal service; however, a digital divide persists in America despite numerous federal grant and loan programs aimed at providing

.com/articles/2015/10/24/not-having-internet-access-at-home-hinders-education-employment.html [https://perma.cc/B8FL-REQQ].

18. SEAN GONSALVES, *THE PROBLEM(S) OF BROADBAND IN AMERICA* 3–4 (2021), <https://ilsr.org/wp-content/uploads/2021/07/Problems-of-Broadband-072021.pdf> [https://perma.cc/2BSG-VXH3].

19. *Mapping and Mitigating the Urban Digital Divide*, THE UNIV. OF CHICAGO: DATA SCI. INST. (Jan. 19, 2021), <https://cdac.uchicago.edu/news/map-ping-and-mitigating-the-urban-digital-divide/> [https://perma.cc/B45F-GKM2].

20. Hannibal Travis, *WI-FI Everywhere: Universal Broadband Access as Antitrust and Telecommunications Policy*, 55 AM. U. L. REV. 1697, 1699 (2006).

21. Broadband Deployment Report: Digital Divide Narrowing Substantially, 34 FCC Rcd. 3857 (2019), <https://docs.fcc.gov/public/attachments/FCC-19-44A1.pdf> [https://perma.cc/YB96-J7AU].

22. H. TROSTLE & CHRISTOPHER MITCHELL, *PROFILES OF MONOPOLY: BIG CABLE AND TELECOM* 21 (2020), https://ilsr.org/wp-content/uploads/2020/08/2020_08_Profiles-of-Monopoly.pdf [https://perma.cc/YP6K-WEJV].

23. 47 U.S.C. § 254(b).

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

universal service.²⁵ The FCC has taken a deregulatory approach to the broadband market, resulting in a lack of cohesion at all levels of government and obstructing the development of broadband infrastructure and access across America.²⁶ Judicial interpretation of the agency's grant of authority in the Telecommunications Act of 1996 further limits the agency's ability to influence state regulation of broadband.²⁷

To achieve universal service, policymakers must address two main problems at their source: 1) the lack of broadband infrastructure and 2) the lack of competition among broadband providers. One promising solution emerges at the local level: municipal broadband. Municipalities have a long history of providing various utilities such as electricity, water, gas, internet, telephone services, waste management, and other essential services that are too cumbersome for statewide or nationwide agencies to implement.²⁸ The growing digital divide prompted some local governments to experiment with providing internet services to their residents.²⁹ Since the 1990s, hundreds of communities have invested in municipally-owned broadband networks.³⁰ Many of these communities built their own networks and provided much-needed competition in their

25. Will Carless, *How the US' Massive Failure to Close the Digital Divide Got Exposed by Coronavirus*, REVEAL NEWS (June 22, 2020), <https://revealnews.org/article/how-the-us-massive-failure-to-close-digital-divide-got-exposed-by-coronavirus/> [https://perma.cc/QP6U-FQF5]; Erica Proffer, *'The Cruellest Part of the Digital Divide' | How Millions in Federal Funding Fails Our Students*, KVUE (Jul. 17, 2020, 9:17 AM), <https://www.kvue.com/article/news/deep-dive-texas/federal-funds-for-students-internet-at-home/269-9206c384-ca44-42b7-a030-f4863b5e523b> [https://perma.cc/L3TL-6CVV] (last updated July 17, 2020, 9:17 AM).

26. Corian Zacher, *Paving the Road to Fiber*, 18 COLO. TECH. L.J. 261, 274 (2020).

27. *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004) (holding that FCC preemption of state laws restricting broadband violated state sovereignty); *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010).

28. Scotty Hendricks, *What Are Municipal Utilities and Why Are They Suddenly Popular?*, BIG THINK (Nov. 26, 2019), <https://bigthink.com/the-present/municipal-electricity-utility/> [https://perma.cc/HDT4-J2H8].

29. Steven C. Carlson, *A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway*, 25 RUTGERS COMPUTER & TECH. L.J. 1, 7–8 (1999) (the first municipal internet network was Glasgow, KY in 1989).

30. Karl Bode, *More Than 750 American Communities Have Built Their Own Internet Networks*, VICE (Jan. 23, 2018, 4:09 PM), <https://www.vice.com/en/article/a3np4a/new-municipal-broadband-map> [https://perma.cc/KQN2-SXCW].

regions.³¹ On average, these publicly-owned networks offer faster internet speeds and lower prices than private broadband providers.³² As more municipalities entered the market, private internet service providers fought back by lobbying state legislatures to regulate this new class of internet service providers.³³ Municipal governments are currently restricted in their ability to own and operate broadband networks in 23 states.³⁴

Municipal broadband networks are an invaluable tool for addressing the digital divide. Currently, municipalities offer some form of broadband service to over 500 communities across the U.S., including many rural areas major internet providers ignore.³⁵ Public investment and ownership in broadband systems aligns with Congress's and the FCC's objectives of achieving universal services. In 2000, the FCC endorsed public investment in internet infrastructure and municipal internet service providers as "best practices" for tackling the digital divide.³⁶ However, adversarial legislation at the state level reduced municipal involvement with ISPs to the detriment of broadband deployment. Internet usage is increasingly important for modern society and unprecedented levels of funding have been authorized to build broadband infrastructure. The tension between these additional funds for broadband and increasing state resistance to municipal broadband threatens to further delay broadband deployment and waste taxpayer resources. A variety of policies can make access to broadband markets easier for municipalities and other providers, but they might require additional oversight and cooperation at all levels of government.

Part I of this Comment provides some background on the current state of broadband technology and the broadband industry, the FCC's policies

31. Carlson, *supra* note 29, at 1.

32. See *Snapshots of Municipal Broadband: A Much-Needed Part of America's Digital Ecosystem*, INST. FOR LOC. SELF-RELIANCE: CMTY. NETWORKS (May 2021), <https://ilsr.org/wp-content/uploads/2021/05/05-2021-Snapshots-Fact-Sheet.pdf> [<https://perma.cc/W5GY-GA7D>].

33. Tyler Cooper, *Municipal Broadband Is Restricted in 18 States Across the U.S. in 2021*, BROADBANDNOW, <https://broadbandnow.com/report/municipal-broadband-roadblocks/> [<https://perma.cc/J2GA-SDRZ>] (last updated Dec. 1, 2021).

34. *Id.*

35. *Community Network Map*, INST. FOR LOC. SELF-RELIANCE: CMTY. NETWORKS, <https://muninetworks.org/communitymap> (last visited Jan. 15, 2022).

36. FED. COMM'N COMM'N, FCC 00-290, DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY: SECOND REPORT 15 (2000), https://transition.fcc.gov/Bureaus/Common_Carrier/Orders/2000/fcc00290.pdf [<https://perma.cc/2Q35-TEFC>].

for regulating broadband, and the federal funding currently available to address the digital divide. Part II outlines the advantages of municipal broadband and how those advantages can reduce the digital divide. Part II also addresses the Supreme Court's analysis of the FCC's authority over broadband regulation. Additionally, Part II will discuss the various types and effects of state law restrictions on municipal broadband resulting from the Supreme Court's interpretation. Finally, Part III will explain how federal preemption of state laws that restrict local governments from providing broadband can help achieve universal service by elevating broadband service from Title I to Title II, increasing regulations over anti-competitive practices, and placing conditions on Congressional spending.

I. BACKGROUND

A. Broadband Technology

Broadband internet is a type of internet service that allows the transmission of data at high speeds, enabling users to “originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”³⁷ Broadband internet service is distinguishable from other types of internet services by its higher speed capabilities and “always on” status, as opposed to dial-up internet.³⁸ Many different types of technologies meet these standards, including digital subscriber line (DSL) broadband, cable modem, fiber, 5G, satellite, and broadband over powerlines (BPL).³⁹

Households and businesses require high speed internet to support routine online activities.⁴⁰ A standard one-on-one video call requires around 2 megabits per second (Mbps) in upload/download speeds,⁴¹ and employees and students working from home need an average of 10 Mbps

37. 47 U.S.C. § 706.

38. *Types of Broadband Connections*, FED. COMM'NS COMM'N, <https://www.fcc.gov/general/types-broadband-connections> [<https://perma.cc/975X-FC84>] (last updated June 23, 2014).

39. *Id.*

40. Letter from Michael F. Bennet, U.S.Sen., Angus S. King, Jr., U.S. Sen., Rob Portman, U.S. Sen., & Joe Manchin III, U.S. Sen., to Tom Vilsack, Sec'y, U.S. Dep't of Agric., Jessica Rosenworcel, Acting Chairwoman, Fed. Comm'ns Comm'n, Gina Raimondo, Sec'y, U.S. Dep't of Com., Brian Deese, Dir., Nat'l Econ. Council (Mar. 4, 2021).

41. Philip Bell, *What Internet Speed Do You Need for Video Conferencing?*, MEGAMEETING (Jan. 29, 2021), <http://www.megameeting.com/news/what-inter-net-speed-for-video-conferencing/> [<https://perma.cc/6ASS-YE2T>].

in download speeds per person.⁴² The current federal standard for broadband internet speeds is 25 Mbps for downloading files, and 3 Mbps for uploading files.⁴³ Internet usage already outpaced the federal standard prior to the COVID-19 pandemic, and spiked even further during the 17-month span from March 2020 to July 2021.⁴⁴

B. The Lack of Competition in the Broadband Market

The broadband market, especially cable broadband, is increasingly dominated by one or two major providers.⁴⁵ Cable is the dominant technology for broadband services. At one point, the FCC and other policymaking institutions believed that other types of technology would provide competition against cable providers.⁴⁶ However, cable remains a majority share of the broadband market today.⁴⁷ Together, Charter Internet services and Comcast own over 65% of the cable broadband market.⁴⁸ About 22 million Americans have no other option besides Comcast for residential internet service,⁴⁹ and 24 million Americans are only served by

42. *Id.*

43. The 25/3 standard was upheld in the FCC Fourteenth Annual Broadband Report (2021), but this requirement was dropped from the ARPA Final Interim Rule.

44. *Responding to COVID-19: Keeping America Connected*, NCTA: THE INTERNET & TELEVISION ASS'N, <https://www.ncta.com/covid-19-overview> [https://perma.cc/6UPH-TUTK] (last visited Jan. 15, 2023).

45. Karl Bode, *The Cable Industry Is Quietly Securing a Massive Monopoly Over American Broadband*, TECHDIRT (Mar. 20, 2018 6:19 AM), <https://www.techdirt.com/articles/20180314/09251639423/cable-industry-is-quietly-securing-massive-monopoly-over-american-broadband.shtml> [https://perma.cc/AP2U-BWFE].

46. FED. COMM'N COMM'N, FCC 05-151, APPROPRIATE FRAMEWORK FOR BROADBAND ACCESS TO THE INTERNET OVER WIRELINE FACILITIES, (2005) (available for download at <https://www.fcc.gov/document/appropriate-framework-broadband-access-internet-over-wireline-0>). Other technologies the FCC has considered include supplemental 5G towers for wireless internet and Broadband over Power Lines (BOPL).

47. Jon Brodtkin, *Comcast, Charter Expand Broadband Domination as Cable Hits 67% Market Share*, ARS TECHNIA (Mar. 9, 2020, 11:03 AM), <https://arstechnica.com/information-technology/2020/03/comcast-charter-expand-broadband-domination-as-cable-hits-67-market-share/> [https://perma.cc/RH25-XEG7].

48. *Id.*

49. TROSTLE & MITCHELL, *supra* note 22, at 4.

Charter Spectrum.⁵⁰ An additional million Americans only have AT&T as an option for residential broadband services.⁵¹

Although this is not enough to be considered a dominant market share,⁵² these companies enjoy advantages such as the high barriers that obstruct other competition from entering into the internet service market.⁵³ Some of these barriers of entry are inherent to the provision of internet services, since ISPs have high start-up costs and can take years to recoup investments on new customers.⁵⁴ Internet service could be characterized as a natural monopoly due to the high costs involved in installing cable and fiber systems.⁵⁵

C. Federal Authority Over Broadband

Substantial federal regulation of internet services began with the Telecommunications Act of 1996, enacted to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage rapid deployment of new telecommunications technologies.”⁵⁶ This Act delegated authority to the FCC to regulate broadband and promote internet access for all Americans.⁵⁷ This was the first major revision in the field of telecommunications law that shifted the way Congress regulated telecommunications since the 1934 Communications Act. Prior to the 1996 Act, the general perception of the telecommunications industry was that of a natural monopoly justified by the large capital investments

50. *Id.* at 6.

51. *Id.* at 8.

52. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945); (“[N]inety percent is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.”) Judge Hand’s language was adopted by the Supreme Court in *Am. Tobacco Co. v. United States*, 328 U.S. 781, 813--14 (1946).

53. Jon Brodtkin, *One Big Reason We Lack Internet Competition: Starting an ISP Is Really Hard*, ARS TECHNICA (Apr. 6, 2014, 12:00 PM), <https://arstechnica.com/information-technology/2014/04/one-big-reason-we-lack-internet-competition-starting-an-isp-is-really-hard/> [<https://perma.cc/7K5H-L49N>].

54. *Id.*

55. Emily Stewart, *America’s Monopoly Problem, Explained by Your Internet Bill*, VOX MEDIA (Feb. 18, 2020, 7:00 AM), <https://www.vox.com/the-goods/2020/2/18/21126347/antitrust-monopolies-internet-telecommunications-cheerleading> [<https://perma.cc/RP2X-H66Y>].

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

57. *Id.*

required to adequately provide telecommunications services.⁵⁸ In 1996, Congress changed its regulatory approach from economic-based regulation to competition-based regulation.⁵⁹ The main objective of this new body of law was the development of competitive markets that would “accelerate deployment of advanced information technologies and services to all Americans.”⁶⁰

Section 706 of the Telecommunications Act of 1996 directs the FCC to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”⁶¹ This directive allows the FCC some discretion. The statute also instructs the FCC to weigh the competitive effects of such an action.⁶² If the FCC determines that broadband was not deployed in a reasonable and timely fashion, it must “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”⁶³ In making this determination, the FCC must consider whether refraining from enforcing the provision or regulation will promote competitive market conditions.⁶⁴ If the FCC determines that forbearance will promote competition among providers of telecommunication services, the FCC may find that forbearance is in the public interest.⁶⁵ Section 706 also allows for any telecommunications carrier or class of telecommunications carriers to submit a petition to the Commission requesting the FCC to exercise that authority.⁶⁶

Another key provision of this regulatory scheme, section 253, allows the FCC to preempt state and local laws negatively affecting competition among telecommunications providers.⁶⁷ This preemption provision extends to any state or local statute or regulation that may “prohibit or have

58. Adam D. Thierer, *Unnatural Monopoly: Critical Moments in the Development of the Bell System Monopoly*, 14 CATO J. 272 (1994).

59. Michael R. Bradley & Vincent Rotty, *Fixing the Glitch: The Smart Rollout of 5G Small Cell Wireless Networks Balancing Private and Public Interests*, 63 S.D. L. REV. 483, 489 (2019).

60. H.R. REP. NO. 104-458, at 1 (1996) (Conf. Rep.).

61. 47 U.S.C. § 1302.

62. *Id.* § 160(b).

63. *Id.* § 1302(b).

64. *Id.* § 160(a).

65. *Id.* § 160(a)(3).

66. *Id.* § 160(c).

67. *Id.* § 253(a), (d).

the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁶⁸ In determining whether an ordinance has this effect, the FCC considers whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced regulatory environment.⁶⁹

The FCC regulates communication services under two classifications: 1) information services—regulated under Title I of the Communications Act of 1934,⁷⁰ and 2) telecommunications services—regulated under Title II.⁷¹ Both are under the FCC’s authority, but Title II grants the FCC broader regulatory powers than Title I. Under Title II, telecommunication services are regulated as common carriers,⁷² giving the FCC more control over rates and penalties for violations.⁷³ Information service providers under Title I may not be regulated as common carriers.⁷⁴ The main difference between these two regulatory schemes is that common carriers are prohibited from making unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service.⁷⁵ The FCC can regulate Title I services in a “commercially reasonable” way, but courts have acknowledged that this standard is ambiguous and context dependent.⁷⁶

When the 1996 Telecommunications Act passed, all internet was regulated under Title II. However, this changed in 2004 when the FCC classified cable broadband as an “information service” under Title I and left DSL services under Title II.⁷⁷ The Supreme Court deferred to the FCC’s determination, and this designation of broadband exempted it from the stricter regulations for Title II common carriers.⁷⁸ There was a brief period where net neutrality concerns caused the FCC to reverse the classification of internet services from “information services” to

68. *Id.* § 253(a).

69. *ExteNet Systems, Inc. v. City of Cambridge*, 481 F. Supp. 3d 41, 55 (D. Mass. 2020).

70. 47 U.S.C. § 201.

71. *Id.* § 152.

72. *Id.* § 153 (The term “common carrier” or “carrier” means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy).

73. *Id.* § 202; *Id.* § 205.

74. *Id.* § 153(51); *Verizon v. FCC*, 740 F.3d 623, 630 (D.C. Cir. 2014).

75. 47 U.S.C. § 202(a).

76. *Verizon*, 740 F.3d 623, 657.

77. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

78. *Id.*

“telecommunications services” in 2015. However, this classification was reversed again, and broadband has been known as an “information service” since 2017.⁷⁹

D. Federal Funding for Broadband

The federal government invests heavily in broadband infrastructure.⁸⁰ The United States Department of Agriculture (USDA) administers several revolving loan/grant programs aimed at increasing rural broadband access. One of these programs, the ReConnect Program, offers loans, grants, and loan-grant combinations to build and upgrade broadband networks in rural areas.⁸¹ To date, this program has invested over \$1.5 billion in rural broadband services.⁸² The USDA also administers the Rural Broadband Access Loan and Loan Guarantee Program, which provides loans and loan/grant combinations to eligible rural areas in need of broadband.⁸³ The USDA provides financial assistance for broadband service in rural, economically-challenged communities through other programs such as the Community Connect Program,⁸⁴ as well as the Telecommunications Infrastructure Loans and Guarantees Program, which provides some financing for broadband in unserved areas and rural areas with populations of 5,000 or less.⁸⁵

In March 2021, Congress enacted the American Rescue Plan Act of 2021 (ARPA), which provides state, territory, or tribal governments \$350 billion in funding to mitigate the fiscal effects stemming from the COVID-19 pandemic.⁸⁶ One of the authorized uses of this funding includes investment in broadband infrastructure.⁸⁷ ARPA amended Title VI of the

79. See generally RESTORING INTERNET FREEDOM, 33 FCC Rcd. 311 (2018).

80. Will Rinehart & Evan Pretzlaff, *Broadband Subsidies Totaled \$8.2 Billion Last Year*, AMERICAN ACTION F. (June 1, 2017), <https://www.americanactionforum.org/research/broadband-subsidies-totaled-8-2-billion-last-year/> [https://perma.cc/2CV6-FXHY].

81. Consolidated Appropriations Act, Pub. L. No. 115-141, 132 Stat. 348 (2018); Consolidated Appropriations Act, Pub. L. No. 116-6, 133 Stat. 13 (2019); Further Consolidated Appropriations Act, Pub. L. No. 116-94, 133 Stat. 2534 (2020).

82. USDA, TOGETHER, AMERICA PROSPERS 8 (2021); *ReConnect Loan and Grant Program*, USDA, <https://www.usda.gov/reconnect> [perma.cc/SY5C-93HM] (last visited Jan. 15, 2023).

83. 7 C.F.R. § 1738.1 (2022).

84. 7 U.S.C. § 950bb-3.

85. 7 C.F.R. 1735 (2022); 7 U.S.C. § 901.

86. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).

87. *Id.* at 223.

Social Security Act to provide \$219.8 billion for state governments to spend on broadband infrastructure.⁸⁸ The Department of Treasury issued its Interim Final Rule for the eligible uses of funds released under ARPA, which gives the state and local governments discretion to spend on broadband and other infrastructure developments.⁸⁹ The ARPA interim rule clarifies that this funding is available for broadband networks owned, operated by or affiliated with local governments, non-profits, and co-operatives.⁹⁰ Some ARPA funds are directly available to metropolitan cities⁹¹ and non-entitlement units⁹² of local government (NEUs),⁹³ and states may not impose any stricter restrictions on these funds than those already imposed by statute or Treasury regulations.⁹⁴ However, state governments have discretion over the funds they choose to disburse.⁹⁵ An additional \$130.2 billion is authorized for metropolitan cities, NEUs, and counties to develop broadband infrastructure to mitigate the effects of the COVID-19 pandemic.⁹⁶

More funding for broadband development is expected to become available through the Infrastructure Investment and Jobs Act (IIJA), including \$65 billion to expand Internet access, about \$42.5 million of which will be available to states in the form of block grants to fund

88. 42 U.S.C. §§ 801-2.

89. 31 C.F.R. § 35.2 (2022).

90. *Id.*

91. The term “Metropolitan city” is defined in section 102(a)(4) of the Housing and Community Development Act of 1974 (42 U.S.C. 5302(a)(4) (2022)) and includes cities that relinquish or defer their status as a metropolitan city for purposes of receiving allocations under section 106 of the Act (42 U.S.C. 5306 (2022)) for the 2021 fiscal year.

92. Non-entitlement units of local government (NEUs), defined in section 603(g)(5) of the Social Security Act and added by section 9901 of the American Rescue Plan Act of 2021, are local governments typically serving populations of less than 50,000.

93. *Coronavirus State and Local Fiscal Recovery Funds*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds> [<https://perma.cc/2RZ3-GPD5>] (last visited Jan. 15, 2022).

94. 31 C.F.R. § 35.2 (2022); *see also ARPA Local Relief Frequently Asked Questions*, NAT’L LEAGUE OF CITIES, <https://www.nlc.org/covid-19-pandemic-response/american-rescue-plan-act/arpa-local-relief-frequently-asked-questions/> [<https://perma.cc/F7BA-4L3M>] (last visited Jan. 15, 2023).

95. 31 C.F.R. § 35.2 (2022) (“Transfers under sections 602(c)(3) and 603(c)(3) must qualify as an eligible use of Fiscal Recovery Funds by the transferor.”).

96. 42 U.S.C. § 803.

broadband infrastructure specifically.⁹⁷ The IJA provides that states “may not exclude cooperatives, nonprofit organizations, public-private partnerships, private companies, public or private utilities, public utility districts, or local governments from eligibility for such grant funds.”⁹⁸

II. ANALYSIS

A. *The Benefits of Municipal Broadband*

Many rural areas lack adequate internet services because the cost of connecting over large distances deters private providers.⁹⁹ Rural communities make up around 38% of the nation’s population.¹⁰⁰ These areas often remain unserved or underserved by private broadband service providers because the increased distance between middle-mile networks and individual businesses and residences increase the installation cost for internet infrastructure.¹⁰¹ Municipalities often circumvent this problem through smaller-scale projects. Broadband network efficiency is directly affected by the size and scale of the project.¹⁰² These networks are not efficient below a 2,000-customer threshold, but they become increasingly cost efficient once several thousand customers join the network. A network remains efficient until about 100,000 customers, beyond which the scale of the project begins to decrease efficiency.¹⁰³ The average local

97. Block grants are grants awarded by the federal government to a state or local government body to fund a variety of social services, usually without many conditions attached. However, state and local governments may attach their own guidelines or conditions. See Will Kenton, *Block Grant Definition*, INVESTOPEDIA, <https://www.investopedia.com/terms/b/block-grant.asp> [<https://perma.cc/QWR6-VCJL>] (last updated Sept. 24, 2022).

98. Infrastructure Investment and Jobs Act of 2021, H.R. 3684, 117th Cong. § (h)(1)(A) (2021-2022).

99. See generally GONSALVES, *supra* note 18.

100. Wendell Cox, *America Is More Small Town Than We Think*, NEW GEOGRAPHY (Sept. 10, 2008), <https://www.newgeography.com/content/00242-america-more-small-town-we-think> [<https://perma.cc/VD49-BG9Y>].

101. *Last Mile Technology*, TECHOPEDIA, <https://www.techopedia.com/definition/26195/last-mile-technology> [<https://perma.cc/KYM3-2P7Z>] (last updated Nov. 16, 2021).

102. Doug Dawson, *ISP Economy of Scale*, POTs AND PANs: BROADBAND FOR ALL (Jan. 8, 2019), <https://potsandpansbyccg.com/2019/01/08/isp-economy-of-scale/> [<https://perma.cc/LH29-6WDD>].

103. *Id.*

government has around 6,000 constituents, meaning, even small, isolated towns can build efficient networks.¹⁰⁴

Another benefit to municipal internet is that many municipalities are already in the business of providing utilities to their communities.¹⁰⁵ Legislative history supports Congress's intent to take advantage of these existing utility services through the provision of BPL.¹⁰⁶ In addition to the familiarity that their constituents have when receiving services from a public provider, the municipalities' role as utility providers allows easy access to existing facilities, infrastructure, and rights-of-way. Municipal utilities that branch into broadband services have high take-rates,¹⁰⁷ as well as high approval ratings within their communities.¹⁰⁸

More importantly, municipalities are more likely to invest in broadband infrastructure because of its long-term benefits,¹⁰⁹ since their business model relies on not just immediately recouping costs, but also the long-term benefits of economic development and population growth associated with high speed internet.¹¹⁰ Municipalities are also more likely to invest in quality infrastructure,¹¹¹ because they are publicly accountable

104. Cox, *supra* note 100.

105. Bruna Alves, *Number of Electricity Providers in the United States in 2020, by Ownership Type*, STATISTA (June 21, 2022), <https://www.statista.com/statistics/245631/us-electricity-providers-by-type/> [<https://perma.cc/KUG5-NZDV>].

106. S. REP. NO. 104-230, at 127 (1996).

107. *Celebrating Lafayette's Success*, NEXT CENTURY CITIES (Feb. 5, 2018), <https://nextcenturycities.org/celebrating-lafayettes-success/> [<https://perma.cc/P2S7-8N63>] ("Take rate" refers to the number of subscribers to a service, typically expressed in a percentage of those taking the service divided by the total number of people who could take the service.).

108. James K. Willcox, *Are City-Owned Municipal Broadband Networks Better?*, CONSUMER REPS. (June 20, 2017), <https://www.consumerreports.org/municipal-broadband/are-city-owned-municipal-broadband-networks-better/> [<https://perma.cc/DC2A-74V5>].

109. WRAL Digital Solutions, *supra* note 12.

110. THE EXEC. OFF. OF THE PRESIDENT, COMMUNITY-BASED BROADBAND SOLUTIONS: THE BENEFITS OF COMPETITION AND CHOICE FOR COMMUNITY DEVELOPMENT AND HIGHSPEED INTERNET ACCESS 6 (2015); BEN LENNETT ET AL., THE ART OF THE POSSIBLE: AN OVERVIEW OF PUBLIC BROADBAND OPTIONS 5 (2014).

111. Tyler Cooper, *Fiber-Optic Internet in the USA*, BROADBANDNOW, <https://broadbandnow.com/Fiber> [<https://perma.cc/TY2U-5FY9>] (last updated Apr. 12, 2022).

to the constituents in their jurisdiction.¹¹² Private providers often try to use existing cable infrastructure or supplemental 5G technology¹¹³ to expand service areas—neither of which sufficiently support the broadband speeds required in the future.

Finally, municipalities provide competition against large, privately owned ISPs which can drive down costs,¹¹⁴ and improve the quality of services in areas otherwise neglected by larger internet service providers.¹¹⁵ As many as three out of four Americans have access to only one internet service provider that offers broadband at minimum speeds.¹¹⁶ Municipal internet service providers in regional internet markets help reduce prices,¹¹⁷ freeze rates,¹¹⁸ and increase service offerings for consumers.¹¹⁹ These benefits will continue to aggregate as technology progresses.¹²⁰

The criticisms of municipalities as competitors in the telecommunications market arise out of the fear that municipalities will use their leverage as local governments to unfairly compete with private

112. Connecting Main Street to the World: Federal Efforts to Expand Small Business Internet Access: Hearing on S.R. 428A Before the S. Comm. on Small Business and Entrepreneurship, 111th Cong. 2-3 (2010) (statement of Terry Huval, Dir. of Utils., Lafayette, Louisiana).

113. *The Impact of 5G on the Cable Industry*, ISE: ICT SOLS. & EDUC. (Aug. 15, 2021), <https://isemag.com/2021/08/telecom-2021-5g-cable-competition/> [<https://perma.cc/MV92-YWSG>]. Supplemental 5G technology allows for access to broadband internet through a 5G cell tower.

114. D. E. Smoot, *Sunday Extra: Wi-Fi Proposed to Promote City*, MUSKOGEE PHOENIX (Dec. 1, 2013), https://www.muskogee phoenix.com/archives/sunday-extra-wi-fi-proposed-to-promote-city/article_c6eae2a3-f96a-5dc9-b37f-267995923d34.html [<https://perma.cc/LX66-UPUU>].

115. Jonathan Sallet, *Tell The Story We Know: Broadband Competition Is Too Limited*, BENTON INST. FOR BROADBAND & SOC'Y (Mar. 6, 2020), <https://www.benton.org/blog/tell-story-we-know-broadband-competition-too-limited> [<https://perma.cc/D9CK-4RWL>].

116. Willcox, *supra* note 108.

117. DAVID TALBOT ET AL., COMMUNITY-OWNED FIBER NETWORKS: VALUE LEADERS IN AMERICA 6 (2018).

118. Connecting Main Street to the World: Federal Efforts to Expand Small Business Internet Access: Hearing on S.R. 428A Before the S. Comm. on Small Business and Entrepreneurship, 111th Cong. 2-3 (2010) (statement of Terry Huval, Dir. of Utils. Lafayette, Louisiana).

119. TALBOT et al., *supra* note 117.

120. WRAL Digital Solutions, *supra* note 12.

providers.¹²¹ Specifically, these criticisms speculate that municipalities will use their governmental authority to impose business fees on private providers and exempt themselves from those same fees or otherwise obtain special tax treatment.¹²² However, the competitive risk of municipal entry into the broadband market is offset by the introduction of competition into the broadband industry. The main barriers of entry to the broadband market include: (1) access to existing networks; (2) incumbent companies' predatory retail pricing and overpricing access; (3) incumbent providers' political power leading to biased regulations; (4) difficulty in accessing capital due to regulatory uncertainty; and (5) financial and technological limitations of alternative access technologies.¹²³ Municipalities investing in broadband usually build their own fiber networks—which does not prevent access to existing infrastructure.¹²⁴ Furthermore, private providers are guaranteed the right to neutral, non-discriminatory access to rights-of-way.¹²⁵ Municipalities also have more transparent pricing on average than the major internet providers,¹²⁶ and have been the target—not the creators—of biased regulation in 23 states.¹²⁷ Municipalities are not the source of the major barriers of entry to the broadband industry; in fact, they are more likely to serve areas that are unserved or underserved, than private providers.¹²⁸

Opponents of municipal broadband also claim the use of municipal authority to access public capital through tax revenues constitutes unfair competition practices for private providers.¹²⁹ However, the wholly taxpayer-funded municipal broadband network is largely a myth: most municipal networks secure funding through federal grants, loans, and bonds, as well as other state sources of funding,¹³⁰ funds which are usually

121. John T. Cobb, *Broad-Banned: The FCC's Preemption of State Limits on Municipal Broadband and the Clear Statement Rule*, 68 EMORY L.J. 407, 415–16 (2018).

122. Beau Hodai, *Big Media and State Lawmakers, Unite!*, FAIRNESS & ACCURACY IN REPORTING (May 1, 2010), <https://fair.org/extra/big-media-and-state-lawmakers-unite/> [<https://perma.cc/R75S-ASZF>].

123. Eun-A Park, *Barriers of Entry Analysis of Broadband Multiple Platforms: Comparing the US and South Korea* (Dec. 2007) (Ph. D. thesis, Pennsylvania State University) (on file with author).

124. TALBOT et al., *supra* note 117.

125. 47 U.S.C. § 253(c).

126. TALBOT et al., *supra* note 117.

127. Cooper, *supra* note 33.

128. *See generally Snapshots of Municipal Broadband*, *supra* note 32.

129. Cobb, *supra* note 121.

130. *How States Support Broadband Projects*, THE PEW CHARITABLE TRS. (July 31, 2019), <https://www.pewtrusts.org/en/research-and-analysis/issue->

available to private and public providers alike. For example, the ARPA Interim Final Rule allows states and other recipients to decide where the funding is spent, and does not differentiate between recipients that are public, private, or public-private partnerships.¹³¹

These arguments also cite the financial risk associated with municipal broadband that may leave taxpayers liable.¹³² Assessing the financial risk involved with municipal broadband is difficult because different methodologies (and underlying ideologies) yield highly variable results.¹³³ Pro-municipal broadband advocates usually cite the savings and benefits experienced by consumers,¹³⁴ as well as the increased productivity and job creations, to promote their argument,¹³⁵ whereas the opponents of municipal broadband cite the costs and debts incurred by the municipality.¹³⁶ While assessing the profits and losses of a private business is straightforward, broadband as a municipal utility is not so simple—i.e., economic development, lower rates, improved quality of life for community members, and other such results affect the communities' assessment of the value of their broadband projects.

B. Nixon v. Missouri and the Clear Statement

When the Missouri state legislature passed a law prohibiting political subdivisions from providing internet services, affected municipal broadband providers petitioned the FCC to preempt the law. The petitioners asserted that the state law violated section 253(a) of the Telecommunications Act of 1996,¹³⁷ which provides: “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹³⁸ The FCC declined

briefs/2019/07/how-states-support-broadband-projects [https://perma.cc/AUN3-QKSU].

131. 31 C.F.R. § 35.2 (2022).

132. Cobb, *supra* note 121.

133. BEN LENNETT et al., *supra* note 110.

134. THE EXEC. OFF. OF THE PRESIDENT, *supra* note 110.

135. William Lehr, Anchor, *Institutions Help Secure Broadband's Promise*, MASS. INST. OF TECH. (Apr. 2012), <https://www.shlb.org/uploads/Policy/Policy%20Research/SHLB%20Research/Anchor%20Institutions%20Help%20Secure%20Broadband.pdf> [https://perma.cc/UH7A-327X].

136. George S. Ford, *Why Chattanooga is Not the 'Poster Child' for Municipal Broadband*, PERSPECTIVES (Jan. 20, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837294 [https://perma.cc/GS9G-KGKH].

137. *In re Mo. Mun. League*, 16 FCC Rcd. 1157, 1158 (2001).

138. 47 U.S.C. § 253(a).

to interpret the term “any entity” in the statute to include a political subdivision.¹³⁹ On review, the Eighth Circuit vacated the order, finding clear intent by Congress to include municipalities in the term “any entity.”¹⁴⁰ The Supreme Court reversed this decision and upheld the state statute,¹⁴¹ concluding that “the class of entities contemplated by section 253 does not include the State's own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors') delivery of telecommunications services.”¹⁴²

This holding echoed the reasoning from the 1999 D.C. Circuit decision in *City of Abilene, Texas v. Federal Communications Commission*, finding a state statute prohibiting municipalities from directly or indirectly selling telecommunications services to the public was not preempted by section 253.¹⁴³ The D.C. Circuit reasoned that the term “any entity” in section 253(a) does not plainly include municipalities.¹⁴⁴ Although Congress left the term “entity” undefined in the Telecommunications Act and the court in *City of Abilene* considered the term to include all conceivable persons, the court declined to interpret “entity” in this way.¹⁴⁵ Instead, the court explained that section 253(a) must be construed in compliance with the precepts laid down by the Supreme Court in *Gregory v. Ashcroft*.¹⁴⁶ *Gregory v. Ashcroft* concerned preemption of a mandatory retirement requirement for state judges.¹⁴⁷ The Court found that determining the qualifications for its judiciary was “an authority that lies at ‘the heart of representative government.’”¹⁴⁸ The majority opinion by Justice O’Connor interpreted the Supremacy Clause to mean that Congress may legislate in areas traditionally regulated by the States, but that Congress would neither exercise this power lightly nor use it without a clear grant of authority.¹⁴⁹ To find that Congress intended to alter the balance between federal and

139. *In re Mo. Mun. League*, 16 FCC Rcd. 1157, 1162 (2001) (citing *In the Matter of the Pub. Util. Comm'n of Tex. the Competition Pol'y Inst.*, 13 FCC Rcd. 3460 (1997) explaining that *Ashcroft* suggests states retain substantial sovereign powers “with which Congress does not readily interfere” absent a “clear indication of intent.”).

140. *Mo. Mun. League v. FCC*, 299 F.3d 949, 955 (8th Cir. 2002), *rev'd sub nom.*, *Nixon v. Mo. Mun. League*, 541 U.S. 125, 124 (2004).

141. *Nixon*, 541 U.S. 125, 141.

142. *Id.* at 125.

143. *City of Abilene, Tex. v. FCC*, 164 F.3d 49 (D.C. Cir. 1999).

144. *Id.*

145. *Id.*

146. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

147. *Id.*

148. *Id.* at 463.

149. *Id.* at 460.

state powers, a court must find a Congressional directive that is “unmistakably clear in the language of the statute.”¹⁵⁰ The Court also acknowledged a natural limit to the rights of states to decide their own methods of governance, and granted that other Constitutional provisions or a more explicit Congressional grant of authority would have weighed in favor of preemption.¹⁵¹

C. State Law Restrictions on Municipal Broadband

After *Nixon*, states began passing more legislation restricting municipalities' provision of telecommunications services, the bulk of which expressed objectives to level the playing field and preserve fair competition in the telecommunications industry.¹⁵² Concerns raised over municipal internet service providers include municipalities' abilities to negotiate and share resources with other governments, as well as municipalities' control over access to public rights of way and authority to grant franchises.¹⁵³ State law restrictions on local broadband can range from outright bans to moderate roadblocks that limit the feasibility or efficacy of municipal networks.¹⁵⁴ Some states create bans that explicitly prohibit municipalities from selling broadband.¹⁵⁵ There are some exceptions for leasing and selling dark fiber,¹⁵⁶ as well as for some educational purposes.¹⁵⁷ However, this regulation generally denies local governments the authority to meaningfully enter into this area of the telecommunications market.¹⁵⁸

Some states have not completely banned local municipal broadband networks, but restrict them to unserved areas. For example, Pennsylvania does not permit local governments to provide broadband services unless

150. *Id.* at 452. (citing *Will v. Mich. Dept. of State Police*, 491 U. S. 58, 65).

151. *Gregory*, 501 U.S. at 463.

152. Jon Brodtkin, *ISP Lobby Has Already Won Limits on Public Broadband in 20 States*, ARS TECHNICA (Feb. 12, 2014, 6:00 m), <https://arstechnica.com/tech-policy/2014/02/isp-lobby-has-already-won-limits-on-public-broadband-in-20-states/> [<https://perma.cc/99ED-UMWH>].

153. *E.g.*, *Time Warner Telecom of Or., LLC v. City of Portland*, 452 F. Supp. 2d 1084, 1100 (D. Or. 2006), *aff'd in part, rev'd in part*, 322 F. App'x 496 (9th Cir. 2009).

154. Cooper, *supra* note 33.

155. Nebraska does not allow local governments to provide internet services—whether retail or wholesale. NEB. REV. STAT. § 86-594 (2022).

156. NEB. REV. STAT. § 86-575 (2022); “Dark fiber” refers to fiber optic units which are unused and available for lease from a network service provider.

157. NEB. REV. STAT. § 79-1319 (2022).

158. *Community Network Map*, *supra* note 35.

no private provider is willing to serve that area, and local governments must submit written requests to private providers and wait 14 months before they are allowed to begin such services.¹⁵⁹ Texas also does not allow local governments to provide broadband unless that area is not currently served by any telecommunications provider.¹⁶⁰ Montana has a similar regulatory scheme, with an additional exception that allows local governments to provide broadband if municipalities are able to provide “advanced services” not currently offered by private providers in the same area.¹⁶¹ While these restrictions appear to be mitigated by the exceptions for unserved areas, requirements for municipalities to solicit providers and prove that their jurisdictions lack internet services could create barriers and potential liabilities that dissuade local governments from pursuing broadband projects.

Another common type of restriction on municipal broadband networks is to limit funding sources. These restrict or prohibit municipalities from cross-subsidizing funds for broadband projects. Cross-subsidization occurs when a municipal network uses revenues from other regulated utilities services or general funds to offset the costs of providing broadband services.¹⁶² Louisiana does not allow for such cross-subsidization. Louisiana state law requires local governments to create specific funds for broadband projects and prohibits transfers to that fund from general or other utilities funds.¹⁶³ Conversely, Alabama allows municipalities to sell bonds in order to finance the costs of a broadband project, but the bonds are payable only from the revenues of the broadband service, not general revenues.¹⁶⁴ These types of regulations reduce the financial stability of prospective projects because municipalities are unable to offset the high start-up costs with their more established revenue streams.

There are many other restrictions imposed on municipal broadband networks. Some states, such as Minnesota for example, impose public approval or referendum requirements, which require 65% public approval for a municipal broadband network.¹⁶⁵ Tennessee allows municipalities to offer broadband through their electricity utilities but prohibits them from

159. 66 PA. STAT. AND CONS. STAT. ANN. § 3014 (West 2006).

160. TEX. UTIL. CODE ANN. § 54.202 (West 2005).

161. MONT. CODE ANN. § 2-17-603 (West 2021).

162. Lindsay R. Capodilupo, *Broadband over Power Lines Crisscrossing the Nation: Rethinking Cross-Subsidization*, 16 COMM'LAW CONSPECTUS 179, 200 (2007).

163. LA. REV. STAT. § 45:844.51(A)(3) (2004).

164. ALA. CODE § 11-50B-9 (2022).

165. MINN. STAT. § 237.19 (1991).

offering those services outside of their electric service areas.¹⁶⁶ Missouri allows municipalities to offer broadband services to residents, but prohibits those networks from offering telephone or TV services in conjunction with broadband services.¹⁶⁷

Municipalities have shown an interest and aptitude to serve some of the areas that need broadband development the most,¹⁶⁸ and provide the high-speed internet Americans require to stay connected.¹⁶⁹ However, the many benefits of providing broadband services at the local level are suppressed in states where regulations prohibit or deter municipalities from serving their constituents. In Louisiana, there is comprehensive regulation over municipalities that intend to provide internet services, including feasibility studies, elections, periodic audits from the Public Service Commission, holding a preliminary hearing, hiring a feasibility consultant, conducting a feasibility study, holding public hearings, and the formal adoption of the feasibility study by resolution.¹⁷⁰ As a result of these stringent requirements, only one municipality in Louisiana successfully provided broadband services.¹⁷¹ The patchwork nature of state broadband regulation led to vast gaps in coverage among states that substantially restrict municipal broadband.¹⁷²

III. SOLUTION

Municipal broadband providers are not a one-size-fits-all solution to the digital divide. The issue of municipal broadband is best understood as embedded in the larger question of how the FCC should regulate broadband. This issue should be seen as an opportunity to update the regulatory approach to reflect the increased importance of internet services. This is also an opportunity to reallocate the regulatory powers of government agencies to better align these powers at the local, state, and federal levels.

166. *Tennessee v. FCC*, 832 F.3d 597, 598 (6th Cir. 2016).

167. MO. REV. STAT. § 392.410(7) (2008).

168. Karl Bode, *New Data Says More Communities Built Their Own Broadband Because of COVID*, VICE (Sept. 10, 2021, 8:20 AM), <https://www.vice.com/en/article/7kv3ge/new-data-says-more-communities-built-their-own-broadband-because-of-covid> [<https://perma.cc/MSS7-FEBP>].

169. See *Snapshots of Municipal Broadband*, *supra* note 32.

170. LA. REV. STAT. § 45:844.41 (2022).

171. Robert Buckman, *LUS Fiber Included in State Broadband Funds at Last Minute*, THE CURRENT (June 9, 2021), <https://thecurrentla.com/2021/lus-fiber-included-in-state-broadband-funds-at-last-minute/> [<https://perma.cc/8T25-22YT>].

172. *Community Network Map*, *supra* note 35.

The infrastructure packages passed by Congress contain unprecedented amounts of funding for broadband networks. To take full advantage of this opportunity, the FCC should increase its regulatory oversight of the broadband industry by recategorizing broadband as a telecommunications service to police anticompetitive practices and promote meaningful competition in the broadband industry. The agencies that distribute broadband funds to the states should also impose conditions on their funding to incentivize states to remove any barriers that prevent municipalities from entering the broadband market.

A. Recategorize Broadband as a Telecommunications Service Under Title II of the Communications Act

The FCC should change its classification of broadband internet from an information service to a telecommunications service, thus subjecting broadband to Title II regulation.¹⁷³ A Title II service classification would give the FCC greater rulemaking and oversight authority to ensure equal access for service providers and consumers, as well as possible control over pricing for broadband services.¹⁷⁴ The Biden administration is likely to take this action.¹⁷⁵

On October 26, 2021, President Biden nominated Jessica Rosenworcel and Gigi Sohn as Commissioners of the FCC.¹⁷⁶ Rosenworcel has been acting chairwoman since January 2021, and voted for broadband to be classified as Title II in 2015.¹⁷⁷ Sohn also previously expressed her support for the reclassification of broadband as a “telecommunications service”

173. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

174. Andrew Jay Schwartzman, *What Is All This Talk About 'Forbearance?'*, BENTON INST. FOR BROADBAND & SOC'Y (Oct. 30, 2014), <https://www.benton.org/blog/what-all-talk-about-forbearance> [<https://perma.cc/5CKY-ZJFD>].

175. *Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> [<https://perma.cc/3G9E-4NV4>].

176. *President Biden Announces Key Nominations*, THE WHITE HOUSE (Oct. 26, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/26/president-biden-announces-key-nominations-8/> [<https://perma.cc/XDQ6-BD9G>].

177. Marguerite Reardon, *Biden's FCC Nominees, if Confirmed, Could Lead to the Return of Net Neutrality Rules*, CNET (Oct. 26, 2021, 9:28 AM), <https://www.cnet.com/tech/mobile/biden-fcc-nominees-could-mean-return-of-net-neutrality-rules/> [<https://perma.cc/RMJ3-36LE>].

under Title II.¹⁷⁸ Rosenworcel was confirmed by the Senate. If Sohn is also confirmed, Democrats will hold a majority control over the agency, and reclassification of broadband is likely to follow.¹⁷⁹ However, Sohn's confirmation is not guaranteed.¹⁸⁰ Recent FCC nominations have been starkly divided along party lines. These confirmations depend on whether Sohn or her opposition can peel off moderates from across the aisle.¹⁸¹ As of March 2022, the Senate Commerce Committee was deadlocked on the issue of Sohn's nomination after a second round of hearings, and Sohn's nomination is still pending.¹⁸²

Even under Title II classification, FCC preemption of inconsistent state regulation of broadband is not guaranteed. If the FCC changes the classification of broadband to telecommunications, any attempt at preemption of state law will be heavily opposed. The question then becomes whether a constitutional challenge to FCC preemption will have a different result than in *Nixon*. The composition of the Supreme Court has fundamentally changed since Nixon, and the only remaining Justice that heard that case is Justice Thomas, who sided with the majority.¹⁸³ It is worth revisiting the Court's analysis and how it might be affected by a change in broadband's regulatory classification.

One of the main arguments advanced in *Nixon* for preempting state law that prohibits municipal broadband was that excluding governmental entities from the telecommunications business flouts the public interest in promoting competition.¹⁸⁴ The Court rejected that argument, on the basis that preemption would not necessarily "draw municipalities into the business" and that the issue does not turn on the merits of municipal

178. Gigi Sohn, *Restoring the Federal Communications Commission's Legal Authority to Oversee the Broadband Market*, BENTON INST. FOR BROADBAND & SOC'Y (Nov. 10, 2020), <https://www.benton.org/headlines/restoring-federal-communications-commission%E2%80%99s-legal-authority-oversee-broadband-market> [<https://perma.cc/RE58-TZCC>].

179. Reardon, *supra* note 178.

180. John Hendel, *Dems' Dreams Could Get Crushed Yet Again — This Time, at the FCC*, POLITICO, https://www.politico.com/news/2021/11/01/manchinema-fcc-dems-net-neutrality-518324?utm_source=sendgrid&utm_medium=email&utm_campaign=Newsletters&mc_cid=06aea53132&mc_eid=5126badc27 [<https://perma.cc/R5KV-P27W>] (last updated Nov. 1, 2021, 7:10 PM).

181. *Id.*

182. Cat Zakrzewski, *Democrats Move a Step Closer to Breaking Deadlocks at FTC and FCC*, WASH. POST (Mar. 3, 2022, 11:42 AM), <https://www.washingtonpost.com/technology/2022/03/03/fcc-ftc-deadlock-biden/> [<https://perma.cc/9NDH-UC45>]. Sohn has now resigned as of April 2023.

183. *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004).

184. *Id.*

broadband.¹⁸⁵ The Court based their reasoning on the inseparable nature of states and their political subdivisions, which rely on states for their existence and authority.¹⁸⁶ The Court also rejected the second main argument, that the term “any entity” included municipalities, and thus constituted a positive grant to preempt state authority over local affairs.¹⁸⁷ The Court applied similar logic to hold that “any entity” could not mean municipalities because they did not have the required “ability” without state authorization.¹⁸⁸

The Court used several examples to illustrate their point. The first example considered cases where states authorized local governments to provide other utilities such as water and electricity, but not the internet.¹⁸⁹ Without express state authority and a federal grant of authority, the Court reasoned that a municipality would not have the ability to provide internet.¹⁹⁰ The second example considered cases where a state provided utilities through a state agency, but denied providing telecommunications specifically. The Court conceded that section 253 would apply in this case, but there would be no method to ensure funding.¹⁹¹ The Court also granted that section 253 would apply where municipalities are authorized generally to provide utilities, but specifically barred from telecommunications by state statute.¹⁹² Section 253 would also apply to a state with previously authorized communications services that later withdrew or restricted the authorization.¹⁹³ The Court held that preemption of state laws restricting their subdivisions from providing broadband would “often accomplish nothing,” “treat States differently depending on the formal structures of their laws authorizing municipalities to function,” and “hold out no promise of a national consistency.”¹⁹⁴

The reference to “the ability of any entity” in section 253 does not have to exclude municipalities. Many municipalities can provide telecommunications services, as evidenced by their current provision of those services. The existence of other municipalities who do not have this

185. *Id.* at 132.

186. *Id.* at 134.

187. *Id.* at 134–35.

188. The Court also rejected the second main argument that the term “any entity” includes municipalities and constitutes a positive grant to preempt state authority over local affairs.

189. *See Nixon*, 541 U.S. at 135.

190. *See id.*

191. *Id.* at 136.

192. *Id.*

193. *Id.*

194. *Id.* at 138.

ability does not exempt the municipalities that do. That preemption may not apply to every kind of state law does not compel the conclusion that it cannot apply to any state law. The Court cites the irregularity of application as a reason for dismissing the FCC's preemptive authority under the statute, but that reasoning is based on the need for consistent broadband regulations, not the purpose of section 253, which is to promote competition.¹⁹⁵ The Court characterized this version of preemption as a "one-way ratchet," where states would be free to authorize municipalities but barred from revoking authorization once granted.¹⁹⁶ Alternatively, this version could be applied to reach an opposite conclusion: that preemption would preserve competition and reduce inconsistency in broadband regulation between states. The dissent argued that section 253 should be read to apply to entities with the ability to provide telecommunications services, as Congress intended in their enactment of the Telecommunications Act.¹⁹⁷

As Justice Stevens' dissent pointed out, there is already a limit on interfering with state and local affairs because the FCC can preempt only those state laws that constitute nonneutral restraints on entry.¹⁹⁸ Here, "neutrality" means a state law that neither unfairly advantages nor disadvantages one provider over another, nor disfavors one technology over another.¹⁹⁹ The majority in *Nixon* feared that this would not be enough to prevent the application of section 253 to prohibit states from altering the overall scope of municipal power.²⁰⁰ However, a state would remain completely free to enact competitively neutral laws "necessary to . . . protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."²⁰¹ Additionally, a state may not alter municipal authority in ways that disadvantage broadband providers, whether publicly or privately owned. Read this way, section 253 allows for preemption of a law that prohibits any entity already possessing the ability to provide telecommunications. This interpretation is aligned with Congress's²⁰² and the FCC's goals²⁰³ of expanding broadband access through existing utilities. As Justice Stevens' dissent pointed out, Congress was aware of the existence of such utilities

195. *Id.* at 136–38.

196. *Id.* at 127.

197. *Id.* at 145 (Stevens, J., dissenting).

198. *Id.* at 146 (Stevens, J., dissenting).

199. Fed.-State Joint Bd. on Universal Serv., 12 FCC Rcd. 8776 (1997).

200. *Nixon*, 541 U.S. 125, 139.

201. 47 U.S.C. § 253(a)-(b).

202. S. Rep. No. 104-230, at 127 (1996).

203. FED. COMM'N COMM'N, *supra* note 36.

as considerations in enacting the Telecommunications Act.²⁰⁴ The dissent also invoked a provision in the same Act where Congress narrowed the definition of the word “utility,” to exclude utilities “owned by . . . any State” or its political subdivisions, as evidence that Congress knew of the distinction and intended to include all entities, not just private entities, in the scope of the statute.²⁰⁵

However, whether the more stringent regulations imposed by Title II outweigh the Tenth Amendment concerns remains uncertain. A federal agency such as the FCC may preempt state regulation when acting within its congressionally delegated authority.²⁰⁶ The Supreme Court found no such authority in the Telecommunications Act when broadband was classified as an information service under Title I. In fact, the classification of broadband as Title I or II was not considered at all in *Nixon*.²⁰⁷ This was likely a strategic omission since, at the time of the decision, cable broadband was regulated as Title I, whereas DSL internet was under Title II.²⁰⁸ The following year the Court upheld this classification as a valid judgment by the FCC.²⁰⁹ When the FCC tried to implement more stringent regulation, the Court found that this regulation was akin to Title II, and that the FCC lacked such authority to regulate broadband under Title I.²¹⁰ Should the issue arise when all of the internet is regulated under Title II, the FCC’s preemption of state laws will be entitled to more deference.

In the 1986 Supreme Court case *Louisiana Public Service Commission v. FCC*, the Court laid out factors in support of preemption: (1) Congress expressed a clear intent to preempt state law; (2) there was an outright or actual conflict between federal and state law; (3) compliance with both federal and state law was, in effect, physically impossible; (4) there was an implicit federal law barrier to state regulation; (5) Congress legislated an entire field of regulation comprehensively with no room for the states to supplement; or (6) state law stands as an obstacle to the accomplishment

204. Communications Act of 1994: Hearing on S. 1822 Before the S. Comm. on Commerce, Science, and Transportation, 103d Cong., 2d Sess. 351-360 (1994) (statement of William J. Ray, Gen. Manager, Glasgow Elec. Plant Bd).

205. 47 U.S.C. § 224; *Nixon*, 541 U.S. at 139, 143-44.

206. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

207. *Nixon*, 541 U.S. at 146 (Stevens, J., dissenting).

208. *Inquiry Concerning High-Speed Access to Internet Over Cable & Other Facilities*, 17 FCC 4798, 4847 (2002) (available for download at <https://www.fcc.gov/document/inquiry-concerning-high-speed-access-internet-over-cable-and-other-1>).

209. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

210. *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010).

and execution of the full objectives of Congress.²¹¹ The Court used the disjunctive “or” when listing these factors, indicating that any one of the factors would be sufficient. However, the subsequent holding in *Gregory v. Ashcroft* elevated the importance of the first factor in cases concerning a state’s management of its own political affairs so that the absence of a clear statement would be dispositive of the issue.

There is little doubt that Congress expressed a clear intent to preempt state law with its directive in section 253; the remaining issue is determining situations to which the directive applies. Even though the intent to preempt is clear from the statutory language of section 253, the scope of preemptive authority falls short of the clear and express standard.

B. Regulate Anti-Competitive Practices Under the Telecommunications Act

Currently, the federal statutory regime imposed by the Telecommunications Act precludes more stringent antitrust regulation. If the FCC lacks authority to intervene under the current regulatory framework, the federal government is severely limited in its ability to regulate anti-competitive activity in the broadband industry. The classification of broadband as a telecommunications service is necessary to promote competition in the broadband industry.

Regulating under antitrust legislation is not a viable option for two main reasons. First, the FCC regulates anticompetitive behavior in the broadband industry under the Telecommunications Act, and courts will defer to the agency’s anti-competition rules rather than the more general federal antitrust regulation. Two Supreme Court decisions provide the rationale for giving deference to the FCC’s anti-competition regulations.²¹² The Telecommunications Act of 1996 imposed a duty on telecommunications providers to provide new entrants in the marketplace access to unbundled network elements (UNEs). In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, the first of those Supreme Court decisions, the plaintiff alleged that Verizon filled the orders on a discriminatory basis.²¹³ The Supreme Court held that Verizon’s refusal to cooperate with other providers could not be a violation of antitrust laws because of the FCC’s oversight and authority in that area of law.²¹⁴ In other words, the Congressional mandate for telecommunications

211. *La. Pub. Serv. Comm’n*, 476 U.S. at 368.

212. *Verizon Commc’n, Inc. v. L. Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007).

213. *Verizon Commc’n, Inc.*, 540 U.S. at 406.

214. *Id.* at 398.

providers to allow access to UNEs in order to promote competition also functioned as an exemption from antitrust legislation for Verizon.

The result in *Trinko* has been questioned and criticized,²¹⁵ mostly due to the savings clause contained in the Telecommunications Act which provides, “nothing in this Act... shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.”²¹⁶ Some critics claim that this holding amounts to a judicial nullification of the savings clause.²¹⁷

Three years later, in *Credit Suisse Securities (USA) LLC v. Billing*, the Supreme Court outlined the following factors that should be considered in determining precedence for different regulatory schemes: (1) whether the relevant law enables the federal agency in question to monitor the challenged activities; (2) whether the history of the agency’s regulations suggests no laxity in the exercise of its authority; and (3) whether allowing an antitrust suit to proceed that is so related to the agency’s responsibilities would present a substantial danger that defendants would be subjected to duplicative and inconsistent standards.²¹⁸ A fourth factor, which operates more as a threshold question, examines whether there is a serious conflict between antitrust law and the regulatory regime.²¹⁹

Thus, these two cases stand for the rule that when an industry is overseen by an expert regulatory agency, the agency’s judgment on competition policy is entitled to deference because the agency has the particular and specific knowledge of that industry to make the best determination. This limits the scope of antitrust regulation, and the prior major federal interruptions in telecommunication regulation would likely be precluded by this rule had it existed.²²⁰ The *Credit Suisse* factors mean it is likely that any challenge to a broadband monopoly under antitrust legislation will be precluded by the FCC’s regulation of information services, even though the FCC’s Title I classification of broadband signals the agency’s deregulatory approach and the Act’s savings clause expressly preserves antitrust enforcement as an option.

215. Travis, *supra* note 20, at 1746.

216. 42 U.S.C. § 18118(a).

217. James E. Scheuermann & William D. Semins, *A New Method for Regulatory Antitrust Analysis? Verizon Communications Inc. v. Trinko*, 12 RICH. J.L. & TECH. 1, 15 (2005).

218. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 274 (2007) (citing *United States v. Nat’l Ass’n of Sec. Dealers, Inc.*, 422 U.S. 694, 734–35 (1975)).

219. *Id.* at 285.

220. Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 704 (2011).

If antitrust regulation is not a viable solution due to the lack of broadband competition, then the FCC will have to promote competition through its own means or regulate broadband like a natural monopoly, akin to the way electricity and telephone services were once regulated. Incumbent internet providers have already demonstrated a willingness to lobby for restrictive legislation and deny access to network infrastructure. Without more oversight, anticompetitive practices will likely increase.

C. Attach Conditions to Broadband Spending

Congress should also condition the receipt of broadband funds on states' compliance with FCC objectives. While Congress's power to tax is not unlimited, Congress has the power to authorize expenditure of public funds, which is not limited by the grants of legislative power in the Constitution.²²¹ Congress can authorize spending for the general welfare, but cannot use its spending power to unduly coerce states into accepting conditions or implementing federal regulations that could not be directly authorized.²²² Congress can use its spending power to encourage favored conduct as well as discourage unfavorable conduct.²²³ The standards for permissible uses of congressional power are: (1) the conditions must not be a surprise, (2) the conditions must be related to the purpose of the spending in question, and (3) the resulting incentive must not rise to the level of coercion.²²⁴

Congress should amend the USDA grants to condition the receipt of funds on states permitting municipalities to provide broadband. These are logical amendments because they are ongoing grant and loan programs that target two weak points of universal service methodology—rural access and affordability for low-income customers. This would incentivize states to remove barriers for municipal broadband in order to avoid losing these funds.

Two main issues arise from attaching conditions to federal broadband spending. The first issue is whether the imposition of conditions would rise to the level of coercion, an impermissible use of Congressional spending power. The second issue is whether imposing conditions on state

221. *United States v. Butler*, 297 U.S. 1, 66 (1936); *South Dakota v. Dole*, 483 U.S. 203, 209 (1987) (“the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.”).

222. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

223. *South Dakota*, 483 U.S. at 203.

224. *Id.*

governments to receive broadband funds is enough to counter the effect of unfavorable state regulations.

The first issue must be addressed in the context of available funds. Congress is permitted to use its conditional spending power to achieve objectives indirectly, so long as the use does not become coercive.²²⁵ There is no exact measurement for coercion, but there are examples of when Congress has gone too far. The Supreme Court has held that a 5% reduction in highway funds was acceptable,²²⁶ but Congress may not completely take away the funding for a major program as a penalty for not following their directives.²²⁷ Thus, it would be permissible for Congress to attach conditions for states to refrain from interfering with municipal broadband, since that condition is sufficiently related to the purpose of the spending: removing barriers to internet access for rural areas. However, a serious reduction in funds would violate the anti-commandeering principle, and a trivial reduction in funds will not incentivize the states to change. Furthermore, while Congress can authorize generous funding for broadband projects, state regulations allow private providers to delay projects and waste funds through state law challenges.²²⁸

A third, somewhat tangential, issue is whether these two issues could be avoided by making funds directly available to local governments for broadband projects without any state oversight at all. Some federal programs already directly fund local governments for broadband projects. However, this does not solve the problem of authorization.

D. A New Congressional Grant of Authority to Preempt State Regulations of Broadband

A new congressional directive could clarify when and how the FCC can preempt state laws restricting municipal broadband, as well as the extent to which antitrust legislation is displaced by the regulations in the Telecommunications Act. A more explicit expression of congressional intent on how to regulate broadband would provide clarity and stability for broadband regulation.²²⁹ Prior holdings on this issue indicate that federal

225. *Id.*

226. *Id.* at 204.

227. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 585.

228. Connecting Main Street to the World: Federal Efforts to Expand Small Business Internet Access: Hearing on S.R. 428A Before the S. Comm. on Small Business and Entrepreneurship, 111th Cong. 2-3 (2010) (statement of Terry Huval, Dir. of Utils., Lafayette, Louisiana).

229. ANGELE A. GILROY, CONG. RSCH. SERV., IF10955, ACCESS TO BROADBAND NETWORKS: NET NEUTRALITY (2019).

intervention into a state's political affairs is permissible if it comes from "unmistakably clear" statutory language.²³⁰ The general confusion around the "any entity" language and whether it includes or excludes municipalities is not likely to end without a more clear directive from Congress.

Congress should provide a clear directive for the FCC to preempt any and all anti-competitive state regulations. The Supreme Court has previously held that there cannot be interference in the relationship between a state and its own subdivisions absent explicit Congressional intent,²³¹ which the Court did not find in section 253 of the Telecommunications Act of 1996.²³² This raises the possibility of providing an explicit congressional grant of authority, either through amending the Telecommunications Act or through separate legislation. The holding in *Nixon* strongly implied that a clear statement might sufficiently support preemption.²³³ The Sixth Circuit's holding in *In the Matter of City of Wilson* echoed this request for a clear statement.²³⁴

In order for such a regulation to be successful, it must meet the clear statement standard. Such a directive would alter the constitutional balance between states and the federal government, and courts have held that this language should be "unmistakably clear."²³⁵ This is a high standard because Congress would be intervening in a states' authority over their political subdivisions. The guidance for such a statement is somewhat ambiguous, however evidence of intent, such as legislative history, has been considered.²³⁶

The main arguments against federal preemption of state laws restricting municipal broadband are based in principles of federalism. For example, the FCC's preemption of state restrictions on government-owned

230. *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (citing *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989)).

231. *Id.* at 467.

232. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 134 (2004).

233. CHRIS D. LINEBAUGH & ERIC N. HOLMES, CONG. RSCH. SERV., R46736, STEPPING IN: THE FCC'S AUTHORITY TO PREEMPT STATE LAWS UNDER THE COMMUNICATIONS ACT (2021).

234. *In the Matter of City of Wilson, N.C. Petition for Preemption of N.C. Gen. Statute Sections 160a-340*, 30 FCC Rcd. 2408 (2015), *review granted, decision rev'd sub nom. Tennessee v. Fed. Commc'ns Comm'n*, 832 F.3d 597 (6th Cir.2016).

235. *Gregory*, 501 U.S. 452 (1991); *Will*, 491 U.S. 58 (1989); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

236. *United States v. Bass*, 404 U.S. 336, 350 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971).

broadband networks violates the constitutional principle that “[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”²³⁷ Under this view, neither section 253(a) nor section 706 can be interpreted as a statement of congressional intent that the FCC can regulate the relationships between states and their political subdivisions.²³⁸ This argument should be rejected because it goes against the Supreme Court’s analysis of federal authority to preempt state laws which conflict with federal legislation. The Supreme Court considered the issue of federal preemption of state laws restricting municipal broadband and found there was a lack of a clear grant of authority, not that the authority could not be granted.²³⁹

Bills have been introduced in the past legislative sessions that would have clarified Congress’s intent, but none have passed as of the 2022 legislative session. The Community Broadband Act, which was proposed in 2005 to “block states from restricting local governments’ ability to provide” broadband service in response to *Nixon*, did not pass.²⁴⁰ The Accessible, Affordable Internet for All Act, introduced in the 116th Congress, would have amended section 706 to prohibit states from forbidding public providers from providing broadband services.²⁴¹ A version of this bill was introduced in the 117th Congress.²⁴² Additionally, a counterproposal bill was introduced in the 117th Congress which would impose a blanket ban on states or political subdivisions offering broadband internet access service.²⁴³ These proposals signal the need for Congress to address the issue of federal preemption of state regulation of broadband.

CONCLUSION

Americans need access to high-speed internet. Although next-generation broadband internet technology is available, the goal of universal service in America has not been achieved. As technology and

237. *Printz v. United States*, 521 U.S. 898, 920 (1997) (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

238. Randolph J. May & Seth L. Cooper, *FCC Preemption of State Restrictions on Government-Owned Broadband Networks: An Affront to Federalism*, 16 *ENGAGE* 39, 49 (2015).

239. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 134 (2004).

240. Mikhail Guttentag, *A Light in Digital Darkness: Public Broadband After Tennessee v. FCC*, 20 *YALE J.L. & TECH.* 311, 344 (2018).

241. H.R. 7302, 117th Cong. (2022) (incorporated into H.R. 2); S. 4131, 117th Cong. (2022).

242. H.R. 1783, 117th Cong. (2021); S. 745, 117th Cong. (2021).

243. H.R. 1149, 117th Cong. (2021).

connection progress, this problem compounds, exposing the most vulnerable communities to the danger of being left behind. Inconsistent state broadband regulations have resulted in wide gaps in broadband coverage, making it difficult for many Americans to perform necessary tasks without adequate internet. The FCC has failed to substantively promote universal access through existing regulations. Congress is pursuing broadband infrastructure development by authorizing unprecedented amounts of funds for this purpose, but there are still vast unserved and underserved areas in the U.S.

Municipal broadband providers are a readily available solution to the digital divide and can be the “yardstick” to measure the quality of internet services and promote competition among broadband providers. Local governments are situated at the nexus of vast amounts of federal funding and the communities most in need of broadband services. However, municipalities cannot offer these benefits when their states erect barriers to internet service. In order to achieve the goal of universal service, the objectives for broadband development at the local, state, and federal level must be aligned. Congress should make an explicit grant of authority for the FCC to preempt laws that stand in the way of universal broadband service for all Americans, including those preventing municipal broadband.