

# THE INCONSISTENT APPLICATION OF INTERNET REGULATIONS AND SUGGESTIONS FOR THE FUTURE

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## I. INTRODUCTION

Countless novels, movies, and television shows depict a dystopian image of a bleak, dusty, technologically advanced, submissive society ruled by an authoritative and oppressive government who punishes its citizens for speaking contrary to the government’s narrative.<sup>1</sup> The Orwellian Big Brother keeps control of his citizens through the use of in-home surveillance, doctoring history, and records to fit his current narrative and remove dissidents from society.<sup>2</sup> He does this in order to portray an image of an absolute, all-knowing,

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1. See, e.g., RAY BRADBURY, *FAHRENHEIT 451*, at 11 (Simone & Schuster 2012) (1951); GEORGE ORWELL, 1984, at 3–5 (Signet Classics 1977) (1949).

2. ORWELL, *supra* note 1, at 259–60.

and infallible figurehead to lead the country into prosperity and happiness.<sup>3</sup> Big Brother is able to control the societal narrative by constantly making revisions and corrections to textbooks and news articles to ensure that, at any given time, the information being disseminated is in accordance with the narrative that Big Brother seeks to push.<sup>4</sup> He effectively employs this through constant changes that only provide one version of events throughout history.<sup>5</sup>

Another familiar image is the pile of books engulfed in flames, the constant smell of kerosene, and the fear of constant government monitoring, as seen in Ray Bradbury's *Fahrenheit 451*.<sup>6</sup> These types of images, often associated with limited communication and information access, seem so far-fetched in today's world because of the use of the internet and the ease in which information can be instantly transmitted.<sup>7</sup> However, monopolization and inconsistent application of regulations can affect how society receives and perceives the world around them.<sup>8</sup> Giving companies unfettered power to monitor and restrict content can potentially create echo-chambers where the voice of corporations, not the citizens, control what is *important* to society.<sup>9</sup>

Countries like Cuba and China are arguably in the early stage of controlled dissemination of information through censorship perpetrated by the government.<sup>10</sup> The governments of these countries, among others, are able to influence the societal narrative by restricting access to speech that opposes the

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3. See *id.* at 262.

4. See *id.* at 54–55.

5. See *id.*

6. BRADBURY, *supra* note 1, at 52; see also ORWELL, *supra* note 1, at 36–37.

7. See Simon Kemp, *Digital 2020: The United States of America*, DATAREPORTAL (Feb. 11, 2020), <http://datareportal.com/reports/digital-2020-united-states-of-america> (“There were 288.1 million internet users in the United States of America in January 2020”).

8. John Samples, *Why the Government Should Not Regulate Content Moderation of Social Media*, CATO INST. (Apr. 9, 2019), <http://www.cato.org/policy-analysis/why-government-should-not-regulate-content-moderation-social-media>.

9. Lee Rainie et al., *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, PEW RSCH. CTR. (Mar. 29, 2017), <http://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/>.

10. See *Cuba: Freedom in the World 2021 Country Report*, FREEDOM HOUSE, <http://freedomhouse.org/country/cuba/freedom-world/2021> (last visited Apr. 1, 2022). Cuba is listed as 13/100 on their internet freedom score. *Id.* China is listed as a 9/100. *China: Freedom in the World 2021 Country Report*, FREEDOM HOUSE, <http://freedomhouse.org/country/china/freedom-world/2021> (last visited Apr. 1, 2022). In contrast, the United States scored an 83/100. *United States: Freedom in the World 2021 Country Report*, FREEDOM HOUSE, <http://freedomhouse.org/country/united-states/freedom-world/2021> (last visited Apr. 1, 2022).

will of the government.<sup>11</sup> For instance, the Chinese government can block individuals from accessing certain websites.<sup>12</sup> The government can affect an individual's ability to buy a plane ticket.<sup>13</sup> The government can even jail people for anti-government rhetoric.<sup>14</sup> Engaging in anti-government rhetoric can result in citizens being tortured in a concentration camp simply for worshipping a certain deity.<sup>15</sup> Or worse, the government can just make you disappear without a trace.<sup>16</sup> This is the grim reality for people in a country just across the Pacific.<sup>17</sup> A country that is becoming increasingly powerful and is slowly scooting their way forward to take place as the new hegemon, as they lead in technological adoption.<sup>18</sup>

To ensure the highest degree of a free and functioning democracy, the United States needs a consistent application of internet regulations, rather than simply updating legislation every time it suits an incumbents' need.<sup>19</sup> In essence, this means that Internet Service Providers ("ISPs") should provide equal, uninhibited access to their customers with few exceptions.<sup>20</sup> The recent trend of repealing executive orders is inefficient and ultimately results in inconsistent applications of the standards in which ISPs are held to and how

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11. See Katie Canales, *China's 'Social Credit' System Ranks Citizens and Punishes Them with Throttled Internet Speeds and Flight Bans if the Communist Party Deems Them Untrustworthy*, BUS. INSIDER, <http://www.businessinsider.com/china-social-credit-system-punishments-and-rewards-explained-2018-4> (last updated Dec. 24, 2021, 11:00 AM); Cuba: Freedom in the World 2021 Country Report, *supra* note 10.

12. *China: Freedom in the World 2021 Country Report, supra* note 10.

13. Canales, *supra* note 11.

14. Chun Han Wong, *World News: China Jails Twitter Users to Stifle Critics*, WALL ST. J., Jan. 30, 2021, at A8.

15. See Darren Byler, *For China's Muslim Minority, the Internet Was a Safe Haven — Until It Wasn't*, FAST CO. (Sept. 23, 2019), <http://www.fastcompany.com/90405715/for-chinas-muslim-minority-the-internet-was-a-safe-haven-until-it-wasnt>; Tracey Shelton & Bang Xiao, *China 'Disappeared' Several High-Profile People in 2018 and Some of Them are Still Missing*, AUSTL. BROAD. CORP., <http://www.abc.net.au/news/2019-01-06/the-people-who-china-disappeared-in-2018-and-where-they-are-now/10676016> (last updated June 5, 2019, 5:41 PM).

16. See Shelton & Xiao, *supra* note 15.

17. See Byler, *supra* note 15.

18. See Joseph S. Nye, Jr., *The Changing Nature of World Power*, 105 POL. SCI. Q. 177, 185 (1990).

19. See discussion *infra* Part VI.

20. See discussion *infra* Sections IV.A, V.A. These exceptions—which will not be detailed in this article—include internet service to first responders, hospitals, law enforcement, military, and other public functions which public interest would best be served by prioritizing their internet access. See discussion *infra* Sections IV.A, V.A.

the laws are applied.<sup>21</sup> Part VI of this Comment will discuss an alternative to the current internet regulations, as well as the implications involved in changing the current laws and executive orders.<sup>22</sup>

Part VI of this Comment will also explain that the current legislation for internet regulations should require ISPs to provide equal internet access to everyone, while at the same time working toward shedding the cloak of protection that ISPs, social media companies, tech companies, and media companies are afforded, when it comes to censorship on their platforms.<sup>23</sup> The purpose of Section VI.B of this Comment is to highlight the potential for abuse and erosion of the First Amendment by analyzing current trends and their long-standing implications.<sup>24</sup> Additionally, Section VI.B of this Comment proposes alternatives to the current and recent trends in internet regulation.<sup>25</sup> In so doing, I will discuss the advantages and disadvantages of government regulation of private tech businesses, specifically ISPs, social media companies, and other current tech giants.<sup>26</sup> Section VI.A of this Comment will compare similar situations of censorship going on internationally and domestically, demonstrating how removing liability has caused damage, and connecting the dots between what is going on now with social media liability and the network neutrality debate which has been inconsistently applied over the years.<sup>27</sup> Ultimately, this Comment will suggest that the problem boils down to providing a necessary utility to citizens and ensuring that universal internet access is not prioritized or restricted on any basis.<sup>28</sup>

## II. EVOLUTION OF COMMUNICATIONS REGULATIONS

The internet, like the radio and television, is a form of communication.<sup>29</sup> Accordingly, the function of the Federal Communications Commission (“FCC”) is to act as a regulator for all recognized forms of

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21. See Lauren Feiner, *Net Neutrality Foe and Trump’s Former FCC Chairman Ajit Pai Stands by Repeal as Democrats Take Over*, CNBC (Jan. 26, 2021, 2:21 PM), <http://www.cnbc.com/2021/01/26/net-neutrality-foe-and-departed-fcc-chairman-ajit-pai-stands-by-repeal.html>.

22. See discussion *infra* Part VI.

23. See discussion *infra* Part VI.

24. See discussion *infra* Section VI.B.2

25. See discussion *infra* Section VI.B.

26. See discussion *infra* Section VI.B.

27. See discussion *infra* Section VI.A; H.R. REP. NO. 104–458, at 194 (1996) (Conf. Rep.).

28. See discussion *infra* Part VI.

29. See *What We Do*, FED. COMM’NS COMM’N, <http://www.fcc.gov/about-fcc/what-we-do> (last visited Apr. 1, 2022); NAT’L RSCH. COUNCIL, *REALIZING THE INFORMATION FUTURE: THE INTERNET AND BEYOND 21* (1994) (ebook).

communication.<sup>30</sup> As the mediums of communication became more widespread, the necessity for regulations became increasingly apparent.<sup>31</sup> Various legislation regulating communications has evolved throughout the history of the United States and the next Section of this Comment provides a brief insight into each.<sup>32</sup>

#### A. *The Early Days of Radio Regulations*

The year was 1912 and the world was starting to get a larger glimpse into the utilization of radio communication.<sup>33</sup> At the time, radio signals were not well established and radios were not widely used by United States citizens.<sup>34</sup> Many frequencies were used for United States military personnel, but the United States government did not have exclusive control over radio waves.<sup>35</sup> In fact, the majority of radio frequencies led to overlapping, and consequently ineffective, signals.<sup>36</sup> A lack of formal regulation meant interfering frequencies and many inconsistencies.<sup>37</sup>

The watershed moment for realizing the need for radio communication regulation was arguably the sinking of the Titanic in the Northern Atlantic Ocean.<sup>38</sup> The Royal Mail Ship (“RMS”) Titanic sent out a distress call that was heard in the northern regions of Canada, specifically in Newfoundland.<sup>39</sup> However, the distress call was masked by interference from amateur, unregulated radio stations throughout the east coast of the United States.<sup>40</sup> These interfering frequencies caused a delayed emergency response

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30. *What We Do*, *supra* note 29; *see also* 47 U.S.C. § 151.

31. *See* 47 U.S.C. § 609; *What We Do*, *supra* note 29.

32. *See* discussion *infra* Sections II.A–B.

33. *See* Sharon Morrison, *Radio Act of 1912*, FREE SPEECH CTR.: FIRST AMEND. ENCYC. (2009), <http://www.mtsu.edu/first-amendment/article/1090/radio-act-of-1912> [hereinafter *Radio Act of 1912*].

34. *See id.*; Carole E. Scott, *The History of the Radio Industry in the United States to 1940*, ECON. HIST. ASS’N, <http://eh.net/encyclopedia/the-history-of-the-radio-industry-in-the-united-states-to-1940/> (last visited Apr. 1, 2022).

35. *See* Thomas H. White, *Pioneering Amateurs: (1900–1917)*, U.S. EARLY RADIO HIST., <http://earlyradiohistory.us/sec012.htm> (last visited Apr. 1, 2022).

36. *See* Sean Coughlan, *Titanic: The Final Messages from a Stricken Ship*, BBC (Apr. 10, 2012), <http://www.bbc.com/news/magazine-17631595>; Morrison, *supra* note 33.

37. *Radio Act of 1912*, *supra* note 33.

38. *See id.*; Coughlan, *supra* note 36.

39. Marc Montgomery, *Canada History: April 15, 1912, Titanic Disappears off Newfoundland*, RADIO CAN. INT’L (Apr. 15, 2021, 2:13 PM), <http://www.rcinet.ca/en/2019/04/15/canada-history-april-15-1912-titanic-disappears-off-newfoundland/>.

40. *See* Coughlan, *supra* note 36; *Radio Act of 1912*, *supra* note 33.

because of the lack of communication.<sup>41</sup> This tragic incident represented the reality that certain radio frequencies *must* be accessible in case of emergency.<sup>42</sup>

The Radio Act of 1912 was passed a few months later and vested the United States Government with the power to require radio stations to obtain licenses that would allow the government to broadcast a signal to the general public.<sup>43</sup> The United States Government effectively took complete control over broadcasting, requiring licensing and restricting frequencies.<sup>44</sup> Following the end of the First World War, radios became a household staple for American citizens.<sup>45</sup> For the first time ever, people could use radios to do things like listen to music without needing a record player, hear news stories without needing to read the paper, and listen to sports without having to watch it live.<sup>46</sup> However, the United States Government did not anticipate how widespread radio would become in the 1920s; thus, new legislation was required to keep up with the times.<sup>47</sup>

In order to handle the unforeseen widespread usage of radio communication, the Radio Act of 1927 was passed, creating a governmental body to manage the service.<sup>48</sup> This act created a new body called the Federal Radio Commission (“FRC”), which was vested with the power to regulate radio communication.<sup>49</sup> The FRC, initially created as a temporary agency, quickly realized that its duties could not be performed in the preliminary time frame that was suggested.<sup>50</sup> Radio soon competed with the newspaper industry, not only as a means of entertainment, but also as a news source and

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41. See Coughlan, *supra* note 36; *Radio Act of 1912*, *supra* note 33.

42. See Coughlan, *supra* note 36.

43. An Act to Regulate Radio Communication, Pub. L. No. 62-264, § 6412, 37 Stat. 302, 302 (1912); *Radio Act of 1912*, *supra* note 33.

44. See *Radio Act of 1912*, *supra* note 33.

45. Joe Wood, *History of the Radio: From Inception to Modern Day*, TECH. WHOLESALE, <http://www.techwholesale.com/history-of-the-radio.html> (last visited Apr. 1, 2022).

46. *Id.*; *First Radio Broadcast of the Olympics*, GUINNESS WORLD RECS., <http://www.guinnessworldrecords.com/world-records/first-radio-broadcast-of-the-olympics> (last visited Apr. 1, 2022).

47. See Wood, *supra* note 45.

48. Radio Act of 1927, Pub. L. No. 69-632, § 4, 44 Stat. 1162, 1163–64; Keith Masters, *Construction of the Equality Clause in the Davis Amendment*, 1 J. RADIO L. 1, 1–2 (1931); Sharon L. Morrison, *Radio Act of 1927 (1927)*, FIRST AMEND. ENCYCLOPEDIA, <http://www.mtsu.edu/first-amendment/article/1091/radio-act-of-1927> (last visited Apr. 1, 2022) [hereinafter *Radio Act of 1927*].

49. *Radio Act of 1927*, *supra* note 48.

50. See FED. RADIO COMM’N, ANNUAL REPORT OF THE FEDERAL RADIO COMMISSION TO THE CONGRESS OF THE UNITED STATES FOR THE FISCAL YEAR ENDED JUNE 30, 1927, at 8 (1927).

a more efficient form of communication.<sup>51</sup> The number of radio stations had risen exponentially and long-distance signals were becoming more widely adopted.<sup>52</sup> The ability to reach a larger audience presented valuable potential for many forms of entertainment.<sup>53</sup> Additionally, spending on radio advertisements had risen and new forms of entertainment programs were making their way onto the radio.<sup>54</sup>

Other than granting the power to require and delegate radio licenses to broadcast, the Acts<sup>55</sup> also denoted radio waves as public property and therefore became subject to the United States Constitution.<sup>56</sup> This classification would be described in greater detail seven years later, when new legislation was passed.<sup>57</sup>

### B. *The Communications Act of 1934*

By 1934, sixty percent of the households in the United States had radios.<sup>58</sup> However, Congress realized that a more constitutionally-favorable method of radio communication regulation could be established by utilizing its Commerce Clause powers vested by the United States Constitution.<sup>59</sup> Consequently, President Roosevelt signed the Communications Act of 1934,<sup>60</sup> which created the FCC to replace the FRC.<sup>61</sup> The newly created FCC was granted the power to oversee radio, telephone, and television communications.<sup>62</sup> The Communications Act incorporated several titles for services, but most notably Title I and Title II.<sup>63</sup> The titles represent different

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51. See Rhonda Jolly, *Media Ownership and Regulation: A Chronology*, PARLIAMENT AUSTL., [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/Media\\_ownership/19938](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/Media_ownership/19938) (last visited Apr. 1, 2022).

52. Scott, *supra* note 34.

53. *Id.*

54. *Id.*

55. See *Radio Act of 1912*, *supra* note 33; *Radio Act of 1927*, *supra* note 48.

56. See *Radio Act of 1927*, *supra* note 48.

57. See *id.*; Brian Caterina, *Communications Act of 1934 (1934)*, FIRST AMEND. ENCYCLOPEDIA (2009), <http://www.mtsu.edu/first-amendment/article/1044/communications-act-of-1934>.

58. Scott, *supra* note 34.

59. See Caterina, *supra* note 57; Communications Act of 1934, Pub. L. No. 73-4165, § 1, 48 Stat. 1064, 1064.

60. § 1, 48 Stat. at 1064.

61. See *id.*

62. See *id.*; Caterina, *supra* note 57.

63. See *id.*; Kia Kokalitcheva, *The Most Important Internet Law Was Written in 1934*, VENTUREBEAT (Nov. 13, 2014, 3:00 PM), <http://venturebeat.com/2014/11/13/the-most-important-internet-law-was-written-in-1934/>.

standards subject to different standards of regulation.<sup>64</sup> For example, Title II services are subject to “common carrier” rules, whereas Title I services are subject to fewer restrictions.<sup>65</sup>

Pursuant to the Communications Act of 1934, a single corporation was limited in the amount of radio station ownership in a given market.<sup>66</sup> Additionally, a single corporation was not allowed to own and operate more than a designated amount of television stations in a given market.<sup>67</sup> These numbers were adjusted as more stations began to emerge.<sup>68</sup> However, the purpose behind the ownership restrictions was to encourage competition and ensure that media sources had the opportunity to spread their forms of communication equally among United States citizens.<sup>69</sup> Additional regulations from the Communications Act that were present created limits on the amount of audience-reach to households a given media company could have.<sup>70</sup> Consistent with First Amendment, the public policy reasoning behind that limitation was to ensure diversity in information dissemination as well as to ensure the information being broadcasted was relevant and equally accessible.<sup>71</sup> These restrictions, although seemingly arbitrary, were created in accordance with constitutional interests in mind.<sup>72</sup> Ultimately, it would be six decades before new laws were created that would regulate communications.<sup>73</sup>

### III. THE RISE IN INTERNET USAGE

The internet began to see commercial use in the late 1980s and early 1990s.<sup>74</sup> “In 1989, [The World became] the first commercial [ISP] on the

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64. See § 1, 48 Stat. at 1064.

65. See *id.*

66. § 301, 48 Stat. at 1081; see also Jonathan A. Obar, *Beyond Cynicism: A Review of the FCC’s Reasoning for Modifying the Newspaper/Broadcast Cross-Ownership Rule*, 14 COMM. L. & POL’Y 479, 484–85 (2009).

67. Obar, *supra* note 66, at 485.

68. *Id.* at 487.

69. See *id.* at 487 n.42.

70. See § 303(h), 48 Stat. at 1082; Rev. of the Comm’n’s Reguls. Governing Television Broad., 10 F.C.C. Rcd. 3524, 3560 (1995).

71. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 624, 662 (1994); *id.* at 686 (Ginsburg, J., concurring in part and dissenting in part).

72. *Id.* at 663 (majority opinion); *id.* at 686 (Ginsburg, J., concurring in part and dissenting in part).

73. See H.R. REP. NO. 104-458, *supra* note 27.

74. *Who Invented the Internet — A Full Story*, BROADBAND SEARCH, <http://www.broadbandsearch.net/blog/who-invented-the-internet-full-history> (last visited Apr. 1, 2022).

planet for the general public.”<sup>75</sup> As the use of the internet became more widespread, it became clear that there was a need to appropriately regulate the internet, without giving the government too much power over what information was available and without leading to monopolies who controlled the information that was accessible to citizens.<sup>76</sup> At that time, it was clear that researchers were aware of the concern that government could control the information it generates, which could result in a monopoly over information made available to the public.<sup>77</sup> Although the National Research Council was giving their preliminary findings regarding the regulation of the internet, it was clear that the regulations would have to evolve and adapt as the usage of the internet did as well.<sup>78</sup> Ultimately, the National Research Council’s preliminary findings along with several cases helped form the legislation which led to a momentous change in the realm of communications regulation.<sup>79</sup>

#### A. *The Rise of the Internet*

In the 1990s, while the internet was still in its infancy, a connection was established using a dial-up connection.<sup>80</sup> A dial-up connection was created by using a telephone line to change how communication was transmitted.<sup>81</sup> Because dial-up was the only mode of internet accessibility for most people, the FCC impliedly received the power to regulate the internet.<sup>82</sup> As the internet gained more users, people began to access it through other methods, like cable modems.<sup>83</sup> Ultimately, the FCC would maintain the power

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75. *History of the World — Our Version*, WORLD, [http://theworld.com/world/about/history/our\\_version](http://theworld.com/world/about/history/our_version) (last updated July 31, 2010); *Who Invented the Internet — A Full Story*, *supra* note 74.

76. NAT’L RSCH. COUNCIL, *supra* note 29, at 158. The National Research Council, with regard to First Amendment challenges, stated: “the First Amendment suggests that government should permit no one to exercise monopoly control over the content carried over the network; content determination and editorial control issues should be the province of competing information providers.” *Id.*

77. *Id.* at 154.

78. *Id.* at 84.

79. See H.R. REP. NO. 104-458, *supra* note 27.

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

81. *Id.*

82. See *id.* at 967, 970.

83. John B. Horrigan, *Part 1. Broadband Adoption in the United States*, PEW RSCH. CTR. (May 28, 2006), <http://www.pewresearch.org/internet/2006/05/28/part-1-broadband-adoption-in-the-united-states/>.

to create and enforce internet regulations and went on to classify it as information service.<sup>84</sup>

This classification was different from radio, television, and telephone communications, and therefore was subject to different regulations.<sup>85</sup> However, the legislators and the FCC did not predict how important internet access would become and how foundational it would be in society today.<sup>86</sup> Several cases, however, led the charge when it came to how the internet, as an information service, would be regulated.<sup>87</sup> One of the first issues presented with internet regulation was whether websites or Internet Service Providers would be considered publishers or distributors of the information on their websites.<sup>88</sup> The reason this was so important was because it helped to determine how defamation law would be addressed in the new medium of communication.<sup>89</sup>

In *Cubby, Inc. v. CompuServe Inc.*,<sup>90</sup> the United States District Court for the Southern District of New York was tasked with determining whether a website is responsible for statements written in one of its forums.<sup>91</sup> The plaintiff sued the defendant after several defamatory comments were made about the plaintiff on a forum hosted on the defendant's website.<sup>92</sup> The court noted that the defendant-website did not have editorial control over the comments made on the message boards and thus could not be considered a publisher of the defamatory speech.<sup>93</sup> Rather, the defendant acted as a distributor of the speech.<sup>94</sup> In coming to their conclusion, the court drew an

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84. *See Nat'l Cable & Telecomm. Ass'n*, 545 U.S. at 968.

85. *See id.* at 967.

86. *See* Emily Stewart, *Give Everybody the Internet*, VOX (Sept. 10, 2020, 8:30 AM), <http://www.vox.com/recode/2020/9/10/21426810/internet-access-covid-19-chattanooga-municipal-broadband-fcc>.

87. *See, e.g., Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at \*1 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Act of 1934 tit. II (codified as 47 U.S.C. § 230).

88. *See Cubby, Inc.*, 776 F. Supp at 137, 139.

89. *Id.* at 135.

90. 776 F. Supp. 135 (S.D.N.Y. 1991).

91. *Id.* at 137–38.

92. *Id.* at 138.

93. *Id.* at 140.

94. *Id.* Interestingly, the *Cubby* court also referenced the famous First Amendment case, *Smith*, in which the Court struck down an ordinance which imposed liability on the owner of a bookstore for possessing a book with obscene content because it would be unreasonable to require a bookstore owner to know the intimate contents of each book on their bookshelves. *Cubby, Inc.*, 776 F. Supp. at 139–40; *Smith v. California*, 361 U.S. 147, 152–53 (1959).

interesting comparison between the website and traditional sources of information:

A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.<sup>95</sup>

Another significant ruling was made a few years later in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*,<sup>96</sup> where the New York Supreme Court was again tasked with determining whether a website should be held as a publisher of statements made by an anonymous user on an online forum.<sup>97</sup> The Plaintiff-brokerage firm—which ultimately dissolved because it defrauded shareholders resulting in many shareholders being arrested and incarcerated<sup>98</sup>—sued the defendant-website for defamatory comments that were made anonymously on a message board.<sup>99</sup> The plaintiff asserted that the defendant should be held responsible as a publisher because the defendant held itself out as a moderator of the content that was published on its message boards.<sup>100</sup> In fact, the defendant used a software screening program to automatically prescreen board postings for offensive language.<sup>101</sup> The New York court agreed with the plaintiff and granted summary judgment in its favor on the issue of whether the defendant acted as a publisher of speech.<sup>102</sup> In doing so, the court distinguished the facts from *Cubby* by noting that the defendant, in that case, had little to no editorial control over the content of those publications, whereas the defendant, in this case, made decisions as to the content, and such decisions constituted editorial control.<sup>103</sup> This ruling, along with *Cubby*, helped set the stage for the Communication Decency Act, which was incorporated under the Telecommunications Act of 1996.<sup>104</sup>

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95. *Cubby, Inc.*, 776 F. Supp. at 140.

96. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

97. *Id.* at \*2.

98. *See THE WOLF OF WALL STREET* (Paramount Pictures 2013).

99. *See Stratton Oakmont, Inc.*, 1995 WL 323710, at \*1.

100. *Id.* at \*2.

101. *Id.*

102. *Id.* at \*1.

103. *Id.* at \*4; *see Cubby, Inc.*, 776 F. Supp. at 140.

104. H.R. REP. NO. 104-458, *supra* note 27 (indicating that one of its specific purposes was to overrule *Stratton Oakmont, Inc.*, and any other similar decisions, which have treated providers and users as publishers or speakers of content that is not their own because

## B. *The Telecommunications Act of 1996*

In February 1996, the Communications Act of 1934 was amended by the Telecommunications Act of 1996.<sup>105</sup> Once again, the United States was in the midst of a technological boom as mobile telephones and the internet became household staples.<sup>106</sup> The purpose of the Act was to help stimulate economic growth and technological innovation, increase diversity, and decrease costs.<sup>107</sup> This Act not only created new standards for internet regulations, ISPs, and websites, but it also affected previous regulations for other forms of communication.<sup>108</sup> Furthermore, the Telecommunications Act of 1996 loosened restrictions against media companies on the ability to purchase additional radio and television stations.<sup>109</sup> President Clinton, who signed the bill, stated that the bill “promotes competition as the key to opening new markets and new opportunities.”<sup>110</sup> He further stated that the bill would “protect consumers by regulating the remaining monopolies for a time and by providing a roadmap for deregulation in the future.”<sup>111</sup> Ultimately, the Act focused largely on updating and establishing classifications for radio, cable, and ISPs.<sup>112</sup>

With those restrictions being lifted, media corporations were able to fast-track the monopolization of radio, television, and telephone communications.<sup>113</sup> Twenty-five years after its passage, media giant iHeartRadio, f/k/a Clear Channel, owns more than 850 radio stations operating

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they have restricted access to objectionable material); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; see *Cubby, Inc.*, 776 F. Supp. at 140.

105. *Telecommunications Act of 1996*, FED. COMM’N COMM’N, <http://www.fcc.gov/general/telecommunications-act-1996> (last updated June 20, 2013); Communications Act of 1934, Pub. L. No. 73-4165, 48 Stat. 1064.

106. *A Brief History of the Telephone: 1990–2000*, PHONES - THEN AND NOW, <http://phones-thenandnow.weebly.com/1990-2000.html> (last visited Apr. 1, 2022).

107. See *Telecommunications Act of 1996*, *supra* note 105.

108. See *id.*; David McCabe, *Bill Clinton’s Telecom Law: Twenty Years Later*, HILL (Feb. 7, 2016, 9:00 AM), <http://thehill.com/policy/technology/268459-bill-clintons-telecom-law-twenty-years-later>.

109. See *Telecommunications Act of 1996*, *supra* note 105.

110. McCabe, *supra* note 108; see Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

111. *Id.*

112. Christopher H. Sterling, *Transformation: The 1996 Act Reshapes Radio*, 58 FED. COMM’N L.J. 593, 593 (2006); *Telecommunications Act of 1996*, *supra* note 105.

113. Sterling, *supra* note 112, at 593; *Telecommunications Act of 1996*, *supra* note 105; see also COMMON CAUSE EDUC. FUND, *THE FALLOUT FROM THE TELECOMMUNICATIONS ACT OF 1996: UNINTENDED CONSEQUENCES AND LESSONS LEARNED* 5 (Mary Boyle ed., 2005).

in the United States, and Sinclair owns over 190 television stations.<sup>114</sup> Accordingly, critics of the Telecommunications Act of 1996 have argued that the law was a complete failure because it endorsed censorship by creating powerful media companies which allowed for selective information dissemination.<sup>115</sup> Alternatively, proponents of the Telecommunications Act of 1996 argued that monopolization does not necessarily limit market reach because the monopoly owner seeks the widest possible audience reach.<sup>116</sup>

Another major effect of the Telecommunications Act of 1996 was the incorporation of section 230, the Communications Decency Act (“CDA”).<sup>117</sup> As opposed to regulating access to the internet as a form of communication, this Act represented the first attempt at regulating access to information on the internet.<sup>118</sup> Additionally, the CDA had the effect of establishing operators of internet services as distributors, rather than publishers of information.<sup>119</sup> This further defined legal culpability, as it related to holding operators liable for speech by users of their services.<sup>120</sup>

Almost immediately after the CDA’s enactment, federal courts had several challenges regarding the CDA.<sup>121</sup> In *Reno v. ACLU*,<sup>122</sup> the Supreme

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114. See *Who Owns What*, INSIDE RADIO, [http://www.insideradio.com/resources/who\\_owns\\_what/](http://www.insideradio.com/resources/who_owns_what/) (last visited Apr. 1, 2022); *Number of Radio Stations Owned by iHeartMedia in the United States from 2014 to 2020*, STATISTA (June 4, 2021), <http://www.statista.com/statistics/603256/iheartmedia-radio-stations/>; Alvin Chang, *Sinclair’s Takeover of Local News, in One Striking Map*, VOX (Apr. 6, 2018, 8:20 AM), <http://www.vox.com/2018/4/6/17202824/sinclair-tribune-map>.

115. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; see Ernie Smith, *Not-So-Clear Channel*, TEDIUM (Apr. 21, 2020), <http://tedium.co/2020/04/21/clear-channel-911-memorandum-history/>. While operating as Clear Channel and following the September 11, 2001 terrorist attacks, iHeartRadio created a blacklist of songs which they strongly discouraged their affiliate stations from playing on the air. *Id.* For instance, the group Rage Against the Machine had their entire catalog of music blacklisted from Clear Channel stations. *Id.* Additionally, several other artists were blacklisted, thought to be for political reasons. *Id.*

116. Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194, 207 (1952); see also Steven T. Berry & Joel Waldfogel, *Do Mergers Increase Program Variety? Evidence from Radio Broadcasting*, 116 Q.J. ECON. 1009, 1010 (2001) (concluding that consolidation reduces station entry but increases product variety); *Telecommunications Act of 1996*, *supra* note 105.

117. See 47 U.S.C. § 230; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

118. 47 U.S.C. § 230; see also *Reno v. ACLU*, 521 U.S. 844, 845 (1997).

119. See 47 U.S.C. § 230.

120. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at \*5 (N.Y. Sup. Ct. May 24, 1995).

121. See *Reno*, 521 U.S. at 845; *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997); 47 U.S.C. § 230.

122. 521 U.S. 844 (1997).

Court struck down several portions of the CDA, holding that they improperly infringed upon constitutional rights.<sup>123</sup> In *Zeran v. Am. Online, Inc.*,<sup>124</sup> the federal appellate court held that the CDA granted ISPs immunity from libel suits because they were acting as distributors, rather than publishers of the speech.<sup>125</sup> Therefore, ISPs were effectively granted immunity from such a suit pursuant to the broad power bestowed upon them pursuant to the CDA.<sup>126</sup> Thus, it was becoming increasingly clear that the original regulations set in place for the internet would need to be further defined and adjusted as they became more widely adopted.<sup>127</sup>

#### IV. NETWORK NEUTRALITY

One of the first cases dealing with the concept of net neutrality created the ability for the FCC to classify and regulate the internet.<sup>128</sup> In *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*,<sup>129</sup> the Court held that ambiguity in the Communications Act of 1934, as amended by the Telecommunications Act of 1996, could be resolved by the appointed agency whose role was to carry that statute out.<sup>130</sup> This ruling allowed the FCC to fill in gaps and assume authority that was not explicitly vested in both the Communications Act of 1934 and the Telecommunications Act of 1996.<sup>131</sup> Therefore, because broadband internet access was not as accessible during either communications enactment, the FCC and President Obama began the process of reclassifying broadband access over a series of executive orders and various litigations.<sup>132</sup>

##### A. *The Open Internet Order*

Prior to 2015, broadband internet was classified as a Title I service under the Communications Act, which treated the internet as an information

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123. *Id.* at 844, 879, 882; 47 U.S.C. § 230.

124. 129 F.3d 327 (4th Cir. 1997).

125. *Id.* at 331–32; 47 U.S.C. § 230.

126. *Zeran*, 129 F.3d at 331; 47 U.S.C. § 230.

127. *See* Preserving the Open Internet, 25 F.C.C. Rcd. 17905, 17907 (2010).

128. *See* *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83, 1003 (2005).

129. 545 U.S. 967 (2005).

130. *Id.* at 1003; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

131. *Id.* at 983–84; *Telecommunications Act of 1996*, *supra* note 105.

132. *See* discussion *infra* Section IV.A.

service.<sup>133</sup> Title I standards granted ISPs a greater amount of discretion in how they managed customers' data, the types of websites customers could access, and the bandwidth speeds they provided to their customers.<sup>134</sup> The initial classification was ultimately reevaluated by the FCC with the purpose of ensuring network neutrality by equally distributing data speeds and access to the internet.<sup>135</sup>

The Open Internet Order (“OIO”) or “net neutrality” was an order passed by the FCC in 2010 that changed the standard of care that ISPs were held to maintain.<sup>136</sup> However, one of the unintended consequences of the order was that it allowed ISPs to charge more for high-speed access, which ultimately did not create a truly neutral network.<sup>137</sup> In fact, the OIO allowed ISPs to create internet fast lanes, in which data could be prioritized, thus giving unequal access speed to various persons and entities.<sup>138</sup>

In *Comcast Corp. v. FCC*,<sup>139</sup> the United States Court of Appeals was tasked with determining whether the FCC had authority to enforce the OIO and regulate ISPs that had interfered with customers' internet access.<sup>140</sup> The court held that the FCC did not have authority to regulate ISPs because the internet was classified under Title I of the Communications Act.<sup>141</sup> This ruling was quintessential in developing net neutrality principles because, in their explanation, the court laid the foundation for how the FCC could ultimately acquire authority over ISPs.<sup>142</sup> The court reasoned that the FCC could not enforce the net neutrality regulations while the internet was classified as an

133. Communications Act of 1934, Pub. L. No. 73-4165, 48 Stat. 1064; see Rebecca R. Ruiz & Steve Lohr, *F.C.C. Votes to Regulate Internet as Utility*, N.Y. TIMES, Feb. 27, 2015, at B1.

134. Communications Act of 1934, Pub. L. No. 73-4165, 48 Stat. 1064; Ruiz & Lohr, *supra* note 133.

135. See Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601, 5603, 5607–08 (2015).

136. See Preserving the Open Internet, 25 F.C.C. Rcd. 17905, 17907 (2010). Because a common carrier is held to the highest standard of care, reclassifying the internet had the effect of changing the standard of care ISPs had to give their customers in handling their data and broadband access. *Id.* at 17981.

137. See 30 F.C.C. Rcd. at 5607–08. This order enabled ISPs to create internet highways in which they could charge higher prices for faster access—also referred to as an internet “fast lane”—it is comparable to a highway charging a premium for access by a motor vehicle. *Id.*

138. See *id.* at 5607.

139. 600 F.3d 642 (D.C. Cir. 2010).

140. *Id.* at 644.

141. *Id.* at 661; see also Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

142. *Comcast Corp.*, 600 F.3d at 648.

“information service,” subject to Title I regulations.<sup>143</sup> It raised the question of whether the FCC actually has the legal authority to repeal title classifications and if it could be estopped from reclassification because of clear inconsistencies.<sup>144</sup>

In 2014, Verizon challenged the FCC again on the basis that it lacked authority to impose regulations.<sup>145</sup> In *Verizon v. FCC*,<sup>146</sup> the court held that the FCC did not have the authority to hold ISPs to nondiscriminatory policies and common carrier regulations because of the title classification of the internet.<sup>147</sup> This ruling was a landmark case for the FCC because it clearly demonstrated the means in which the FCC could implement net neutrality regulations.<sup>148</sup> *Verizon* ultimately led to the reclassification of the internet once more, since it showed the FCC a new avenue of achieving net neutrality.<sup>149</sup>

In 2015, the FCC released an updated Open Internet Order that would allow equal, uninhibited distribution of data to all internet users in the United States by reclassifying ISPs as a telecommunication service, recognizing the internet as a “common carrier” subject to Title II standards of the Communications Act.<sup>150</sup> True to its name, the Open Internet Order was intended to preserve internet openness.<sup>151</sup> Specifically, the Act stated the following:

Given that broadband providers—both fixed and mobile—have both the incentives and ability to harm the open Internet, we again conclude that the relatively small incremental burdens imposed by our rules are outweighed by the benefits of preserving the open nature of the Internet, including the continued growth of the virtuous cycle of innovation, consumer demand, and investment. We note, for example, that the disclosure requirements adopted in this order are widely understood, have industry-based definitions, and are commonly used in commercial Service Level Agreements by many broadband providers. Open Internet rules benefit investors, innovators, and end users by providing more certainty to

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143. *Id.* at 649.

144. *Id.* at 644, 647.

145. *Verizon v. FCC*, 740 F.3d 623, 634 (D.C. Cir. 2014).

146. 740 F.3d 623 (D.C. Cir. 2014).

147. *Id.* at 628, 650.

148. *See id.* at 667 (Silberman, J., concurring in part and dissenting in part).

149. *See id.* at 667–68 (Silberman, J., concurring in part and dissenting in part).

150. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601, 5870–71 (2015).

151. Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601, 5603 (2015).

each regarding broadband providers' behavior and helping to ensure the market is conducive to optimal use of the Internet. Open Internet rules are also critical for ensuring that people living and working in rural areas can take advantage of the substantial benefits that the open Internet has to offer. In minority communities where many individuals' only Internet connection may be through a mobile device, robust open Internet rules help make sure these communities are not negatively impacted by harmful broadband provider conduct. Such rules additionally provide essential safeguards to ensure that the Internet flourishes as a platform for education and research.<sup>152</sup>

In essence, common carrier status means that a service cannot vary the type or quality of access it provides to users.<sup>153</sup> A common carrier is held to the highest legal standard of care in providing a service, maintaining the utmost level of liability for occurrences caused during the administration of their service.<sup>154</sup> For the internet, it basically meant that ISPs could no longer block access to websites and were required to maintain the speed and quality of their services.<sup>155</sup> As it relates to prioritizing certain information over others, the Order addressed this as follows:

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization. "Paid prioritization" refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.<sup>156</sup>

This classification had some major implications, especially for protecting consumers.<sup>157</sup> Consumers benefited from the classification because it ensured that their private data was handled with the utmost level of care.<sup>158</sup>

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152. *Id.* at 5643–44.

153. *See id.* at 5644.

154. *See Carrier*, BLACK'S LAW DICTIONARY (11th ed. 2019).

155. 30 F.C.C. Rcd. at 5646.

156. *Id.* at 5607–08.

157. *Id.* at 5605.

158. *Carrier*, *supra* note 154.

In theory, this meant that ISPs could be held responsible for preventable data breaches and censorship violations.<sup>159</sup>

### B. *Challenges to Net Neutrality*

A notable downside to the reclassification was the possibility of creating monopolies and reducing private spending on infrastructure.<sup>160</sup> This potential for monopolization was conceivable by understanding that increased regulations can result in higher barriers of entry to the ISP market, due to the expensive precautions that ISPs would need to take in delivering secure, uninhibited internet access.<sup>161</sup> The maintenance of regulations may also redirect private spending by ISPs away from innovative development of technology and infrastructure.<sup>162</sup> This could be problematic because the ability to maintain efficacy as more internet users come online can be hindered by the lack of innovation and infrastructure to support those users.<sup>163</sup>

In 2017, the Trump administration took control of the White House, which was accompanied by the newly appointed chairman of the FCC.<sup>164</sup> Ajit Pai, who had served on the FCC under the Obama administration, had previously served as general counsel for Verizon, one of the big three ISPs.<sup>165</sup> The FCC began to work on the repeal of net neutrality, asserting that the reclassification of ISPs would create an increase in economic stimulation in the private technology sector, and consequently lower the barriers for entry into the ISP marketplace.<sup>166</sup> In January 2018, the Open Internet Order was officially repealed and ISPs would soon be allowed to return to the way things were before.<sup>167</sup>

Unfortunately, not long after the repeal, the state of California was faced with its first major issue arising out of the newly reestablished Title I

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159. See *Net Neutrality: When Data is Used Against You*, BOOST LABS (Aug. 29, 2018), <http://boostlabs.com/blog/net-neutrality-when-data-is-used-against-you/>.

160. See *Restoring Internet Freedom*, 33 F.C.C. Rcd. 311, 364, 390–91 (2018).

161. See *id.* at 364.

162. *Id.* at 368–69, 370.

163. See *id.* at 369–70.

164. Christine Wang, *President Trump Designates Ajit Pai as Next FCC Chairman*, CNBC (Jan. 23, 2017, 6:34 PM), <http://www.cnbc.com/2017/01/23/president-trump-designates-ajit-pai-as-next-fcc-chairman.html>.

165. See *id.*; Jon Brodtkin, *There Are Ajit Pai “Verizon Puppet” Jokes That the FCC Doesn’t Want You to Read*, ARS TECHNICA (Feb. 7, 2018, 12:42 PM), <http://arstechnica.com/tech-policy/2018/02/there-are-ajit-pai-verizon-puppet-jokes-that-the-fcc-doesnt-want-you-to-read/>; *Mobile Broadband Internet Providers*, BROADBANDNOW, <http://broadbandnow.com/Mobile-Broadband-Providers> (last visited Apr. 1, 2022).

166. See 33 F.C.C. Rcd. at 450.

167. *Id.* at 491, 578.

classification.<sup>168</sup> On June 29, 2018, the Santa Clara Fire Department (“SCFD”) responded to a rapidly spreading fire in Northern California.<sup>169</sup> Unbeknownst to the emergency responders, the repeal of network neutrality had gone into effect weeks prior, leaving them little to no notice regarding the opportunity of data throttling.<sup>170</sup> Data throttling “is a reactive measure employed in communication networks to regulate network traffic and minimize bandwidth congestion.”<sup>171</sup>

Verizon was the ISP in charge of providing access to the SCFD at the time of the fires.<sup>172</sup> While coordinating its response, the SCFD noticed that its vehicles were experiencing significant connectivity issues.<sup>173</sup> Apparently, its internet speed had “slowed to a crawl.”<sup>174</sup> Emails were quickly sent out to try and resolve this issue, with hours going by before receiving a response from Verizon.<sup>175</sup> The SCFD expressed its need for an internet plan without data caps or throttling and an account manager with Verizon suggested it simply needed to upgrade its subscription.<sup>176</sup> According to the declarations and emails submitted by the SCFD fire chief, “Santa Clara Fire paid Verizon for ‘unlimited’ data but suffered from heavy throttling until the department paid Verizon more.”<sup>177</sup> Fire Chief Anthony Bowden presented his case as to why the lack of network neutrality protections presents challenges to safety.<sup>178</sup> “Bowden said Verizon reduced its data rates to just one two-hundredths of

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168. See Gigi Sohn, *Verizon Couldn’t Have Restricted Santa Clara County’s Internet Service During the Fires Under Net Neutrality*, NBC NEWS (Aug. 24, 2018, 10:35 AM), <http://www.nbcnews.com/think/opinion/verizon-couldn-t-have-restricted-santa-clara-county-s-phone-ncna903531>.

169. See *Tesla Fire*, CAL. DEPT. FORESTRY AND FIRE PROTECTION (CAL FIRE), <http://www.fire.ca.gov/incidents/2018/6/29/tesla-fire/> (last updated Jan. 4, 2019, 9:57 AM).

170. See Sohn, *supra* note 168; Colin Dwyer, *Verizon Throttled Firefighters’ Data as Mendocino Wildfire Raged, Fire Chief Says*, NPR (Aug. 22, 2018, 4:13 PM), <http://www.npr.org/2018/08/22/640815074/verizon-throttled-firefighters-data-as-mendocino-wildfire-raged-fire-chief-says>.

171. *About: Bandwidth Throttling*, DBPEDIA, [http://dbpedia.org/page/Bandwidth\\_throttling](http://dbpedia.org/page/Bandwidth_throttling) (last visited Apr. 1, 2022) (recalling that the Open Internet Order in 2015 restricted the ability to throttle internet access).

172. Jon Brodtkin, *Verizon Throttled Fire Department’s “Unlimited” Data During Calif. Wildfire*, ARS TECHNICA (Aug. 21, 2018, 3:49 PM), <http://arstechnica.com/tech-policy/2018/08/verizon-throttled-fire-departments-unlimited-data-during-calif-wildfire/> [hereinafter *Verizon Throttled Fire Department’s “Unlimited” Data During Calif. Wildfire*].

173. Dwyer, *supra* note 170.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Verizon Throttled Fire Department’s “Unlimited” Data During Calif. Wildfire*, *supra* note 172.

178. Dwyer, *supra* note 170.

what was usual—and did so at a critical time for the emergency response.”<sup>179</sup> In its response, Verizon stated the following:

Regardless of the plan emergency responders choose, we have a practice to remove data speed restrictions when contacted in emergency situations . . . We have done that many times, including for emergency personnel responding to these tragic fires. In this situation, we should have lifted the speed restriction when our customer reached out to us. This was a customer support mistake. We are reviewing the situation and will fix any issues going forward.<sup>180</sup>

The newly repealed net neutrality protections allowed Verizon to throttle data because of the lack of government regulations.<sup>181</sup> This was one of the first instances in which unforeseen consequences of net neutrality reared its head.<sup>182</sup>

## V. ISSUES WITH CURRENT APPLICATION OF INTERNET REGULATIONS

Within the last three presidential administrations, the United States has seen the internet reclassified three different times.<sup>183</sup> The inconsistent application of regulations has allowed ISPs and media companies to alter how they provide services to their customers.<sup>184</sup>

### A. *Rinse, Repeal, Repeat*

When reclassifying the internet, and other services for that matter, the FCC makes decisions pursuant to an executive appointment.<sup>185</sup> Their decision-making affects all consumers of the internet, but these decisions may

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179. *Id.*

180. *Verizon Throttled Fire Department’s “Unlimited” Data During Calif. Wildfire*, *supra* note 172.

181. *See id.* Recall that the emergency response to the sinking of the Titanic was also delayed because coordination was impossible due to the lack of governmental oversight on the medium of communication. Coughlan, *supra* note 36.

182. *See Verizon Throttled Fire Department’s “Unlimited” Data During Calif. Wildfire*, *supra* note 172.

183. *See* Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601, 5603 (2015); 47 C.F.R. pts. 1, 8, 20 (2020).

184. *See* 30 F.C.C. Rcd. at 5603.

185. *See* Chris Mills, *Former FCC Chairman Destroys the Anti-Net-Neutrality Argument Point by Point*, BGR (Aug. 1, 2017, 6:06 PM), <http://bgr.com/politics/fcc-ajit-pai-tom-wheeler-net-neutrality-arguments/>; *Verizon Throttled Fire Department’s “Unlimited” Data During Calif. Wildfire*, *supra* note 172; 47 U.S.C. § 151.

not be representative of the betterment of the internet; rather, they may be made pursuant to political party objectives.<sup>186</sup> Additionally, because the FCC is appointed by the executive branch, the possibility that lobbying or cronyism influences the manner in which citizens are granted access to a fundamental part of our functioning society, can create issues.<sup>187</sup> Because the FCC is making decisions that determine the way people get information, express their opinion, conduct their work, and help society function as a whole, some argue that they should be subject to constitutional restrictions and consequently should make ISPs subject to state action.<sup>188</sup>

Proponents of Title I classification may resort to comments on the FCC's website to support the idea that there is no clear majority opinion on the title classifications.<sup>189</sup> In the past decade, the internet has been reclassified by the FCC two times, under two different FCC Chairmen, serving politically distinct administrations.<sup>190</sup> In 2014 and 2017, the FCC digitally opened the floor for commentary regarding the decision to reclassify the internet by encouraging citizens to give feedback on their website.<sup>191</sup> Celebrities, talk show personalities, and other influencers made a push for citizens to get

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186. *See What We Do*, *supra* note 29; PAULA WILLIAMS, HOW THE INTERNET IS BEING USED BY POLITICAL ORGANIZATIONS: PROMISES, PROBLEMS AND POINTERS i (Dep't Parliamentary Libr. 2012), [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/DR005/upload\\_binary/DR005.pdf;fileType=application/pdf#search=%221990s%201998%22](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/DR005/upload_binary/DR005.pdf;fileType=application/pdf#search=%221990s%201998%22).

187. *See Mills*, *supra* note 185. Tom Wheeler was a president and CEO of two major ISP related organizations, in addition to serving as the FCC Chairmen during the Obama Administration. *Id.*; *Biography of Former FCC Chairman Tom Wheeler*, FED. COMM'NS COMM'N, <http://www.fcc.gov/biography-former-fcc-chairman-tom-wheeler> (last updated Jan. 20, 2017); Common Cause, *New Report: How Lobbying and Political Influence by Broadband Gatekeepers Has Shaped the Digital Divide*, YUBANET (July 19, 2021), <http://yubanet.com/usa/new-report-how-lobbying-and-political-influence-by-broadband-gatekeepers-has-shaped-the-digital-divide/>.

188. *See Eric Sirota*, *Can the First Amendment Save Net Neutrality?*, 70 BAYLOR L. REV. 781, 784 (2017).

189. *See Bridget C.E. Dooling & Michael Livermore*, *Bot-Generated Comments on Government Proposals Could Be Useful Someday*, SLATE (June 21, 2021, 11:00 AM), <http://slate.com/technology/2021/06/bot-generated-comments-on-regulatory-proposals-could-be-useful.html>.

190. *See, e.g.*, *Protecting and Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5614 (2015); 47 C.F.R. pts. 1, 8, 20.

191. *See Jacob Kastrenakes*, *FCC Received a Total of 3.7 Million Comments on Net Neutrality*, VERGE (Sept. 16, 2014, 6:06 PM), <http://www.theverge.com/2014/9/16/6257887/fcc-net-neutrality-3-7-million-comments-made>; Paul Hitlin et al., *Public Comments to the Federal Communications Commission About Net Neutrality Contain Many Inaccuracies and Duplicates*, PEW RSCH. CTR. 1, 2 (Nov. 29, 2017), <http://www.pewresearch.org/internet/2017/11/29/public-comments-to-the-federal-communications-commission-about-net-neutrality-contain-many-inaccuracies-and-duplicates/>.

involved and express their opinions on the matter.<sup>192</sup> However, the FCC was free to ignore the comments and had no obligation to take them into consideration.<sup>193</sup>

In 2014, the FCC's website crashed due to the unexpected traffic volume, with an overwhelming number of citizens advocating for stricter net neutrality regulations.<sup>194</sup> In 2017, the FCC sought to repeal the regulations that were established at the end of 2014.<sup>195</sup> Again, the FCC welcomed comments from citizens discussing their opinions surrounding the classification.<sup>196</sup> This time, there was a pretty comparable number of proponents and opponents of the choice to return to Title II regulations.<sup>197</sup> However, some internet users claimed that the FCC's comment page may have been the victim of some type of spambot attack.<sup>198</sup> One user detected abnormalities with language processing techniques that pointed to suspicious consistencies like duplicate comments and similarities in verbiage.<sup>199</sup> Users also asserted that spambot campaigns were used to generate millions of pro-Title II submissions in an attempt to create a false illusion of repeal support.<sup>200</sup>

Recently, the importance of having adequate, uninhibited access to the internet has become very apparent.<sup>201</sup> Throughout the coronavirus pandemic,

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192. See Soraya Nadia McDonald, *John Oliver's Net Neutrality Rant May Have Caused FCC Site Crash*, WASH. POST (June 4, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/06/04/john-olivers-net-neutrality-rant-may-have-caused-fcc-site-crash/>.

193. See Jacob Kastrenakes, *FCC Ignored Your Net Neutrality Comment, Unless You Made a 'Serious' Legal Argument*, VERGE (Nov. 22, 2017, 10:58 AM), <http://www.theverge.com/2017/11/22/16689838/fcc-net-neutrality-comments-were-largely-ignored> [hereinafter *FCC Ignored Your Net Neutrality Comment*].

194. McDonald, *supra* note 192; Kastrenakes, *supra* note 191.

195. See DANA A. SCHERER, CONG. RSCH. SERV., R45338, FCC MEDIA OWNERSHIP RULES 2 (2021).

196. Hitlin et al., *supra* note 191, at 2.

197. See *id.* at 6.

198. See Dooling & Livermore, *supra* note 189; *What is a Spam Bot? How Spam Comments and Spam Messages Spread*, CLOUDFLARE, <http://www.cloudflare.com/learning/bots/what-is-a-spambot/> (last visited Apr. 1, 2022). A spambot attack is essentially a campaign by one or more users to cause a mass influx of comments on an internet medium. *Id.*

199. Jeff Kao, *More Than a Million Pro-Repeal Net Neutrality Comments Were Likely Faked*, HACKER NOON, <http://hackernoon.com/more-than-a-million-pro-repeal-net-neutrality-comments-were-likely-faked-e9f0e3ed36a6> (last updated Nov. 29, 2017).

200. See *id.*

201. See Emily A. Vogels et al., *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, PEW RSCH. CTR. 1, 2-3, 7 (Apr. 30, 2020), <http://www.pewresearch.org/internet/wp->

our country has witnessed this first-hand.<sup>202</sup> Whether the internet was required to work or attend school, it has become absolutely essential in how our country functions.<sup>203</sup> Accordingly, the necessity of regulating the internet as a utility, rather than its current classification, should be one of the country's largest concerns.<sup>204</sup> The internet has become so ingrained in our daily lives that to function without it seems unfathomable.<sup>205</sup> In fact, school districts that had less access to the internet had to turn toward other entities in order to provide access to their students.<sup>206</sup> Specifically, some governments and organizations have worked together to provide students with tablets, computers, and internet access, so that these students could be accommodated in the age of online education.<sup>207</sup> If nothing else, this past year has shown the citizens of the world how essential the internet is to provide information, and accordingly, should be treated as a public utility.<sup>208</sup>

## VI. ALTERNATIVES TO CURRENT REGULATIONS

### A. *Comparisons to Other Countries*

If the United States wants to align consistently with the founding fathers, it is in society's best interest to ensure the highest level of freedom on the internet.<sup>209</sup> However, internet freedom does not simply mean that nothing

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content/uploads/sites/9/2020/04/PI\_2020.04.30\_COVID-internet\_REPORT.pdf (“Americans were also asked how important the internet has been for them during the coronavirus pandemic. Fully 87% of adults say the internet has been at least important for them personally during the coronavirus outbreak, including 53% who describe it as essential.”).

202. *See id.* at 3–5.

203. *See id.*

204. *See* Jack J. Barry, *COVID-19 Exposes Why Access to the Internet Is a Human Right*, OPEN GLOB. RTS. (May 26, 2020), <http://www.openglobalrights.org/covid-19-exposes-why-access-to-internet-is-human-right/>.

205. *See* Vogels et al., *supra* note 201, at 2–3.

206. *See The Impact of COVID-19 on Student Equity and Inclusion: Supporting Vulnerable Students During School Closures and School Re-Openings*, OECD (Nov. 19, 2020), <http://www.oecd.org/coronavirus/policy-responses/the-impact-of-covid-19-on-student-equity-and-inclusion-supporting-vulnerable-students-during-school-closures-and-school-re-openings-d593b5c8/> [hereinafter *COVID-19 and Student Equity*].

207. *Id.*; *see also* James K. Willcox, *COVID-19 Relief Package Will Help Families in Need of Internet Access*, CONSUMER REPS., <http://www.consumerreports.org/broadband-access/covid-19-relief-package-will-help-families-in-need-of-internet-access/> (last updated Dec. 28, 2020).

208. *See* Barry, *supra* note 204.

209. *See The Founding Fathers*, NAT'L GEOGRAPHIC (Jan. 24, 2020), <http://www.nationalgeographic.org/article/founding-fathers/>.

is censored and anything goes.<sup>210</sup> Internet freedom stands for the idea that information should be easily accessible to all citizens without giving preference to information that may be slanted or biased one way or another.<sup>211</sup>

Iceland is an example of a country that has been recognized for having high levels of internet freedom.<sup>212</sup> Iceland is a country that explicitly values citizens' rights to their own personal data, which is recognized through legislation.<sup>213</sup> Consistent with the free flow of information are Iceland's whistleblower protection laws, which grant immunity to those who uncover wrongdoings conducted by government officials.<sup>214</sup> Furthermore, "[t]here are no government-imposed restrictions on connectivity in Iceland, and the government does not exercise technical or legal control over the . . . infrastructure."<sup>215</sup>

## B. *Ideas for the Future*

Ultimately, the manner in which the internet is regulated needs a complete overhaul.<sup>216</sup> For starters, the market share held by any single ISP should be limited.<sup>217</sup> In order to maintain the freest flow of information, our internet access should be available from several different entities.<sup>218</sup> As it stands, the current state of accessibility is generally limited to two or three different ISPs, with a few other subsidiaries of those ISPs posing as separate entities.<sup>219</sup> However, these subsidiaries function by using the same infrastructure as the main ISPs, and therefore are limited to providing services

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210. See *Smith v. California*, 361 U.S. 147, 152 (1959) (exemplifying obscene speech as one of the several categories of speech that is not protected by the constitutional guarantees of freedom of speech and of the press).

211. See *Preserving the Open Internet*, 25 F.C.C. Rcd. 17905,17941–42 (2015).

212. *Freedom on the Net 2020: Iceland*, FREEDOM HOUSE, <http://freedomhouse.org/country/iceland/freedom-net/2020> (last visited Apr. 1, 2022).

213. *Id.*

214. *Id.*

215. *Id.*

216. See Peter Christiansen, *Why Can I Only Get a Few Internet Providers?*, HIGHSPEEDINTERNET.COM (Nov. 11, 2021), <http://www.highspeedinternet.com/resources/why-can-i-only-get-a-few-internet-providers>.

217. See *id.*; VALERIE C. BRANNON, CONG. RSCH. SERV., R45650, *FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT* 32–33 (2019).

218. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994); Christiansen, *supra* note 216.

219. See Christiansen, *supra* note 216; Ingrid Burrington & Commentary, *Tracing the Byzantine Maze of the Companies that Have Come to Control America's Internet*, QUARTZ (Oct. 5, 2016), <http://qz.com/790210/tracing-the-byzantine-maze-of-the-companies-that-have-come-to-control-americas-internet/>.

by the big three.<sup>220</sup> Further, our country should encourage competition by restricting the amount of market share, as was done with radio and television, prior to the adoption of the Telecommunications Act of 1996.<sup>221</sup>

There are important implications for changing the current state of internet regulation.<sup>222</sup> As it stands, social media companies, as well as many other internet websites, are given broad latitude in how they regulate speech on their platforms.<sup>223</sup> This is done pursuant to section 230, the Communications Decency Act of the Telecommunications Act of 1996.<sup>224</sup> Section 230 allows websites to regulate speech and posts on their websites with complete immunity.<sup>225</sup>

As discussed above, the websites that allow posts on their websites are not held to be publishers of that speech—rather, they are held to be distributors of the speech.<sup>226</sup> This is significant because it brings up the issue of allowing private entities to regulate speech and the dissemination of information reflecting conflicting viewpoints.<sup>227</sup> However, there is a lot of debate and differing viewpoints that suggest social media companies should be subject to constitutional restrictions for censoring speech on their platforms.<sup>228</sup> The arguments for section 230 state that a private company should have the ability to restrict users from its platform however it sees fit.<sup>229</sup> The problem with this thought process is that the restrictions may result in the controlled dissemination of speech, sometimes reflecting only one side of the story.<sup>230</sup> The arguments against section 230 protections largely cite to this problem.<sup>231</sup>

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220. See Christiansen, *supra* note 216.

221. See Rev. of the Comm'n's Reguls. Governing Television Broad., *supra* note 70; Telecommunications Act of 1996, Pub. L. No. 104-104, § 230, 110 Stat. 56, 137.

222. See Wesley D. Lewis, *Trends in ISP and Platform Liability: CDA Section 230 and DMCA Safe Harbors*, HAYNES BOONE 2, 4 (Aug. 18, 2020), <http://www.haynesboone.com/-/media/project/haynesboone/haynesboone/pdfs/attorney-publications/2020/cda-section-230-and-dmca-safe-harbors.pdf>.

223. Jessica Guynn, *Donald Trump and Joe Biden vs. Facebook and Twitter: Why Section 230 Could Get Repealed in 2021*, USA TODAY, <http://www.usatoday.com/story/tech/2021/01/04/trump-biden-pelosi-section-230-repeal-facebook-twitter-google/4132529001/> (last updated Jan. 5, 2021, 11:10 PM).

224. See Lewis, *supra* note 222, at 1; § 230, 110 Stat. at 137.

225. See 47 U.S.C. § 230(c)(2).

226. See Lewis, *supra* note 222, at 1.

227. *Id.* at 2.

228. *Id.*

229. See discussion *supra* Section III.B; 47 U.S.C. § 230(c)(2).

230. See Lewis, *supra* note 222, at 2; Torsten Bell, *The Truth Is Out There, but It's Increasingly Hard to Distinguish from Lies*, GUARDIAN (July 4, 2021, 5:00 PM), <http://www.theguardian.com/commentisfree/2021/jul/04/the-truth-is-out-there-but-it-is-increasingly-hard-to-distinguish-from-lies>.

231. See Lewis, *supra* note 222, at 2.

Allowing large corporations with dominant market shares, and consequently large influence over society, to dictate the information being given to its users creates platforms where a single viewpoint or ideology is represented, and consequently creates echo chambers for persons who do not get to see alternative arguments.<sup>232</sup>

## VII. CONCLUSION

Recently, Justice Clarence Thomas filed a concurring opinion that discussed the legal difficulties in applying old doctrines to new technology and digital platforms.<sup>233</sup> In the lower court, the Second Circuit held that the comment threads on Twitter were a public forum in justifying its holding.<sup>234</sup> But many argued that if Twitter comment threads—which make up the majority of the platform—are held to be public forums, they should not be treated as such.<sup>235</sup> The Court has previously held, as a matter of law, that a public forum is subject to the highest judicial scrutiny under the First Amendment.<sup>236</sup> As such, the government may not regulate speech in a public forum, unless it meets judicial strict scrutiny.<sup>237</sup> However, social media platforms, like Twitter, are given immunity from civil lawsuits for regulating speech on their platform, yet they are held to be a public forum in the eyes of the Second Circuit.<sup>238</sup> In addressing this, Justice Thomas stated the following:

Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.<sup>239</sup>

With that in mind, it is easy to see the inconsistency in allowing platforms, such as Twitter, to be free to regulate speech as they please without

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232. See Bell, *supra* note 230.

233. See *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S. Ct. 1220, 1221 (2021).

234. *Id.* at 1221.

235. *Id.* at 1224.

236. *Id.*

237. *Id.*

238. See 47 U.S.C. § 230(c)(2)(A); *Knight First Amend. Inst.*, 141 S. Ct. at 1221, 1226.

239. *Knight First Amend. Inst.*, 141 S. Ct. at 1221.

facing liability, but at the same time treating the platform as a public forum that is traditionally subject to the strictest form of judicial scrutiny when regulating speech.<sup>240</sup> Many critics have argued that the enforcement of the Communications Decency Act was the product of legislative cronyism and allowing it to continue will undoubtedly lead to more interference with the First Amendment rights of individuals who should not be subject to this in the first place.<sup>241</sup>

Internet regulations, as well as communication regulations as a whole, need to be updated.<sup>242</sup> Failing to do so would delegitimize the legislature because the regulations would be easily alterable and constantly subject to suit the executive office's objectives.<sup>243</sup> In some cases, this can be a good thing, but it leaves it susceptible to cronyism as well.<sup>244</sup> We have seen the importance of the internet firsthand throughout the pandemic.<sup>245</sup> Accordingly, it should be regulated by an updated law that emphasizes the importance the internet has in our lives.<sup>246</sup> This could be done by repealing the Telecommunications Act of 1996 and amending the Communications Act of 1934 to reflect how we classify various mediums of communication and the protections we give media companies.<sup>247</sup> Specifically, the law should hold all forms of communication up to common carriage standards.<sup>248</sup> Additionally, new regulatory legislation should hold ISPs as having an agency relationship with the government so that they are held to upholding constitutional rights.<sup>249</sup> Further, it should reevaluate whether media companies should be given complete immunity in censoring their platforms because some of these websites have proven themselves to be integral in how citizens receive

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240. David McGee, *What Constitutes a Public Forum on Social Media?*, 43 HUM. RTS., no. 4, 2018, at 10.

241. 47 U.S.C. § 230; see *When Does Twitter Blocking Violate the First Amendment?*, NAT'L CONST. CTR. (Aug. 1, 2019), <http://constitutioncenter.org/interactive-constitution/podcast/when-does-twitter-blocking-violate-the-first-amendment>.

242. See Ben Sperry, *Conservatism and the Section 230 Debate: Applying First Principles*, TRUTH ON MKT. (Sept. 30, 2020), <http://truthonthemarket.com/tag/communications-decency-act-section-230/>; Christiansen, *supra* note 216.

243. See Sperry, *supra* note 242.

244. See, e.g., NAT'L CONST. CTR., *supra* note 241.

245. See Vogels et al., *supra* note 201.

246. See *id.*; *United States: Freedom in the World 2021 Country Report*, *supra* note 10.

247. See *Protecting and Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5723 (2015); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; Communications Act of 1934, Pub. L. No. 73-4165, 48 Stat. 1064.

248. See *Preserving the Open Internet*, 25 F.C.C. Rcd. 17905, 18067 (2010).

249. See BRANNON, *supra* note 217, at 25.

information, and thus creates echo chambers of information where people do not have an opportunity to receive diverse information.<sup>250</sup>

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250. Bell, *supra* note 230; see also *supra* Section VI.B.