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Escalating Instability of Network Neutrality Policy in the U.S.

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Escalating Instability of Network Neutrality Policy in the U.S.

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1. Introduction

Since the early 2000's, telecommunications policies in the U.S. have been unstable, particularly for policies related to providers of broadband Internet access services, such as network neutrality. Since the federal presidential and Congressional elections in 2016, the instability of federal network neutrality policy continues through the FCC's adoption of the *Restoring Internet Freedom Order* in 2017, reversing the FCC's *Open Internet Order* of 2015 that had established *Open Internet Rules*. Moreover, the *2017 Order* creates a new phase of federal-state policy instability through a sweeping declaration of federal preemption, escalating tensions between the federal government and the States' regulatory authority.

What are the reasons for this policy instability and escalation? This paper is part of a larger body of research to answer this question. Inquiry flows from the observation that this policy instability arises during a period of pronounced political dysfunction in the U.S., resulting from severe party polarization and divided government, that also coincides with the era of deregulatory policymaking. The analysis examines the emergence of this period of political dysfunction and its impact on deregulatory policies from the perspective of coevolving political and economic systems. There are long temporal arcs of evolution within and among political and economic systems. These include evolution within and among the system of political governance under the U.S. Constitution and the economic system of capitalism, both fueled by technological innovations.

Dating from the 19th century, this coevolution in the U.S. has led to increased reliance on the corporate form—an artificial, legal entity—as a tool or mechanism for collective action by humans to conduct activities within the economic system. Over time, in numerous and varying ways, corporations have leveraged their economic power to effectuate changes in both the economic and political systems for their own benefit. In the late 20th and early 21st centuries, corporations’ deregulatory strategies have also further evolved. To pursue their deregulatory policy objectives, these strategies include increased reliance on judicial litigation and administrative decisions, novel interpretations or even mischaracterizations of the law, and judicial retrenchment of individual rights and legal remedies. Thus, a further question is what developments within and among the political and economic systems in the U.S. have contributed to the evolution of these deregulatory strategies?

By examining these questions as a general matter (not confined to the telecommunications industry), one finds that the instability of network neutrality policy is symptomatic of more fundamental systemic developments under U.S. political governance. For this reason, instability of U.S. network neutrality policy is likely to continue for an extended period of time. Moreover, the new phase of disruption in U.S. network neutrality policy, by exacerbating policy instability through federal preemption of States’ regulatory authority, further complicates the achievement of political and legal resolution.

2. Instability of U.S. Network Neutrality Policy

For the telecommunications policy debate of network neutrality, the resulting political dynamic has been a legal battle over the classification of broadband Internet access service (BIAS) – as a telecommunications service (i.e. common carriage service) or as an information service under federal law. This is because under the federal statutory framework, the legal classification of the service determines the scope of FCC jurisdiction and applicable regulatory framework. In turn, the legal classification of the service has changed, depending upon which political party has the majority of FCC commissioners.

Beginning in 2002, a Republican majority of FCC commissioners classified BIAS provided by cable companies and later telephony companies as an information service in 2002 and 2005, respectively. After two D.C. Circuit Court of Appeals decisions in *Comcast v. FCC* (2010) and *Verizon v. FCC* (2014), identifying legal flaws in asserted FCC jurisdiction under analysis grounded in classification of BIAS as an information service,¹ a Democratic majority of FCC commissioners reclassified all BIAS service as a telecommunications service and accordingly established open Internet rules in the FCC's *Open Internet Order* (2015), known as the network neutrality order, which was upheld upon judicial review by the D.C. Circuit Court of Appeals in June 2016.

As a result of the November 2016 federal elections – under which the Republican Party controls the Presidency, a majority in both the House and Senate of Congress, and a majority of the FCC commissioners – the regulation of BIAS service is again in flux. In May 2017, the FCC opened a Notice of Proposed Rulemaking (NPRM), titled “In the Matter of Restoring Internet Freedom.” Pursuant to this NPRM, the FCC adopted an order in December 2017, reclassifying BIAS service as an information service, reversing the FCC's 2015 *Open Internet Order*, and repealing most of the 2015 *Open Internet Rules*.

Thus, the 2017 *Restoring Internet Freedom Order* disrupts, again, the federal regulation regime for BIAS service. Numerous lawsuits have already been filed challenging the FCC order, which have been consolidated in an appeal pending before the D.C. Circuit Court of Appeals (*Mozilla v. FCC*). In addition, on May 16, 2018, the U.S. Senate voted 52-47² to approve a resolution under the Congressional Review Act to repeal the FCC 2017 Order. Meanwhile, Democrats in the U.S. House of Representatives have filed a discharge petition to force a vote on a similar resolution in the House.

Moreover, under the 2017 Order, this disruption is more acute than simply a change in federal jurisdictional authority. This is because the FCC preempts any State or local

¹ In a 2010 order, while the majority of FCC commissioners were under Democratic control, the FCC attempted to adopt open Internet rules while preserving classification of BIAS as an information service. However, in *Verizon v. FCC*, the Court found the FCC lacked jurisdiction to impose some of these rules while maintaining legal classification of BIAS as an information service.

² The 52 votes approving the resolution were comprised of 49 Democrats and 3 Republicans.

government measures that would effectively impose rules or requirements that the FCC preempted or decided to refrain from imposing under this order. (The *2015 Order* contained no comparable provision of preemption.) As a result, this preemption *also* significantly disrupts States' regulatory authority under the longstanding, historical dual jurisdictional (joint federal-state) regulatory framework applied to telecommunications services in the U.S.

The States are responding to this preemption in various ways. Twenty-two state attorneys general filed appeals challenging the FCC's 2017 *Restoring Internet Freedom Order*, which have been consolidated with all other parties' appeals in the case now pending before the federal D.C. Circuit Court of Appeals. In addition, some States have introduced and/or passed legislation to impose their own network neutrality requirements, essentially inviting judicial litigation to test the validity of the FCC's preemption of state jurisdictional authority. The National Association of Regulatory Utility Commissioners (NARUC) is also considering how state regulatory commissions should respond to the FCC 2017 Order.

3. Emergence of Political Dysfunction in the U.S.

Examination of the political dysfunction that has arisen in the U.S. reveals that the instability of network neutrality policy is a reflection of the general, underlying dynamic of political dysfunction in the U.S. After describing fundamental aspects of the U.S. governance structure, this section briefly describes important changes in political party dynamics and their effects on policymaking. It also examines how corporations fomented political movements to take advantage of these changes in the context of extending the earlier deregulatory movement. The collective effects of these developments are heightened political dysfunction and policy instability. For network neutrality, these effects are manifested in policy outcomes that flip back and forth with shifts in the political party holding the majority of commissioners at the FCC before and after intermittent judicial rulings.

3.1 U.S. governance structure of federalism and the distinctive role of the judiciary

Political institutions are fragmented by design under the U.S. Constitution. Under a system of federalism, sovereignty is shared between the federal government and the States. The federal government is divided into three branches (legislative, executive, judicial) under the doctrine of separation of powers, with checks and balances among the three branches. Each State also has its own constitution, which likewise provides separation of power among three branches of government with checks and balances among the branches. As to those matters for which the federal government is sovereign, federal law governs; and as to those matters for which States are sovereign, state law governs.

Under U.S. governance the judiciary has a distinctive role. In this respect, the judiciary has two important functions. One of the key functions of the judiciary is the common law judicial process, which the States retained and inherited from England. The federal judiciary established under the U.S. Constitution also subsequently utilized a common law process. This process consists of judge-made law, on a case-by-case basis through the principle of case precedent. Thus, the common law system is a lawmaking function that relies on the private enforcement mechanism of litigation.

Another key function is judicial review. Under judicial review, a court may invalidate laws and decisions by the legislative and executive branches – including administrative agencies – that are incompatible with a higher authority. In this regard, U.S. constitutional law is the highest authority, and statutes have higher authority than administrative law or common law. The federal judiciary has the definitive power under federal law, and the state judiciaries have the analogous power with regard to interpretation of their respective state law. As courts may not initiate cases, but rather cases must be brought before them, the judicial review function also relies on the private enforcement mechanism of litigation.

It is pursuant to the process of judicial review that federal courts are the final authority as to the constitutionality of federal law under the U.S. Constitution, and similarly

the state courts are the final authority as to the constitutional of state law under State constitutions. Given this primacy of judicial review, the framework of the U.S. Constitution and judicial doctrines of its interpretation that have evolved thereunder over time provide legal principles for determining when the federal government may or may not preempt State governments.

3.2 Adversarial legalism under divided government and party polarization

Under the governance structure briefly described in section 3.1, the U.S. has developed policymaking through a process referred to as adversarial legalism.

‘[A]dversarial legalism’ ... mean[s] policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation. Adversarial legalism can be distinguished from other methods of governance and dispute resolution that rely instead on bureaucratic administration, or on discretionary judgment by experts or political authorities, or on the judge-dominated style of litigation common in most other countries. While the United States often employs these other methods too, it relies on adversarial legalism far more than other economically advanced democracies (Kagan, 2001, p. 3).

Given its pervasiveness and deep roots in American political institutions and values, Kagan asserts that adversarial legalism “is best viewed not merely as a method of solving legal disputes but as a mode of governance” (2001, p. 5).

In the 1960’s, with the rise of party polarization and divided government,³ adversarial legalism began to increase dramatically through creation of new federal and state statutory regimes reliant on private litigation for their enforcement (Kagan, 2001, pp. 38-39; Farhang, 2010, pp. 221-222). “The conjuncture of divided government and party polarization, primarily with Democratic legislators facing Republic presidents, over roughly the past four decades has been an important cause of the explosion of federal statutory litigation beginning at the end of the 1960s” (Farhang, 2010, p. 222).

³ Divided government describes a situation in which one political party controls the executive branch while another party controls one or both houses of the legislative branch.

Between the mid-1960s and mid-1970s, federal and state governments enacted an unprecedented wave of regulatory statutes concerning pollution control, land use, consumer protection, and nondiscrimination in employment and education. They also mandated a more legalistic and punitive approach to regulatory enforcement, not only by regulatory officials but also by advocacy groups acting as ‘private attorneys general’ (Kagan, 2001, pp. 38-39, citations omitted).

As a result, both federal and state policymaking increasingly relied on litigation, within a governance structure that by design was already heavily dependent on private enforcement mechanisms.

3.3 Phase of hyperpartisanship

Brownstein (2008, pp. 17-18) shows that relations between the Republican and Democratic parties in the U.S. have moved through four distinct phases during the history of modern U.S. politics: high partisanship (1896-1938); bipartisan negotiation (1938 – mid-1960s); period of transition (mid-1960s – mid-1990s); hyperpartisanship (mid-1990s – to date). The rise of adversarial legalism described in section 3.2 occurred during the third phase of transition.

Central to the current dynamic of political dysfunction is the fourth phase of hyperpartisanship, dating from the mid-1990’s. “The defining characteristics of this age of hyperpartisanship are greater unity within the parties and more intense conflicts between them”, arising largely from Republican backlash to post-World War II liberal policies (Brownstein, 2008, p. 15). In addition, the parties are now divided by ideology rather than along arbitrary lines of religion, race, or economic status; and “[i]deologically, culturally, and geographically, the electoral coalitions of the two major parties have dispersed to the point where they now represent almost mirror images of each other” (Brownstein, 2008, p. 16).

The persistence of hyperpartisanship is enabled by gerrymandering, that is, the political manipulation of redistricting, creating a feedback loop that increases political

tribalism through the primary election system that increases the ideological purity of winning party nominees (Friedman & Mandelbaum, 2012, chap. 12).

This hyperpartisanship is coupled with Americans also being closely divided. This “is an unprecedented and explosive combination. Voters for the losing side always feel unrepresented when the other party wins unified control over government” (Brownstein, 2008, p. 19). Yet, under this dynamic, “the *intensity* of belief among average voters isn’t the principal problem” (p. 23, emphasis in original). “American politics ... is breaking down because too few political leaders resist the rising pressures inside the parties for ideological and partisan conformity that make it more difficult to bridge our disagreements. ... [T]he problem isn’t too many ideologues but too few conciliators willing to challenge the ideologues, and partisan warriors on each side demanding a polarized politics” (p. 25). In other words, “What’s unusual now is that the *political system* is more polarized than the country” (p. 25, emphasis in original).

With regard to the evolution of telecommunications policies, the Telecommunications Act of 1996 (TA96) was enacted towards the end of the third phase of transition when bipartisan consensus was still possible on some issues. However, as implementation of TA96 continues in the 2000s, the combination of hyperpartisanship and closely divided Americans has created a political dynamic whereby FCC policy decisions regarding network neutrality shift back and forth—successive rulings reversing prior ones as to factual determinations and conclusions of law—as the political party holding the majority of FCC commissioners changes over time.

3.4 Rise of market populism as a political mythology

During the third phase of political party relations (mid-1960s – mid-1990s) described by Brownstein as a transition, market populism arose as a political mythology. Under market populism, “American leaders in the nineties came to believe that markets were a popular system, a far more democratic form of organization than (democratically elected) governments” (Frank, 2001, p. xiv). Frank describes market populism as pro-

corporate populism, which rode a top a 30-year backlash against the social and cultural changes of the 1960s. It arose from a corporate movement, abetted by “revolutionary” management theory, for the purpose of extending the deregulatory movement of the Reagan administration into the 1990s by politically and socially legitimizing corporations (Frank, 2001, pp. 170-219).

To speak of pro-corporate populism is to raise one of the great political enigmas of the last thirty years. Historically populism was a rebellion *against* the corporate order, a political tongue reserved by definition for the non-rich and the non-powerful.... Populism was the American language of social class.

But beginning in 1968 this primal set piece of American democracy seemed to change its stripes. The war between classes had somehow reversed polarity. It was now a conflict in which the patriotic, blue-collar “silent majority” (along with their employers) faced off against a new elite, the “liberal establishment” and its spoiled, flag-burning children. This new ruling class ... earned the people’s wrath not by exploiting workers or ripping off family farmers, but by showing contemptuous disregard for the wisdom and the values of average Americans. The backlash erected an entire new social hierarchy according to which the “normal Americans” were at the bottom as usual—but the people at the top weren’t the millionaires or the owners, they were those sneering kids who dodged the draft, along with their liberal parents and the various minorities and criminals those parents seemed so determined to pamper. (Frank, 2001, pp. 25-26, emphasis in original).

Frank opens his book with the observation that the passage of the Telecommunications Act of 1996 is an artifact of market populism.

In February 1996, Congress passed the Telecommunications Act, a typical economic artifact of the Age of Clinton [during which] [d]eregulation was one of the central tenets of the free-market faith of the nineties, something that both President Clinton and the Republican Congress agreed was in the best interests of all. For them the Telecommunications Act was just another great push in the triumphant rollback of “big government” that had already been under way for fifteen years. As such, it was passed by a huge majority acting in the finest spirit of bipartisanship. (Frank, 2001, p. ix).

3.5 Rise of the Tea Party movement and the mythology of its origins

Political dysfunction during the fourth phase of hyperpartisanship (mid-1990s – to date) intensified with the rise of the Tea Party movement within the Republican Party, which generally opposes excessive taxation and government intervention in the private sector. “Nearly every contemporary story or media account of the Tea Party movement in America describes it as a largely spontaneous, uncoordinated, populist movement that emerged in 2009 after Obama took office. ... It’s a nice story. It’s also a carefully crafted myth” (Nesbit, 2016, pp. 24-25).

Contrary to the myth, Nesbit’s book “reveals the Tea Party not as a sudden emergence due to reactionary movements against big government but rather the behind-the-scenes, secret strategy of wealthy corporations and individuals that began in the early 1990s to control the GOP. It uncovers the hidden alliances made to further that purpose” (2016, pp. 3-4). Rather, “[t]he truth is that the funding mechanisms, central messages, and key pillars of the Tea Party movement were many years in the making. It is not a true grassroots movement but was strategically built to deflect anger away from corporations and redirect it at the government. A network had already been developed, funded by Koch and tobacco industry money, and only awaited a suitable opponent, which they found in Barack Obama” (p. 25).⁴

As Nesbit recounts in detail, the basic infrastructure of the network that would become known as the Tea Party movement can be traced to the Koch Industries’ founding in 1984 of Citizens for a Sound Economy, a hybrid nonprofit organization engaged in educational and political activities, to create grassroots support for deregulation, corporate tax cuts and other right wing, corporate causes (2016, pp. 11-17).

While the Kochs clearly didn’t much like party politics, they chose the Republican Party as the likeliest target of opportunity for the Libertarian brand. ... In their political utopia, there would be no national government—or one that was a small fraction of its size and scope today. At a minimum, the Kochs hoped to create a movement within the Republican Party that

⁴ Koch refers to the Koch brothers, Charles and David, who own Koch Industries, the largest private oil company in the world.

reflected their own philosophy—that the best government was a very limited government. (Nesbit, 2016, p. 11).

In the 1990s, two of the largest tobacco companies, Philip Morris and RJ Reynolds, joined forces with the Kochs “to create antitax front groups in a handful of states that would battle any tax that moved” (Nesbit, 2016, p. 13). However, the tobacco companies’ involvement did not become public for almost twenty years.

What didn’t become public until nearly twenty years later was that these themes of a Tea Party antitax, antiregulation, and antigovernment revolt were then developed almost simultaneously by two of the largest tobacco companies—Philip Morris and R.J. Reynolds—under the guise of political and business coalitions to fight excise taxes of all sorts, including cigarette taxes. In successive phases in the 1990s, with the Kochs’ CSE as its core mobilization network partner, Philip Morris and RJR helped create state-based antitax and antiregulation propaganda campaigns such as Get Government Off Our Back, Enough is Enough, and the Coalition Against Regressive Taxation. (Nesbit, 2016, p. 14).

It is during the fourth phase of hyperpartisanship that FCC decisions related to network neutrality began; and as hyperpartisanship intensified with the rise of the Tea Party movement, so did the instability of FCC policies as the majority of FCC commissioners shifted back and forth between the Republican and Democratic parties.

4. Conclusion: Underlying U.S. Political Dysfunction Drives Instability of Network Neutrality Policy

Upon reexamining the trajectory of U.S. network neutrality policymaking described in section 2 within the context of the more general trajectory of changing political dynamics and dysfunction discussed in section 3, it becomes clear that the former is a microcosm of the latter.

The Telecommunications Act of 1996 (TA96) was enacted by Congressional legislation during the late stage of the third phase of political party relations, referred to as the phase of transition between the second phase of bipartisanship and the fourth phase of hyperpartisanship. Bipartisanship agreement on deregulatory telecommunications policy in TA96 was facilitated by the rise of pro-corporate, market populism as a political mythology

during the 1990s. TA96 modified the preexisting regulatory framework based on joint federal-state jurisdiction, reflective of the U.S. governance structure of federalism, with delegation of regulatory authority to the FCC and state commissions.

Enforcement of and further policymaking within TA96 heavily relies on adversarial legalism, which is a mode of governance that has increased dramatically during the rise of party polarization and divided government. Moreover, implementation of TA96 under heightened adversarial legalism has and continues to occur during the fourth phase of hyperpartisanship between the political parties. As for network neutrality policy in particular, the partisan legal battle at the FCC over the classification of broadband Internet access service (BIAS) as a telecommunications or information service began in the early 2000s during this phase of hyperpartisanship. Furthermore, it is this conjuncture of adversarial legalism and hyperpartisanship that has created the politically volatile conditions underlying the trajectory of inconsistent FCC rulings related to service classification and imposition of open Internet rules. As the political party holding the majority of FCC commissioners shifts between the Republican and Democratic parties, so too do the rulings, where the opportunity or necessity for further rulings is often triggered by federal appellate court decisions upholding or reversing prior FCC rulings. In addition, the two most recent FCC rulings in 2015 and 2017 occurred after the emergence of the Tea Party Movement. The rapidity with which the FCC's *2015 Order* under a Democratic majority of commissioners was reversed by the *2017 Order* under a Republican majority reflects the increased intensity of hyperpartisanship under Tea Party influence, particularly given that in 2016 the D.C. Circuit Court of Appeals had just *upheld* the FCC's *2015 Order* in its entirety.⁵

The *2017 Order* is significant not only in the rapidity of its reversal of the *2015 Order*, but also in its substance. First, the *2017 Order* reversed FCC policy by reclassifying BIAS as information services, thereby reducing the scope of FCC (federal)

⁵ By contrast, FCC rulings in 2010 and 2015 under a Democratic majority of commissioners were triggered by D.C. Circuit Court of Appeals decisions in 2010 and 2014 identifying legal flaws in asserted FCC jurisdiction under the analysis grounded in classification of BIAS as an information service.

jurisdictional authority, and vacating most of the 2015 Open Internet rules (other than those related to transparency). Adversarial legalism continues as the legal validity of the *2017 Order* has already been challenged and an appeal is pending before the D.C. Circuit Court of Appeals. Furthermore, reflective of the current phase of hyperpartisanship in Congress, a coalition consisting of all Democratic and a handful of Republican Senators has passed a resolution to reverse the *2017 Order* under the Congressional Review Act; however, passage of such a resolution in the Republican-controlled House is unlikely (where the Republican Speaker of the House and the Rules Committee have greater ability to block such a resolution from even being brought to the floor for a vote). Moreover, it is also unlikely that Republican President Trump would sign such a resolution even if it passed both chambers of Congress. Under these conditions, a Congressional legislative solution to the policy instability appears remote.

Second, the *2017 Order* went further by asserting a broad scope of federal preemption, prohibiting any State or local government measures that would effectively impose rules or requirements that the FCC has chosen to preempt or decided to refrain from imposing under its order. In so doing, the *2017 Order* disrupts longstanding State regulatory authority rooted in the U.S. Constitution framework of federalism. The scope of this federal preemption is perceived as being particularly, politically provocative. As a result, this federal preemption is fomenting a backlash of further partisan policymaking and adversarial legalism within the States to challenge the federal encroachment on their sovereign powers. Thus far in 2018, Washington and Oregon have enacted state network neutrality laws, five state governors have ordered network neutrality through executive decision, and approximately twenty states have or are considering some form of legislative action; many, but not all, of the states that have chosen not to act are Republican (Rogers, 2018). In this way, a new phase of federal-state policy instability has ensued, escalating tensions between the federal and state governments.

Thus, reflective of the current phase of hyperpartisanship in the U.S., the instability of network neutrality is ongoing. Until the underlying political dynamics change, the

policy instability will likely continue. Moreover, given the lack of any apparent noticeable shift in such dynamics in the near future, the instability could persist for an extended period of time.

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