The Unvanquished:
The Administrative State and the Federal Communications Commission

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March 2017

Prepared for the Hoover Institution Regulation and Rule of Law Workshop
March 10, 2017

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I. INTRODUCTION

Federal agencies regulate the economy at will. Endowed with expansive statutory authority, backed by power-loving administrations, neglected by a distracted Congress, and blessed by indulgent courts, federal agencies have sought and have penetrated the frontiers of legal regulation. Regulation has often become an end in itself, more important than the markets it limits.

Since the progressive movement of the late 19th century, regulation has been infused with a skepticism of markets, a disbelief in competition, a conviction that smart people can and will solve problems that markets will not, and a moral certainty that all of this is good.[2] The combination of the power of government with the self-righteousness of regulation leads to what can be called the *Administrative State*. It embodies both the institutions of government and the will to use those institutions to regulate excessively.

On November 8, 2016, the United States elected Donald J. Trump as president. Before becoming president, Mr. Trump attacked regulations from many federal agencies including the Federal Communications Commission (FCC).[3] It was widely predicted that President Trump would substantially trim regulation in America and curtail the bureaucracy that promulgates the regulation. No doubt, he intends to try.[4]

Presidents come and go. The Administrative State remains unvanquished. Even if a president were to curtail regulation today, the Administrative State would survive and return tomorrow. To vanquish the Administrative State will take more than an election. It will take a change not only in laws and administrative leadership but a change in the conviction that excessive regulation works.

Below, I examine how far deregulation might go at one independent agency, the FCC. The FCC is a small agency that regulates a large and important part of the U.S. economy with rapidly changing technology. FCC Chairman Ajit has spoken articulately about the need for a greater use of economics at the FCC, and that in turn should lead to greater deregulation.[5] The FCC staff is filled with talented people who can and do migrate to higher-paying jobs in the private sector. If deregulation can work anywhere, it should be

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[2] See, e.g., Thomas Leonard, *Illiberal Reformers*, Princeton University Press, (2016).
[3] See, as but one example, Trump's Twitter feed of November 12, 2014, at https:/, /twitter.com/realdonaldtrump/status/532608358508167168?lang=en.
[4] "Can Trump Slay The Regulatory Beast? Other Presidents Tried And Failed," *Investors Business Daily*, March 2, 2017, at http://www.investors.com/politics/editorials/can-trump-drain-the-job-killing-regulatory-swamp/
[5] Ajit Pai, Speech at the Hudson Institute, April 5, 2017, available at https://www.fcc.gov/document/chairman-pai-economic-analysis-communications-policy

at the FCC. On the other hand, if deregulation is difficult to impose at the FCC, how much harder it must be at other larger, more bureaucratic agencies.

A. Background

Before the middle of the 19th century, the federal government did little to interfere with markets other than the occasional horrific enforcement of the property rights of slave owners. Washington, DC was a sleepy town, shuttered much of the year. Of course, the Departments of State, Justice, Treasury, War, Navy, and the Post Office had civil servants in Washington. But, other than setting postal rates, these individuals thought little about writing rules to determine the day-to-day lives of ordinary Americans. The large regulatory agencies that dot the Washington landscape today had not yet been invented.

In early 19th century America, no federal agency claimed that streams and puddles were protected by the federal government. No federal agency claimed that bathrooms in schools were a federal issue. No federal agency asserted responsibility for much of what happened in the day-to-day lives of ordinary Americans.

Federal regulation today is not an accident, nor even the simple accretion of rules over the decades. Regulation and its intellectual predicate that a few wise people can manage industries and markets better than raw market forces were central tenets of the progressive movement that dominated America in the late 19th century and early 20th century.[6] The development of regulatory agencies to shape the lives of ordinary Americans was not the collateral damage of another objective; the regulatory agencies and their ever-expanding power were the objective. The Progressives succeeded, perhaps beyond their wildest dreams.

B. Individuals in government are not, and should not be, heroic

The first step to reducing unnecessary FCC regulation is to find a great FCC chairman. The FCC has one in Ajit Pai. For years, he has consistently spoken against excess FCC regulations.[7] A great chairman cannot correct any statutory frailties of the Commission. For at least a moment in time, a great FCC chairman can lead wisely and reduce the burden of harmful regulation. But a great chairman can only stay in office so long; at some point, lesser individuals necessarily take charge.

The mere conjecture that a government agency requires only exceptionally talented leadership is troubling. A government is condemned to failure if it only works well in those rare instances when talented individuals are in charge. In the history of American regulation, there is but one notable example of a major regulatory agency dissolving itself, the Civil Aeronautics Board under Alfred Kahn. The Civil Aeronautics Board was an agency whose sole function was to regulate airline prices and routes; its dissolution

[6] See Thomas Leonard, *Illiberal Reformers*, (2016), particularly at p. 7.
[7] See https://www.fcc.gov/about/leadership/ajit-pai.

unambiguously benefitted everyone. Most government agencies, including the FCC, are alloyed with elements of likely necessary regulation, such as registering wireless licensees.

Homer tells us of Odysseus, a great hero, the Zeus-sprung son of Laertes. Few individuals could have done what Odysseus did. Living in a different era, perhaps he would have been a great chairman of the FCC, or even a great leader of the worst imaginable government agency. It is easy to seek great individuals as solutions to underlying institutional problems. But Presidents today are left to choose FCC chairman from among mere mortals, without benefit of Zeusian heritage.

Plato, after rejecting alternatives, finds the philosopher king to be the best leader. Perhaps a philosopher king would make a great FCC chairman. But America does not recognize aristocracies, much less kings. Indeed, presidents such as Andrew Jackson come to Washington to fill government positions with individuals whose qualifications are not necessarily based on talent, intellect, or administrative experience. No president selects officers based on Homeric superhuman qualifications, much less aristocratic or intellectual background. A necessary element of democracy is that elected leaders choose officers, and that choice is based predictably on all too human and fallible qualities.

Human talent and capabilities are also subjective and intangible. Since its inception in 1934, the FCC has been chaired by individuals all of whom were, according to at least some authorities, extraordinarily talented. Some were doubtlessly among the Best and Brightest of their generation. And yet the Administrative State has constantly grown and spread at the FCC. Talented individuals alone were not sufficient to check the Administrative State; in many instances, talented individuals helped promote the Administrative State. Indeed, the Progressive view of the Administrative State is based on confidence in the heroism of elite leader.

In a lawful view of government, the chairman of the FCC is likely to live in obscurity.[8] In the Administrative State view of government agency heads, dramatic change is an imperative; failure to execute dramatic change is a personal failing. Of course, most agency heads are ordinary people, not granted heroic qualities. In reality, agency heads are merely one player in a much larger game of regulation and deregulation. The regulatory activities of agencies are constrained by the general realm of their statutory authority, often can be poorly written. It is up to Congress to write more fundamental changes in statute. And it is up to courts to demand that agencies stay within their statutory framework rather than go far beyond them.

Below, I examine in order the challenges the Administrative State presents to the FCC chairman, Congress, and the courts, respectively. What are reasonable expectations for

[8] H. Furchtgott-Roth, "Ajit Pai Could Bring Consistency Back to the FCC," *The Hill*, January 26, 2017, at http://thehill.com/blogs/pundits-blog/technology/316280-ajit-pai-could-bring-consistency-back-to-the-fcc.

changes in regulation at federal agencies and the FCC in particular? Before examining regulation at the FCC, let's review what the FCC is and why it might be important.

II. THE FCC IS A SMALL AGENCY WITH A DISPROPORTIONATE EFFECT ON THE U.S. ECONOMY

No one much cares about the excesses of the Federal Buggy Whip Commission or even the National Popcorn Board. Those and other obscure agencies can regulate all they want without much of an effect on the economy. But the FCC is a different matter.

Based on the frequency with which national newspaper editorialize about it, one might reasonably assume that the FCC is an enormous agency with enormous powers. That conclusion would be only half correct: it is a powerful agency. But it is not large by Washington standards. In FY 2016, it had a budget of $506 million with 1650 full-time-equivalent staff members.[9] In Washington, where agency budgets are measured in the tens of billions of dollars and bureaucracies are measured in the tens of thousands of employees, the FCC is but a tiny agency.

Nor does the FCC regulate most or even the largest part of the U.S. economy. According to the Bureau of Economic Analysis of the Department of Commerce, the broader "information-communications-technology-producing industries"[10] accounted for $1.062 trillion in value added to the U.S. economy in 2015.[11] But in an economy with more than $18 trillion in GDP, the broader information sector, only part of which is regulated by the FCC, accounts for no more than 5.9% of the U.S. economy.[12] That is a large share, but certainly not the largest.

Because it regulates consumer electronic devices as well as communications services familiar to practically all consumers, the FCC is more important than the direct size of the economic sector it regulates. Cell phone manufacturers and cell phone operators, automobile radios and radio stations, blue-tooth devices and GPS devices—all of these and more fall under the direct or indirect regulation of the FCC. Ordinary consumers who know little about Washington have all seen the FCC stamp on consumer electronic devices that have transmitters.

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[9] See https://apps.fcc.gov/edocs_public/attachmatch/DOC-337668A1.pdf.

[10] These industries consist of computer and electronic product manufacturing (excluding navigational, measuring, electromedical, and control instruments manufacturing); software publishers; broadcasting and telecommunications; data processing, hosting and related services; internet publishing and broadcasting and web search portals; and computer systems design and related services. See footnote 3 on the value-added worksheet of the "Value Added" excel workbook, available at https://bea.gov/industry/gdpbyind_data.htm. Accessed February 12, 2017.

[11] "Value-Added" worksheet of the "Value Added" excel workbook, available at https://bea.gov/industry/gdpbyind_data.htm. Accessed February 12, 2017.

[12] Ibid.

And the consumers are likely at least occasionally to see editorial commentary about the chairman of the FCC. Regardless of the year or the political party in power, the chair of the FCC is typically caricatured as either a saint[13] or a sinner,[14] but rarely just as an ordinary person. The chair of the FCC is far more likely to be featured in the editorial pages of major newspapers than the heads of much larger agencies. Why?

In part, newspapers and other media are regulated—or live under the threat of regulation—by the FCC. Much larger agencies such as the Departments of Housing and Urban Development, Interior, Labor, Transportation, Veterans Affairs, and Education simply do not threaten news organizations.

Moreover, many federal agencies stay relatively well inside their statutory boundaries. The FCC does not. Its policies can and do shift with new Administrations. Mercurial policy positions are far more interesting for journalist and editorial writers to cover than the latest non-partisan failure at an agency such as Veterans Affairs.

More than most cabinet agencies, the FCC regulates products and services familiar to practically every American. From consumer electronic devices to wireless services, from broadband to music copyrights, the FCC regulates the products and services familiar to Americans on a daily basis. That consumer familiarity is attractive to editorial pages.

The FCC also captures the imagination of editorial page writers because it deals with many of the larger-than-life personalities of corporate America. Directly or indirectly, the FCC regulates—and in turn is lobbied by--Larry Paige, Sergey Brin, Tim Cook, Bill Gates, Mark Zuckerberg, Jeff Bezos, Brian Roberts, Satya Nadella, Charlie Ergen, John Malone, Ted Turner, Barry Diller, Les Moonves, Bob Iger, Randall Stephenson, Lowell McAdam, and John Legere, to name just a few of the executives whose businesses are shaped and buffeted by the FCC.

The FCC is also important because it raises funds for and controls a Universal Service Fund that assigns more than $10 billion in benefits annually.[15] That is a substantial sum of money, even in Washington. Moreover, the FCC engages in a wide range of activities,

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[13] See, e.g., "The FCC's New Life of Pai," *Wall Street Journal*, February 9, 2017, at https://Chevron.wsj.com/articles/the-fccs-new-life-of-pai-1486686662.

[14] See, e.g., Sumita Bural, "FCC Chairman Ajit Pai's net neutrality crackdown will ruin your internet," *Washington Post*, February 8, 2017, https://mic.com/articles/167905/fcc-chairman-ajit-pais-net-neutrality-crackdown-will-ruin-your-internet#.NtQa0IDoA; see also, "The FCC talks the talk on the digital divide — and then walks in the other direction," *Washington Post*, February 12, 2017, https://Chevron.washingtonpost.com/opinions/the-fcc-talks-the-talk-on-the-digital-divide--and-then-walks-in-the-other-direction/2017/02/11/45a754f4-ef06-11e6-9662-6eedf1627882_story.html?utm_term=.cf318d15b99c.

[15] See https://www.fcc.gov/general/universal-service.

such as extralegal reviews of mergers, that garner the attention of businesses and politicians across America.

The FCC captures the attention and imagination of businesses and investors. Not only do FCC rules affect the value of various companies, but investors will value assets and business based on *expectations* of future FCC rules. Expectations of the status of FCC rules favorable to certain business models fed the dot.com stock bubble of the late 1990s.[16] Some of the largest corporations in America—AT&T, MCI, Worldcom, Adelphia—as well as dozens of other publicly traded companies and countless privately held companies disappeared or were substantially hobbled from 2000-2006 by misunderstanding FCC rules. The value of wireless spectrum has gyrated wildly over the past 20 years in part because of ever-changing FCC rules.

Finally, by statute the chairman of the FCC is more powerful than the heads of most other independent agencies. Whereas the head of the Federal Trade Commission, or the International Trade Commission, or countless other agencies are simply a slightly empowered member on a board of five commissioners, the head of the FCC has the status of "chief executive officer."[17] No one knows exactly what that term has meant since the Communications Act of 1934 was enacted more than 80 years ago, but every chairman has assumed it means that he alone is in charge. And so it has been.

III. THE FCC HAS AN ACCUMULATION OF REGULATIONS AND DOES NOT WORK WELL

The FCC is obligated under the Communications Act to write regulations. To have no regulations is not a lawful choice. But to have more regulations, and more intrusive regulations, than necessary may not be a lawful outcome either. Yet the FCC has many more rules than necessary, some beyond the scope of law.

Bad regulation has consequences. The overall inefficiency of the FCC and harm to the American economy are well documented.[18] Decisions are made slowly;[19] decisions are sometimes arbitrary; consumer welfare is lost.[20] On practically any topic under consideration before the FCC, it is not hard to find parties discussing among themselves that the FCC as an institution itself as part of the problem. Needlessly to say, these institutional complaints are rarely brought publicly to the Commission itself for fear of offending agency officials in a position to retaliate. Of course, the Commission has it defenders, some of whom point to other countries whose regulations are even worse than

[16] See H. Furchtgott-Roth, *A Tough Act to Follow*, (Washington, DC: AEI Press, 2006).
[17] 47 USC 155(a).
[18] See, e.g., Furchtgott-Roth, *A Tough Act to Follow*.
[19] Ibid., pp. 24-25.
[20] See, e.g., J. Hausman Taxation by Telecommunications Regulation: The Economics of the E-Rate, (Washington, DC: AEI Press, 1998).

America's. Until the past few decades, the communications sector in most countries was government-owned. That other countries have worse regulation in the communications sector than America is hardly an endorsement of American regulation.

A. The symptoms of the FCC's overregulation

What are the symptoms of the FCC's overregulation? Below, I list a few.

1. The overall cost of FCC regulation

There are various means of quantifying the overall harm of poor FCC regulation. One approach is a large cost-benefit analysis. Although there have been many such exercises, the very exercise is subject to imponderable measurement issues. The FCC has enormous breadth and scope for regulation, and, as it promulgates dozens of rulemakings each year, it is impossible to construct a meaningful "but for" world of communications regulation. Some economists have tried to calculate the total costs. For example, Jerry Ellig in 2005 estimated the annual cost of FCC regulation at $105 billion in "higher prices and forgone services."[21] In 2013, Ryan Young estimated compliance costs at the FCC cost $142 billion annually.[22] In 2015, Wayne Crews estimated the cost of FCC regulation [infrastructure?] at $132 billion.[23] Although these cost estimates are large numbers in absolute value, they are not particularly large relative to the size of industries regulated by the FCC.[24] As an indication of the order of magnitude of these costs, $100 billion would be approximately 10% of a $1 trillion sector,[25] and approximately 1% of a $10 trillion consumer surplus.[26]

These estimates are likely as good as are available, but they also likely are understated. They cannot begin to quantify the costs of decisions outside the law, of technologies that are stunted or delayed.[27] Simply stated: the actual costs of bad regulation are large but incalculable.

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[21] Jerry Ellig, "Costs and Consequences of Federal Telecommunications and Broadband Regulation," Mercatus Center, February 2005, p. I, https://Chevron.mercatus.org/system/files/MC_RSP_RA-TelecomBroadbandReg_050216.pdf.

[22] Ryan Young, "Federal Communications Commission Regulations Impose $142 billion in Compliance Costs, More on the Way," Competitive Enterprise Institute, February 21, 2013 at https://cei.org/sites/default/files/Ryan%20Young%20-%20FCC%20Regulatory%20Report%20Card.pdf.

[23] Clyde Wayne Crews, Jr., "Ten Thousand Commandments," Competitive Enterprise Institute, 2016, Figure 1, at https://cei.org/sites/default/files/Wayne%20Crews%20-%20Ten%20Thousand%20Commandments%202016%20-%20May%204%202016.pdf.

[24] See $1 trillion value added from BEA.

[25] Ibid.

[26] See C. Bazelon on the approximate ratio of 10:1 for consumer welfare to the economic value in the wireless industry.

[27] For examples of studies that begin to examine the costs of delayed introduction of new services, see J.H. Rohlfs, C.L. Jackson, and T.E. Kelly, "Estimate of the Loss to the

a. Lack of credible cost-benefit analyses

Each year, the Commission adopts dozens of order that contain new federal regulations. Does each one of these new FCC regulations have demonstrable benefits that exceed their costs? The answer to that question depends on how it is framed. The FCC is largely exempt from traditional cost-benefit analyses.[28] For each new rule, one will not find a back-of-the-envelope—much less a detailed analytical--quantification of the costs and benefits of the proposed rule. An order might contain a few sentences listing claims of benefits—rarely costs—in its Regulatory Flexibility Act Analysis section, but the Commission itself never goes on record with a formal measure of total costs and benefits. The Regulatory Flexibility Act Analysis is not subject to judicial review, and consequently the Commission does not take much trouble over it.[29]

b. The page-count approach

Another approach is cost approximation is to measure the number of regulations or the pages of the Code of Federal Regulations. Communications statutes are contained in title 47 of the U.S. Code. The most recent GPO publication of 47 USC contains 406 pages.[30] The Code of Federal Regulations that corresponds to 47 USC is divided into four chapters: parts 0-199 for the FCC; parts 200-299 for the Office of Science and Technology Policy and the National Security Council; parts 300-399 for the National Telecommunications and Information Administration of the Department of Commerce; parts 300-399 for the National Telecommunications and Information Administration of the Department of Commerce and the National Highway Traffic Safety Administration of the Department of Transportation.[31] Just those rules for the FCC comprised 5 volumes

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United States Caused by the FCC's Delay in Licensing Cellular Telecommunications," paper prepared for National Economic Research Associates, White Plains, New York, November 8, 1991 (revised); and J. Hausman, "Valuing the Effect of Regulation on New Services in Telecommunications," in *Brookings Papers on Economic Activity, Microeconomics, 1997*, eds. M.N. Bailey, P.C. Reiss, and C. Winston (Washington, DC: Brookings Press, 1997).

28 See, H. Furchtgott-Roth, Testimony before the U.S. House of Representatives, Judiciary Committee, Subcommittee on Courts, Commercial and Administrative Law, "Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Cost and Benefits," May 4, 2011.

[29] H. Furchtgott-Roth, Testimony before the U.S. House of Representatives, Judiciary Committee, Subcommittee on Courts, Commercial and Administrative Law, "Cost-Justifying Regulations: Protecting Jobs and the Economy by Presidential and Judicial Review of Cost and Benefits," May 4, 2011.

[30] GPO, 2015 U.S.C. 47, pdf version, at https://Chevron.gpo.gov/fdsys/pkg/USCODE-2015-title47/pdf/USCODE-2015-title47.pdf.

[31] See GPO, 2015 CFR 47, at https://Chevron.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR&searchPath=Title+47%2FChapter+IV&oldPath=Title+47&isCollapsed=true&selectedYearFrom=2015&ycord=1671.

with a total of 3,965 pages in 2015.[32] Most pages are densely packed with detailed information; reading at a pace of one page per day would take nearly 11 years to completely read all of the rules that pertain just to the FCC if those rules remained constant.

But they are constantly changing. Between 2012 and 2015, the FCC added 97 pages of net new rules.[33] That reflects less than a 1% growth in the pages of the CFR. Indeed, since 1996, the FCC's CFR page count has grown at less than 1% per year.

The formal page count of FCC rules is a poor measure of the regulatory power and effect of the FCC. The statute and formal rules in the CFR are only part of the web of regulatory powers used by the FCC and other administrative agencies. The FCC has many orders and guidance letters that are not part of the CFR. The FCC may also give informal guidance, either in writing or orally. Many businesses live under the threat of future rules. Finally, the FCC uses many adjudicatory proceedings, such as merger reviews, to impose company-specific regulations.

Regardless of the page count of regulations--whether 4,000 or 6,000 or 2,000--the FCC still retains extraordinary discretion to write new rules, or to impose its administrative will without or without formal regulations. Potential investors and competitors in the communications sector are concerned not just about existing rules, both formal and informal, but also about potential future rules. Businesses considering mergers in the communications sector fear FCC review.

2. The accretion of regulations

In 1934, the FCC began with a large base of regulations for radio from the Federal Radio Agency and for telephone and telegraph service from the Interstate Commerce Commission. Over the years, the FCC primarily expanded regulations. Until the Telecommunications Act of 1996, the Commission never had specific responsibilities to remove unnecessary regulations. Although the Telecommunications Act of 1996 specifically instructs the FCC to review its rules periodically and remove unnecessary ones, the FCC has taken few efforts systematically to review its rules. Apparently, no one has standing to go to court to compel the FCC to do what statutes require it to do.

[32] In 2015, volume 1 had 1028 pages; volume 2 had 588 pages; volume 3 had 609 pages; volume 4 had 882 pages; and volume 5 had 858 pages.
[33] In 2012, volume 1 had 965 pages; volume 2 had 591 pages; volume 3 had 567 pages; volume 4 had 879 pages; and volume 5 had 866 pages.

3. Decline in investment and innovation

Symptoms of bad regulation include less investment and less innovation in a sector than would happen with better regulation. Some evidence suggests that this disinvestment has occurred in the communications sector.[34]

B. The causes of bad regulation at the FCC

I have cataloged the causes of bad regulation elsewhere.[35] These causes include but are not limited to the following:

1. The structure of the FCC as an independent agency combining the powers of the executive, the legislative, and the judicial branches of government;
2. As the result of the above, a failure of the FCC to follow statutory language;
3. In part as a result of the combination of powers, the failure of the Commission to identify and to distinguish clearly property rights, contracts, and liability rules under the law;[36]
4. An indulgence of the courts to allow the FCC to do as it pleases independent of statutory language.

An astute reader might note that these causes largely stem from the combination of powers and cannot be remedied by an agency head, no matter how heroic. In terms of a complete remedy, that assessment is correct, but an agency chair can do much on his or her own.

IV. THE UNVANQUISHED ADMINISTRATIVE STATE: CHALLENGES FOR THE FCC

The Administrative State poses challenges for the Commission, particularly for those individuals resistant to the Administrative State. Below, I address particularly the challenges to the FCC Chairman, as if the Chairman and the Commission were interchangeable. Of course, they are not. But the FCC chair, more than the other

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[34] See Hal Singer, "Tracing AT&T's Capital Expenditures Over Time," February 10, 2017, at https://haljsinger.wordpress.com/2017/02/10/tracing-atts-capital-expenditure-over-time/

[35] H. Furchtgott-Roth, *A Tough Act to Follow*.

[36] See, e.g,. C. DeMuth, "Wireless Telecommunications Policy for American Leadership in the 21st Century," *National Affairs*, Spring 2017, vol. 31, no. 31, at http://www.nationalaffairs.com/policy-reforms-to-advance-innovation; H. Furchtgott-Roth, "Open Spectrum: A Major Step for U.S. Innovation and Economic Growth," Hudson Institute, June 2013, available at https://hudson.org/research/9764-open-spectrum-a-major-step-for-u-s-innovation-and-economic-growth

commissioners, can change the way the FCC operates and the way its approaches problems. Surely, there is much that an agency head or FCC chairman can do to vanquish the Administrative State. After all, he is by statute the "chief executive officer" of the organization.[37] Relative to the heads of other federal agencies, the chair of the FCC has extraordinary powers.

Although the chairman has extraordinary powers, historically those powers have been more likely been used to expand rather than to contract the Administrative State. The Administrative State that has grown up around the FCC operates largely beyond statute, and the Administrative State around the FCC has grown with successive FCC chairmen. In the simplest of terms, the issue is whether the Administrative State shapes the FCC chair, or whether the FCC chair shapes the Administrative State. The former is the norm; the latter frightens the Administrative State.

A. The Administrative State Seeks to shape the FCC Chairman

Below, I examine some of the advantages the Administrative State has relative to the head of an agency such as the FCC.

1. Time limits on the head of an agency

Over the past century and a half, the Administrative State in Washington has grown with few temporary setbacks through different administrations with the entire range of political views. Staffs have grown. Budgets have grown. The number, scope, and power of regulations have grown. New agencies are born.

Through it all, the permanent career agency staff has risen in influence relative to the temporary political staff of agencies. The Communications Act, for example, refers repeatedly to the "Commission," comprised of all five commissioners, and rarely to the "staff" or even "bureau chiefs." Yet the countless day-to-day decisions of the Commission, some of great consequence, are made by the staff.

This is not to say that the Commission should be involved in the day-to-day decisions. Rather, over time the Commission has become involved in more and more decisions which inevitably are delegated to the career staff. Once a type of decision has been delegated to the staff, it is difficult for the non-chairman commissioners to retrieve it. The staff is professional, largely without a partisan agenda. But many if not most of the day-to-day decisions of the FCC are made by the 1600-person staff with the Commission only engaged on "new and novel" issues, if then. Some see the outcome that the FCC operates on auto-pilot by the staff whether commissioners are present or not as a virtue; others see it as the very product of the Administrative State.

[37] 47 U.S.C. 155(a).

The median tenure of the head of a federal agency such as the FCC is almost certainly less than four years.[38] Many if not most of the staff of a federal agency will outlast a new agency head. Protected by civil service rules, career staff members have little fear of adverse consequences of taking positions contrary to the head of the agency. Every agency head is keenly aware that the staff will survive them and will serve their successor, even one of a different political party. The role of an agency head becomes in part that of a curator of a museum, to preserve the institution until someone else can take over.

The head of a federal agency such as the FCC is also well aware of the power and permanence of the agency and its staff. The objective of a new head of a federal agency, no matter the political party, is to bring the agency at least partially under his or her control. Some agency heads may want the agency to grow more rapidly than do other agency heads, but few if any agency heads want to end an agency as if it were a dragon to be slayed. They want the agency to respond to their commands, or at least not to behave as if the agency head did not exist.

To emphasize the limited tenure of an agency head, advocates of the Administrative State have created a vocabulary to measure the success of an agency head entirely independent of a statutory foundation. For example, the advocates speak of the "legacy" of the agency head, a *personal* not an institutional accomplishment, no matter that it is a term not found in any statute or even executive order or regulation. The agency head, or so the "legacy" concept suggests, will be remembered after the term of office by how much the head expanded the Administrative State of the agency. Merely serving in anonymity and preserving the status quo is rarely enough to count as a legacy for the advocates; some new expansion is necessary.

2. Creating an informal familial relationship

Most large federal agencies have a specialized bar association and other organizations of outside professionals who frequently appear before the agency. These organizations inadvertently become instruments of the Administrative State, benefitting from the continued prosperity of the agency, whether the broader public benefits or not. The organizations often sponsor large gala events at which outside professionals and the government agency employees meet and mingle. For example, the Federal Communications Bar Association organizes an annual "Chairman's Dinner" to honor the chairman of the FCC.

These events are well-intentioned, a social meeting place for professionals with a common agency interest. But they also create a familial atmosphere in which the lines between government employee and outside advocates are blurred. It is difficult for

[38] Some administrations only last four years. Agency heads take time to be nominated and confirmed by the Senate. Many leave office before the end of the first presidential term.

individuals either inside or outside government to enjoy the gala extolling the government agency while also working to limit the size and power of the agency.

3. Skepticism of competitive markets

The Communications Act was written for the regulation of non-competitive markets, not the regulation of competitive markets. In 1934, telephone services, telegraphy services, and radio broadcasting were not considered to be competitive. The purpose of the Act in 1934 was not to allow for competition but to mandate regulation of these industries.[39] Competition was not a widely used concept in the original 1934 Act.[40] Instead, the Act repeatedly refers to the "public interest," an amorphous concept disembodied from markets and consumers. Under the "public interest" standard, regulations can leave markets impeded, consumers harmed, and businesses discouraged as long as the magic words of "public interest" are intoned.

The Communications Act was born as in opposition to free markets and property. Title III of the Communications Act was grafted from the Radio Act of 1927 which expropriated all spectrum in the United States.[41] To be a FCC licensee under Title III, an applicant must relinquish all property claims in spectrum.[42] Worse, to be a broadcast licensee, one must by rule accept the moniker of a "public trustee,"[43] a term not found in statute. A "trustee" has no property claims on the underlying asset, a license. A trustee has duties to the underlying property owner, a position which the federal government claims for itself.

Each year, dozens of new regulations are proposed or considered at the FCC. Some proposals would implicitly relax existing rules. Others would expand the intrusion of government. Proponents of such rules rarely suggest that a new rule is necessary because markets are competitive. They suggest the opposite.

Despite regulation, competitive markets for various communications services develop as a result of new technologies. In these instances, the FCC searches for reasons to continue to regulate. The FCC at times offers regulatory solutions in search of problem. Network

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[39] "AN ACT to provide for the regulation of interstate and foreign communication by wire or radio, and for other purposes." Preamble, Communications Act of 1934, Pub. L. No. 416.

[40] The word "competition" or "competitive" appears seven times in the original 1934 Act, but not in the context of competition for communications services.

[41] Radio Act of 1927, Pub. L. No. 632, available at http://earlyradiohistory.us/1927act.htm.

[42] The Radio Act of 1927, incorporated in the Communications Act of 1934, forbade "the ownership [of spectrum], by individuals, firms, or corporations, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 USC, 301.

[43] 47 CFR 73.3580.

neutrality, set-top boxes, and municipal broadband, and broadband privacy are FCC issues that fit that characterization in otherwise competitive markets.

4. Caricatures of the agency head

Regulation and deregulation are often viewed in extreme, monochromatic, forms. The FCC chairman is but a character in a moral tale of the extremes of regulation. One can easily imagine two versions of the same fairy tale told to children in different American homes:

> Version 1: Once upon a time in a distant land called America, a giant evil dragon called "Excessive Regulation" was strangling everyone in the country. A gallant president arrived and slew Excessive Regulation. Aided by the chairman of the FCC, the president put in place a new program called "Deregulation," and everyone lived happily ever after. The end.

> Version 2: Once upon a time in a distant land called America, a giant evil dragon called "Deregulation" was starving everyone in the country. A gallant president arrived and slew Deregulation. Aided by the chairman of the FCC, the president put in place a new program called "Reregulation," and everyone lived happily ever after. The end.

In a childish description of the world, regulation and deregulation are not only polar opposites in morality, they are also states of the world that can ultimately be reclaimed and redeemed from the opposing forces.

In only slightly more subtle forms, the fairy tales with FCC chairmen as the lead characters are printed on the editorial pages of leading newspapers. With respect to the Federal Communications Commission (FCC), version 1 was printed by the *Wall Street Journal* in February 2017.[44] Version 2 was printed at roughly the same time by both the *New York Times*[45] and the *Washington Post*.[46] In the public eye, even relatively obscure agencies such as the FCC and their chairmen have become symbols of either good or evil, populated by staff members who are either heroes or villains.

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[44] "The FCC's New Life of Pai," *Wall Street Journal*, February 9, 2017, https://Chevron.wsj.com/articles/the-fccs-new-life-of-pai-1486686662.

[45] "An Anti-Consumer Agenda at the FCC," *New York Times*, February 10, 2017, https://Chevron.nytimes.com/2017/02/10/opinion/an-anti-consumer-agenda-at-the-fcc.html.

[46] "The FCC Talks the Talk on the digital divide, and then walks in the other direction," *Washington Post*, February 11, 2017, https://Chevron.washingtonpost.com/opinions/the-fcc-talks-the-talk-on-the-digital-divide--and-then-walks-in-the-other-direction/2017/02/11/45a754f4-ef06-11e6-9662-6eedf1627882_story.html?utm_term=.fb1b118a41f2.

B. What an FCC chairman can do against the Administrative State

Below I list just a few of the areas where an FCC chairman can help make regulation more rational and can lessen the power of the Administrative State. I review various options to reduce unnecessary regulation. These options should not be viewed as the only available possibilities. A wise chairman may pursue other options, or may assess some of the options presented here as impractical for any number of reasons.

Here are some steps that a chairman of the FCC could take to restrain the sometimes unlawful and heroic actions of the Administrative State at the FCC, and Chairman Pai has begun to take these steps:[47]

- Have a vision;
- Have fealty to the statute;
- Understand the power of *Chevron* deference;
- Articulate the concepts of necessity and consistency with the public interest in new regulations;
- Review existing rules completely as required;
- Avoid merger reviews;
- Discern the costs and benefits of regulation;
- Articulate property rights concepts;
- Win at litigation; and
- Slow the reregulation process.

1. Have a vision

An FCC chairman can articulate a vision of the future of the agency, a future based on rational and lawful regulation and limitations of the Administrative State. Reasonable people take seriously thoughtful statements, and they particularly take seriously the thoughtful statements by the head of an organization about the future of that organization. For decades, chairmen of the FCC have had a broad audience to listen to views about the expansive future of the agency. The same holds true today for a chairman articulating a deregulatory agenda.

2. Have fealty to the statute

The FCC is a construction of the Communications Act. The Act confers substantial authority to the FCC. Yet many past chairmen have seen it as a constraint and have sought ways to circumscribe it, to expand its already substantial powers. The result is that much of what the FCC does is not squarely inside the Communications Act. A

[47] Ajit Pai, Speech at the Hudson Institute, April 5, 2017, available at https://www.fcc.gov/document/chairman-pai-economic-analysis-communications-policy

chairman of the FCC could offer greater fealty to the Act and disdain for what the Commission does outside the Act.

3. Understand the power of Chevron deference

Chevron deference is the judicial concept that courts will defer to administrative agencies such as the FCC on the interpretation of potentially ambiguous statutory language.[48] *Chevron* is frequently used by courts to defer to the FCC even on non-technical matters such as creating statutory ambiguity where none is obvious.

Given that it grants an administrative agency enormous discretion, *Chevron* is one of the critical weapons in the arsenal of the Administrative State. But Chevron can also be used against the Administrative State by an FCC chairman inclined to do so. Indeed, the underlying Chevron case involved discretion of the EPA to lessen regulation. As the chairman of the FCC is the first among equals and a powerful CEO, *Chevron* implicitly gives the chairman of the FCC substantial deference. Even for a chairman with a deregulatory agenda, *Chevron* offers a very clear path towards deregulation. (Below, I explain why, for the health of the agency, *Chevron* should be substantially narrowed.)

4. Articulate the concepts of necessity and consistency with the public interest in new regulations

Practically every FCC statutory provision, and practically every FCC order adopting a rule, pays homage to the vague concept of the "public interest." It is tempting to advise an FCC chair either to abjure the use of the term "public interest" or to define it narrowly in terms of clear economic principles. Neither approach is likely to work well. Renouncing the use of the term "public interest" would be a rational view of the world, but it would run contrary to the statutory provisions of the Communications Act. The chairman of the FCC is duty-bound to uphold the law, even the vague phrases such as "public interest."

Narrowing the definition of "public interest" to identifiable economic concepts would also be a rational exercise. But the term "public interest" is not limited in use to the Communications Act; the vague term infects that language of many statutes. Federal courts have often addressed matter of the "public interest," and it is doubtful that agency efforts to refine or narrow its meaning would be successful, particularly as a future chairman could and would seek to revise it once again.

Although the term "public interest" in contemporary usage often refers to left-of-center concepts, such ideological connotations have not always been the case. The *Public Interest* was a right-of-center intellectual journal edited for decades by Irving Kristol. The Oxford English Dictionary presents an etymology of the term "public interest," few of the examples of which pertain narrowly to government programs.

[48] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

Almost every FCC rule is adopted with reference to the "public interest," a term used frequently in the Communications Act. Prior commissions and courts have adopted an infinitely elastic interpretation of the public interest standard, to mean almost anything that a majority of commissioners, or even just a single agency employee, deems it to be at one point in time.

For decades, the FCC has adopted new rules without any particular articulation of the public interest standard, the necessity standard, or the consistency standard. Before *Chevron*, courts often deferred to the FCC on their interpretation of the public interest standard.[49] A chairman could insist on a clear standard for the public interest to distinguish between rules that meet statutory requirements and those that do not.

While reasonable people might disagree on how to interpret the "public interest," it may be easier to limit what is "necessary" in the public interest. The public interest, however it is defined, existed long before the FCC or communications law or communications regulation. If the public interest could survive and quite likely thrive without communications law or FCC rules, it is difficult to find today many of those rules "necessary" for the public interest.

The mere articulation of a distinction between the public interest and the necessity of an FCC rule for the public interest should help the public and courts understand the effective limitations of FCC rules. Practical applications abound. An allocation of $1 million to a worthy cause might be "consistent" with the public interest, but it is unlikely to be "necessary." A rule to prohibit a newspaper owner from also owning a radio station is almost certainly neither "necessary" nor "consistent" with the public interest. Similarly, a rule prohibiting a broadband Internet access service from blocking even content abhorrent to a consumer may be neither "consistent" nor "necessary" with the public interest.

The statutory language instructs the FCC to take certain steps that are either "necessary" for the public interest or "consistent" with the public. For these terms, an FCC chairman can establish the high threshold of regulatory language ever meeting these standards. These are both difficult standards to assess, but both are subject to interpretation by the chairman of the FCC. Here are some possible interpretations that could be employed with new regulations:

a) Consistent

An FCC chair might reasonably take the position that a rule is *consistent* with the public interest only to the extent various costs and benefits associated with the rule have been clearly and consistently estimated and vetted. Further, a chair might take the position that

[49] See, e.g., *FCC v. Pottsville Broadcasting* 309 U.S. 134 (1940) administrative law and authority of FCC including public interest; *NBC v. U.S.,* 319 U.S. 190 (1943) administrative law and authority of FCC including public interest; *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969) expansive power of FCC and public interest.

a rule is consistent with the public interest only to the extent its future implementation is clearly mapped out. For example, a rule might require once every two years, and it will expire unless it meets certain demonstrable milestones.

b) Necessary

An FCC chair might reasonably take the position that a rule is *necessary* in the public interest should be a much more difficult standard to meet than the standard of *consistent* with the public interest. An FCC chair might reasonably say that a difficult evidentiary burden is required to show that a rule is necessary. For example, an FCC chair might require a showing of enormous and unambiguous harm that would follow absent the rule. To the extent a consensus of support for a rule emerges in the record, the burden of "necessary" might be met. But to the extent there are different views about the harms that would follow absent the rule, the Commission and its staff would take a much a closer examination, and the likelihood the rule is "necessary" is substantially diminished.

Similarly, the "public interest" is sometimes modified with "and convenience" or "convenience, and necessity."[50] The distinction among these standards can be heavily influenced by the FCC chairman.

5. Review existing rules completely as required by statute

Part of the accumulation of regulations at the FCC is simply a lack of care in weeding out outdated regulations. The Commission is required by statute to review its rules periodically but fails to conduct such reviews, much less to take those reviews seriously.

a) Section 10

Section 10 of the Telecommunications Act of 1996 allows parties to petition the Commission to forbear from certain regulations if the FCC determines:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[51]

At the time of the passage of the Telecommunications Act of 1996, this section was thought to be a powerful tool to allow the FCC to eliminate excessive regulations. Over

[50] By my count, "pubic interest" appear 149 in 47 USC, of which 48 times are with "public interest and necessity" and 9 times as "public interest, convenience, or necessity." The term public interest appears 308 times in the 47 CFR.
[51] 47 U.S.C. 160.

the past 21 years, however, the provision has been rarely applied. When it has received Section 10 petitions, the Commission has initiated lengthy proceedings that have not resulted in major reductions in regulatory burdens.[52] A chairman sympathetic to deregulation could indicate a new willingness to consider such petitions.

Section 10 is limited. It applies only to formal rules related to telecommunications carriers. Rules that do not affect telecommunications carriers are not covered. Nor are the many orders and informal rules.

b) Section 11

Section 11 of the Telecommunications Act of 1996 mandates the Commission review *all* of its regulations with respect to telecommunications services once every two years and eliminate those no longer *necessary*.[53] The Commission is required to repeal or modify "any regulation it determines to be no longer necessary in the public interest."[54] The "*necessary*" standard is important because it is a difficult standard to meet; few regulations are actually *necessary* for any purpose.

The Commission initially refused to conduct such a review on its own.[55] It never conducted a comprehensive review. In the 21 years 1996 the Commission has yet to review all of its rules even once. The cause is not the difficulty or burden of the effort, but rather the Commission does not want to review any rules, much less all rules.

An FCC chairman could engage Section 11 as the statute requires and review *all* rules with respect to telecommunications services and repeals those that are no longer *necessary*. Another advantage of Section 11 is that all rules can be reviewed under a single docket with a single set of comments and single record. In no more than a year, the Commission could repeal or modify a substantial body of rules that are no longer *necessary* in the public interest or by any other standard.

Section 11 is limited. It applies only to formal rules related to telecommunications services. Rules that do not affect telecommunications services are not covered. Nor are the many orders and informal rules.

c) Section 202

Section 202 of the Telecommunications Act of 1996 instructed the Commission to apply

[52] As of June 7, 2017, the Commission listed 3 pending Section 10 petitions, all from 2013-2014. https://www.fcc.gov/wireline-competition/competition-policy-division/forbearance/general/forbearance, accessed June 7, 2017.
[53] 47 U.S.C. 161.
[54] Ibid.
[55] See, H. Furchtgott-Roth, Separate Statement, *1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements*, 13 FCC Rcd 6040 (released Jan. 30, 1998).

the Section 11 review to its broadcast ownership rules as well.

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 [47 U.S.C. 161] and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[56]

Section 202 was subsequently amended to apply only quadrennially. In the 21 years since 1996, the FCC has reviewed its broadcast ownership rules only two or three times. These reviews have been hopelessly mired in appellate courts, but none of the reviews resulted in unambiguous findings that some or all of the rules "were no longer *necessary*."

A chair of the FCC could engage Section 202 as the statute requires and review *all* ownership rules and eliminate those that are no longer *necessary*. It is difficult to see how any record could demonstrate that any of the ownership rules is necessary under a public interest or any standard. American consumers have substantial antitrust protections under the Sherman Act that protect them against abuse of market power. For purposes of protecting the American consumer, all the ownership rules are entirely redundant and not necessary.

6. Avoid merger reviews

Since the early 1990s, the FCC has engaged in a lawless, redundant federal review of all major mergers in the communications sector. The Communications Act provides no specific merger review authority. The Commission instead relies on necessary approvals for transfers of licenses, authorizations, etc. Many government agencies are required to approve transfers of assets and licenses, such as automobile titles or land titles. As anyone who has bought or sold a car knows, the Department of Motor Vehicles does not engage in merger reviews. Nor does the county clerk or deeds. Only the FCC asserts that its clerical responsibility to approve transfers of licenses and authorizations gives it antitrust authority that equals and even exceeds that of the actual federal antitrust agencies: the Department of Justice and the Federal Trade Commission.

Regrettably, federal antitrust agencies have in the past coordinated with the FCC sharing information and governmental tactics even though the FCC has no statutory authorization to review mergers, much less to coordinate with those federal agencies that have actual statutory authority. The coordination is not only beyond statute, but it confounds an agency that relies almost entirely on a public record—the FCC—with agencies that rely almost entirely on closed confidential records, the Department of Justice and the Federal Trade Commission. The federal antitrust agencies, but not the American consumer or the American economy, regrettably have benefitted from the coordination. It is administratively much easier to have the FCC effectively block a merger or condition a merger by regulatory fiat without persuading anyone rather than an antitrust agency that

[56] Pub. L. 104–104, title II, § 202, Feb. 8, 1996, 110 Stat. 110.

must go to court to persuade a judge to block a merger under well-established antitrust analysis.

Moreover, the FCC reviews mergers in an entirely arbitrary manner, choosing to review only those mergers among companies heavily regulated by the FCC and ignoring mergers among more fortunate companies. A merger involving large numbers of FCC licenses between large oil companies or large financial institutions goes unnoticed by the FCC while a merger of much smaller FCC-regulated companies is scrutinized closely by the FCC.

An FCC chair could single-handedly halt the arbitrary and redundant and unlawful FCC review of mergers. Further, the chairman could initiate a proceeding to determine if the Commission has ever had unambiguous statutory authority to review mergers in their entirety. To the extent such unambiguous authority is lacking, as I have often found, the chairman could initiate a rulemaking that would declare a future merger review beyond compliance with FCC rules and unlawful for the Commission to conduct.

7. Discern the costs and benefits of regulation

Society is filled with experts who can distinguish better from lesser assets. A sommelier can discern one type of wine from another, and a good vintage from a lesser one. A real estate appraiser can estimate the market value of a piece of real estate and compare it with a different piece of real estate. Similarly, one would expect that an expert agency could discern and articulate the potential costs and benefits of its regulatory actions and even be able to set milestones.

Since the advent of the Communications Act of 1934, the FCC has had little or no track record of discernment about the benefits and costs of its proposed regulations. In the dozens of new rules that the FCC promulgates each year, one can find no precise statement that resembles an actual benefit-cost analysis, no projections of benefits or costs over time, no clear weighing of the risks associated with various regulatory outcomes, and no plan for reviewing performance over time.

A chair of the FCC could reasonable state that, to be consistent with the public interest, a rule must have clear benefits that exceed identifiable costs. This is not a difficult standard to articulate. Tom Hazlett has proposed a means to provide cost-benefit analyses for proposed FCC rules.[57]

8. Articulate property rights concepts

The Administrative State thrives on the language of an alternative universe in which property and contracts and private interests do not exist, in which all relevant decisions

[57] Thomas W. Hazlett, "Economic Analysis at the Federal Communications Commission: A Simple Proposal to Atone for Past Sins" Resources for the Future, Discussion Paper, May 31, 2011, at http://www.rff.org/research/publications/economic-analysis-federal-communications-commission-simple-proposal-atone-past.

about the use and allocation of resources are made by government officials, and in which markets are controlled by central administration rather than market forces, much less competition. A chairman of the FCC can combat the Administrative simply by denying the existence of the alternative universe. The chairman could articulate property rights and common law concepts such as *property, contract, liability*, *torts*, and *damages*. A chairman could note the concept of *markets* and observe where they are *competitive*. Where markets are competitive, regulation is not needed. In all markets, competitive or not, property right concepts are powerful tools to weaken the Administrative State. In the Administrative State, property and market concepts are rarely thought, and even more rarely articulated. The chairman of the FCC can rectify the oversight.

Property rights and market concepts are important in large part because they are the tools of improving consumer welfare. Turning customer telephone handsets from the rental property of Western Electric regulated by the FCC into private property owned by the customer benefited American consumers. At every instance, customers and businesses are better of with the choice of owning property rather than being denied the opportunity to own assets. Similarly, the best friend an American consumer has in a market is a new competitor, not a new regulator. Competitors offer Americans choices at lower prices; regulators offer no choices and impose higher costs.

9. Win at litigation

The Administrative State grows by challenging legal frontiers. For decades, the FCC has sought the boundaries of the law and, at times, consciously gone beyond those bounds. For the FCC to win in court--whether on new regulations or administrative or enforcement actions—has been a matter of uncertainty. Lenient federal courts may always side with a federal agency. But legal imprecision has always led to the possibility of court losses. Losing in court is damaging not only to the federal government as an institution but also to the countless outside parties that made decisions under the assumption that the FCC would prevail in court.

A new chairman could instruct the FCC staff to stay well within the boundaries of the law and not to explore its frontiers. That would be a dramatic change at the FCC. The likelihood of an FCC well within the law winning in court should be much higher than now. Judges would grow accustomed to assuming that the FCC operates well within the law. And private parties on the outside would have greater confidence that FCC decisions would survive court challenges.

10. Slow the process of reregulation

A time will come when a new FCC chairman allied with the Administrative State will return. Unnecessary regulation will follow. But in the meantime, an FCC chair can take steps to slow the process of reregulation. These steps can include creating by rule detailed steps to promulgate new rules at the FCC including careful construction of the record; careful construction of the requirements for cost-benefit analyses for every part of every rule; and careful timelines for the review of the efficacy of existing and new rules. Such rules may not stop reregulation, but they might slow it down.

V. THE UNVANQUISHED ADMINISTRATIVE STATE: CHALLENGES FOR CONGRESS

One might assume that Congress would serve as a deterrent against the Administrative State by an aggressive FCC. After all, the legislative and rulemaking power that the FCC exercises ultimately was ceded by Congress, and Congress might reasonably seek to reclaim that power. Although it has enormous capacity to do so, Congress does little to check the excesses of the Administrative State in the FCC and other agencies.

Here are some steps that Congress could take to restrain the sometimes unlawful and heroic actions of the Administrative State at the FCC:

- Pass legislation to separate the FCC into different organizations;
- Update the Communications Act;
- Articulate property contract rights in the communications sector;
- Pass authorization bills;
- Bring the FCC into the appropriations process;
- Clarify that *Chevron* is a usurpation of Congressional prerogatives;
- Regulate the regulators.

None of these steps individually is likely; the combination of all of them almost certainly will not happen in the foreseeable future. I discuss these not with the expectation that Congress will act but with the expectation that Congress will not act. I present them to emphasize how distant we are from a statutory foundation for rational regulation today and how unlikely we are to get such a statutory foundation soon. The net result of this discussion is that Congress will continue to be an ineffective restraint on the Administrative State tendencies of the FCC.

A. Pass legislation to separate the FCC into different organizations

Congress created the Interstate Commerce Commission, the first independent agency in 1887. During the New Deal, independent agencies became the progressive institution of choice for new government agencies.[58]

The primary harm of independent agencies is not one of who controls appointment and removal of commissioners.[59] Nor is it even constitutional delegation of legislative authority, although Congress surely should be concerned about such delegation. The primary harm of independent agencies is that they do not perform any of the functions of government well. As discussed elsewhere,[60] the Commission is deeply flawed as an agency that combines all of the powers of government—legislative, executive, and judicial—into a single body. For centuries, political philosophers have warned against

[58] See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).
[59] See, e.g., Humphrey's Executor v. United States, (1935).
[60] H. Furchtgott-Roth, *A Tough Act to Follow*, AEI Press, 2006.

such a combination of power as a recipe for governmental tyranny.[61] Sloppy rulemaking is compensated with sloppy administration and arbitrary enforcement and adjudication. No part of the agency has incentives to execute exactly right because everyone assumes that another part of the agency will compensate for any mistakes. And there are many.

Although it is not moving in these directions, Congress could legislatively separate the FCC into different organizations. Congress effectively could recognize that the Interstate Commerce Act of 1887, which created the first "independent agency," was a failure. The recognition might be 130 years late, but it would be better late than never.

Hypothetically, as conceived under the constitution, rulemaking could be made as part of legislative branch; administration and enforcement could be part of the executive branch, perhaps in the Department of Commerce; and adjudication could be exclusively through federal courts, which are available under the current Communications Act. With such a separation, opportunities for extraordinary power and discretion in federal communications regulation would be limited.

B. Update the Communications Act

Even with a great chairman who takes every possible step to reduce regulation, the FCC can only at most reduce the level of unnecessary regulation for a period of time until the next regulatory chairman takes office. Without changes in statute, the FCC under a subsequent chair will simply revert to its over-regulatory zeal. Heroic actions of the FCC will return.

Congress should update the many outdated elements of the Communications Act. Even the title of Title 47 of the U.S. Code, "Telegraphs, Telephones, and Radiotelegraphs" hearkens back to 1934. Most Americans have neither sent nor received a telegram, if they even know what one is. Few Americans are familiar with the term "radiotelegraph" and would likely be surprised to learn that it is in the title of the chapter of federal law that the FCC has used for years to attempt to regulate the Internet and other contemporary technologies.

Many sections of the Title 47 of the U.S. Code are archaic. One could pick a section at random, but consider one of the most egregious--Section 301(a):

> It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.

[61] See, e.g., John Locke and Montesquieu.

The purported purpose of Title 47 is "to maintain the control of the United States over all the channels of radio transmission." Accordingly, the purpose is not to benefit the American public or to generate economic activity, but to "maintain control" presumably for the federal government. Regulation is a natural outcome.

Further, the purpose is to provide for use of such channels, "but not the ownership thereof …under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." Use of spectrum is to be only through licensed use, and licenses are to have no economic value.

Section 301(a) becomes worse: "No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio … except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter." Simply, no one shall operate a cell phone, or laptop computer or microwave oven without a license to do so. Practically all Americans violate Section 301(a) every day, operating equipment and transmitting energy and signals without a specific FCC license, whether on licensed or unlicensed spectrum.

The very language of Section 301(a) and much of Title III militate against property rights, claiming no private ownership when much of the American wireless industry operates on an implicit form of ownership. The commercial value of privately owned spectrum licenses is easily in the hundreds of billions of dollars.[62] Statutory language should recognize that value rather than pretend it does not exist.

In practically every year since 1934, Congress has amended the Communications Act. These amendments are important to provide federal governance for new technologies such as broadcast television, satellite, cable, wireless services, and broadband, but the piecemeal amendments do not address systematic problems caused by excessive regulation.

The archaic, confused, and contradictory language of Title 47 encourages the FCC to ignore statutory language and take heroic actions. Usually, the FCC is all too accommodating. As long as the FCC operates day-to-day under the current statute—almost no matter how lawlessly—Congress perceives little pressure to rewrite the Communications Act. It becomes a lawless symbiotic relationship: bad communications law begets heroic action by the FCC to circumvent the law which in turn begets a false sense of calm in Congress which begets no movement to rewrite Communications Act. Only Congress can stop the madness.

Congress is a profoundly slow-moving institution, and little would slow the growth of regulation than returning all legislative and significant rulemaking authority to Congress

[62] C. Bazelon and G. McHenry, "Mobile Broadband Spectrum: A Vital Resource for the U.S. Economy," May 2015, available at http://www.ctia.org/docs/default-source/default-document-library/brattle_spectrum_051115.pdf

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and away from administrative agencies.[63] The reason to return rulemaking to Congress is not that Congress is inherently inefficient but that rulemaking properly belongs to Congress, whether it is efficient or not.

C. Articulate property contract rights in the communications sector

As discussed above, the Administrative State thrives on language that denies property rights and market activities. This is a challenge not just for the FCC but for Congress as well. Congress could and should employ property rights concepts and market concepts in the discussion of communications policy. The discussion of communications policy in Congress all too often is predicated on regulation rather than on the interests of consumers and providers in the efficient operation of communications markets. Several recent publications focus on property-rights concepts in the context of communications law.[64] Senators and members of the House could employ property rights concepts in speeches, and deliberations about communications issues.

D. Pass authorization bills

Living creatures need food to survive. Government agencies need funds. Congress has the power to condition the spending of funds by agencies on the performance of certain requirements. For much of the first 200 years of the United States, Congress exercised this power. But for much of the last 40 years since the passage of the Budget Control and Impoundment Act of 1974, Congress has largely abandoned the authorization process. Under idealized budget and appropriations processes in Congress, each federal agency should receive annually an authorization law and a separate appropriation subject to authorization. The FCC has not had a separate authorization since 1990.[65]

Annual authorizations would allow Congress to express its oversight concerns in laws to constrain the activities of the FCC. For example, Congress could authorize certain funds to be spent for certain purposes such as enforcing rules against pirate radio stations and prohibit funds being used for other purposes, such as promulgation or enforcement of rules pertaining to a specific topic. Absent such annual authorization laws, the FCC largely spends its funds as it sees fit. Consequently, the FCC faces little credible threat of oversight that is translated into statutory provisions.

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[63] Of course, agencies would make minor ministerial rules such as hours of operation.
[64] See, for example, the work of Chris deMuth and H. Furchtgott-Roth. C. deMuth, "Open Skies and Open Spectrum: The Occasional Power of Simple Ideas," *National Review*, July 13, 2013; C. deMuth, "Wireless Telecommunications Policy for American Leadership in the 21st Century;" H. Furchtgott-Roth, "Open Spectrum: A Major Step for U.S. Innovation and Economic Growth," Hudson Institute, June 2013. "The Economic Value of Property Rights Concepts in Spectrum, Both With and Without Licenses," January 2017.
[65] See https://www.law.cornell.edu/topn/federal_communications_commission_authorization_act_of_1990.

E. Bring the FCC into the appropriations process

The FCC is self-funded. It operates usually on the basis of receipts from licensing and auction activities, often without appropriations from Treasury. Rather than be entirely self-funded, the FCC should have annual appropriations paid by the U.S. Treasury. Currently, all or practically all, of the FCC budget is funded by regulatory fees and auction cost recovery. For example, the proposed FY 2017 budget requested $499 million, none of it from the U.S. Treasury, but all of it from fees and receipts collected by the FCC directly.[66]

As part of the authorization process, Congress could limit personnel dedicated to licensing and auction activities, and instruct the FCC that it can recover no more than the salary for those individuals from regulatory fees and auction recover. Today, the FCC collects many license and other fees, far in excess of the FCC's regulatory costs. The government often collects receipts for providing a specific service, such as admission to a national park or a map of the national park. If the receipt is equal to, or less than, the cost of providing the service, the receipt can be treated as a fee. But when a receipt is in excess of the cost of providing a specific service, the receipt is not a fee but a tax.

Federal courts have been consistent in finding that Congress cannot delegate taxing authority. License fees at agencies such as the FCC should be fees, not taxes. FCC licensees should pay only for the cost of licensing and nothing more. Licensing activities at the FCC are an important but small share of the FCC's overall activities. Similarly, auction receipts retained by the FCC should be for auction-specific activities only. The combination of licensing fees and auction receipts should be far less than the overall FCC budget, but in recent years those two activities have paid for the entire FCC budget. Consequently, Congress generally and the Appropriations Committees in particular, have lost an opportunity to review and oversee the activities of the FCC.

F. Clarify that *Chevron* is a usurpation of Congressional prerogative

As explained in the following section, *Chevron* deference has been a substantial loss of Congressional control over agencies such as the FCC. Congress can and should take steps to reverse *Chevron*. One approach would be to pass a simple statute such as the following:

Unless specifically stated as a delegated authority in statute, Congress has not, and will not delegate, to any governmental entity any authority to interpret a statute that is silent or ambiguous with respect to any specific issue.

G. Regulate the regulators

[66] FCC, Fiscal Year 2017 Budget estimates to Congress, February 2016, at https://apps.fcc.gov/edocs_public/attachmatch/DOC-337668A2.pdf

Over the past few decades, Congress has passed several bills to regulate regulators and require of them more reporting, more cost-benefit analyses, and more record-keeping and analyses to support new regulations. These procedural laws have had little if any tangible benefit, certainly none at the FCC. Congress could improve laws to regulate the regulators, but history suggests that regulators are skilled at avoiding such laws. Below are a few examples:

1. Require more cost-benefit analyses

Chairman Pai of the FCC has recently committed to greater use of cost-benefit analysis at the FCC.[67] Of the thousands of FCC rules in the Code of Federal Regulations, there is no formal or commonly agreed-upon cost-benefit for even one of them. One cannot determine from a federal document the claimed costs and benefits of a proposed rule; nor can one determine from a federal document the costs and benefits of rules in place. Proponents of a rule claim the benefits are great the public interest greater. Opponents claim the opposite.

In the past few decades, many bills have been introduced in Congress to regulate regulators. Some of the bills have become law as Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 and the Regulatory Flexibility Act of 1980 (RFA). These and other laws require some agencies to prepare cost-benefit analyses of new rules. The cost-benefit analysis-oriented statutes and bills have many limitations including:

1. Actual cost-benefit analyses are not prepared at the FCC because few laws require such exercises by the FCC.
2. Many cost-benefit analyses of executive orders, particularly those which require OMB review, apply only to executive branch agencies and exempt independent agencies such as the FCC.
3. Even if cost-benefit analyses were prepared at the FCC, they would be prepared under the political supervision of those who favor new rules. Otherwise, there would be no need to prepare a cost-benefit analysis. Not surprisingly, cost-benefit analyses for proposed rules and final rules would invariably find benefits that exceed costs.
4. Cost-benefit analyses prepared by federal agencies do not have timelines with target benefits and costs to monitor the accuracy of the original estimates. Optimistic analyses are prepared, never to be reviewed again.
5. Most FCC proposed and final rules have complicated language appended to FCC orders that may contain hundreds of pages of text. Courts may take many years to tease through the language of just one rule—let all of the rules--to determine what it means and whether and how it is lawful. It is not surprising that economists, either before or after a rule is promulgated, cannot

[67] Ajit Pai, Speech at the Hudson Institute, April 5, 2017, available at https://www.fcc.gov/document/chairman-pai-economic-analysis-communications-policy

determine the exact effect of rule, much less accurately estimate its costs and benefits.

6. Even where everyone can agree on the effects of a proposed or final rule, economists do not necessarily agree on which costs and benefits to include—and how to discount them over time. The costs and benefits of the effects of a rule on a public good—such as the public health effects of radiation from wireless devices—are difficult to measure.
7. If cost-benefit analyses were prepared by the FCC, they would not be subject to a court or other challenge. There is no effective review of agency cost-benefit analyses which invariably find enormous benefits and slight costs for proposed and final rules.
8. No cost-benefit analyses are prepared for the hundreds of rules already in place by the FCC.
9. No cost-benefit analyses are prepared for orders or for informal rulemakings.

For these and other reasons, it is doubtful that having Congress pass a law requiring the FCC to conduct more cost-benefit analyses would, by itself, meaningfully reduce overregulation at the FCC. Of course, an FCC chair could, as Chairman Ajit Pai has done, internally require cost-benefit analyses at the FCC, but a subsequent chairman could revert to having no analyses conducted.

2. Require more economists on staff

A corollary to more cost-benefit analyses is to require more economists on the staff of the FCC. Chairman Pai has proposed to have reorganized many of the FCC's economists into a single organization.[68]

3. Give third parties standing to complain about inadequate cost-benefit analyses

One proposal that would make a useful difference would be to allow complaints about cost-benefit analyses conducted by agencies. Today, if the FCC or another agency does a poor job of preparing a cost-benefit analysis, no one has standing in court to challenge it. Government-mandated cost-benefit analyses face no credible threat if poorly prepared, and not surprisingly they are often prepared with relatively little care. That carelessness would change if third parties could challenge analyses in court. Presently, the FCC is required to prepare few if any cost-benefit analyses. Consequently, giving third parties standing in court to dispute FCC cost-benefit analyses would have little practical effect.

[68] Ajit Pai, Speech at the Hudson Institute, April 5, 2017, available at https://www.fcc.gov/document/chairman-pai-economic-analysis-communications-policy

VI. THE UNVANQUISHED ADMINISTRATIVE STATE: CHALLENGES FOR THE COURTS

The history of the FCC since 1934 can be read as a series of indulgent court opinions from *Pottsville*,[69] to *NBC v FCC*,[70] to *Red Lion*,[71] to the *Turner* cases,[72] *AT&T v. Iowa Utilities Board*,[73] to *AT&T v City of Portland*,[74] to *Brand X*,[75] to USTA,[76] the FCC has lived a charmed life, withstanding one existential threat to its regulation after another. The Administrative State thrives at the FCC in large part because courts have enabled it. Had the courts at any time limited the powers of the FCC to what is actually written in statute, the FCC today would be a smaller, more obscure, more law-abiding agency.

Even if an FCC chair attempted to limit the Administrative State, and even if Congress did everything necessary to restrain the FCC, could a future FCC chair decide to become heroic and expand regulation under the Administrative State? The answer, regrettably, is "yes" because courts have in the past, and likely will in the future, let FCC chairmen operate at will, even outside the law. Unless and until the courts are willing to require the FCC and other bureaucracies to remain narrowly within the law, they will have every incentive to engage in adventurism.

A. *Chevron* deference

For the past 30 years, the Administrative State at the FCC has thrived under the judicial construct of *Chevron* deference.[77] As the D.C. Circuit explained in *USTA*:

> At Chevron step one, we ask "whether Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 842. Where "the intent of Congress is clear, that is the end of the matter; for [we], as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842–43. But if "the statute is silent or ambiguous with respect to the specific issue," we proceed to Chevron step two, where "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843.[78]

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[69] *FCC v. Pottsville Broadcasting* 309 U.S. 134 (1940)
[70] *NBC v. U.S.,* 319 U.S. 190 (1943)
[71] *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969)
[72] *Turner v. FCC* 512 U.S. 622 (1994); *Turner v FCC II,* 520 U.S. 180 (1997).
[73] *ATT v. IUB, Iowa Utilities*, 525 U.S. 366 (1999).
[74] *AT&T, et. al. v. City of Portland*, 9th Circuit, Appeal No. 99-35609 (2000).
[75] *NCTA v. Brand X*, 545 U.S. 967 (2005)
[76] *U.S. Telecom et al v FCC*, D.C. Circuit, Appeal No. 15-1063, (2016).
[77] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).
[78] *USTA v FCC*, 15-1063, 32.

Under *Chevron* deference, a federal agency is granted deference in interpreting ambiguous statutory language. Under *Chevron* deference, federal agencies are allowed discretion to construct rules as they see fit where statutory language is ambiguous or vague. Viewed through a permissive lens, all statutory language is ambiguous and vague.

Parties who believe that a government agency has promulgated rules beyond statutory authority can and do challenge the rules in courts. Courts resolve disputes between parties much as baseball umpires call balls and strikes or NFL referees call penalties. Impartial umpires and referees do not favor one team over another. In an impartial court, judges do not favor one party over another. But in disputes about whether a federal governmental agency has exceeded its statutory authority, federal courts are not impartial; the agency tend to win, and other parties, particularly the American consumer, tend to lose.

As a result, an FCC chairman—or the head of any federal agency—can wield extraordinary power, even in the face of a hostile Congress or deregulatory precedents at the agency. The FCC chairman can search and easily find ambiguous language and, based on that ambiguous language, engage in expansive regulation.

Among the countless examples of the abuses of *Chevron* deference is the court indulgence in allowing the FCC to regulate broadband as it sees fit. In *Brand X*,[79] the FCC claimed that broadband was an information service under the Communications Act and declined to regulate accordingly; the Supreme Court said the statutory language on the relevant definitions was ambiguous and deferred to the Commission interpretation. Ten years later in *USTA*, the FCC claimed that broadband was a telecommunications service and sought to regulation accordingly. Again, the Supreme Court said the statutory language on the relevant definitions was ambiguous and deferred to the Commission interpretation. In case after case, weary and indulgent courts have deferred to the FCC under *Chevron* deference.

No doubt, there is a rational foundation for some form of *Chevron* deference. If a statute were to instruct an agency to begin operations in the morning, the agency reasonably would have the discretion to decide whether that meant 8:00 am or 8:30 a.m. Congress instructed the agency to open and implicitly delegated to it the authority to choose when to open. That issue need not be returned to Congress to decide.

But the second step of *Chevron*, in the presence of ambiguous or silent statutory language, is without meaningful limit: "whether the agency's answer is based on a permissible construction of the statute." At least three major problems with the second step emerge:

1. The very language of *Chevron* presents a logical inconsistency: if there is ambiguity or silence of statutory language under step one, how can there be any

[79] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 986 (2005).

"permissible construction of the statute" under step two? There are two possible ways to reconcile these two concepts:

   a. The first reconciliation is in the presence of ambiguity. The statute could mean option A or option B, and the agency decides which one. This interpretation begs the question of why, in the presence of such ambiguity, the issue would not be returned to Congress. Under *Chevron*, the agency, not Congress, decides.
   b. The second reconciliation is, in the absence of ambiguity between two or more finite, bounded options, is to assign extraordinary flexibility, elasticity, and even invention to a newly invented but "permissible construction of the statute." Here the agency can be, and often is, engaged in unbounded legislative activities that the agency, such as the FCC, alone will execute and enforce.

2. Agencies, not Congress nor even the courts, decide how to invent "permissible construction of the statute." Important decisions are left to agencies to invent solutions on their own. This is an enormous incentive for agencies to act in a heroic manner. Indeed, the courts demand it.
3. The *Chevron* court concedes that there is not a unique statutory interpretation under step two. The concept of a "permissible construction of the statute" can be decided one way one year and another way the following year, and any number of ways year after year. The specific meaning of the law is up to the arbitrary, and potentially dramatically changing, views of an agency.

The FCC employs *Chevron* deference countless times to invent new interpretations of law. For example, whether and how the federal government should regulate *broadband* as a common carrier under Title II is a matter of substantial importance. Congress could not have delegated that authority to the FCC because Congress had not even defined broadband at the time the relevant portions of Title II were enacted. The FCC should not regulate a concept that Congress has not considered much delegated to it. And the courts should not delegate to the FCC on behalf of Congress regulatory authority that only Congress can grant.

Much of the FCC's regulatory arsenal over the past 30 years does not follow from statutory language as much as from *Chevron* deference. For the FCC to assert that it has regulatory authority over broadband under Title II is an extraordinary grasp of power, neither delegated not specifically written into statute. Regrettably, the courts have enabled that decision.

Chevron has given rise to a large set of unintended, destructive results including the following:

1. *The search for vague language*. The office of the general counsel in federal agencies, including the FCC, scour statutory authority for instances of vague language. It is not hard to find. Even the most carefully written statutory language can be read as ambiguous when read carefully enough. Rather than seeking to understand what Congress clearly meant in statutory language,

agencies seek to understand what Congress clearly did not mean by finding instances of vague language and embellishing what it might possibly mean.

2. *The temptation of agency heads to become heroes* Not only is vague language easy to find, but powerful interest groups lobby the chair of the FCC and other agency heads to take heroic steps to regulate outside of the clearest meaning of statutory language and instead use the most aggressive possible interpretation. After all, the courts are likely to support almost any plausible interpretation. Agency heads are promised media attention, publicity, and the Washington concept of "legacy"—years later, people will remember what the agency head did. Ironically, Chevron deference creates an easy opportunity for agency heads to become heroes. The temptations are difficult to resist.
3. *When in a dispute with third parties about the legality of federal regulations, the courts tend to find a federal agency is right*. This tendency tends to breed both slothful and reckless behavior as follows:
    a. Agencies that assume they are going to win in court need not be careful about bringing their most careful case to court. They can afford to be slothful in the expectation of winning in court. Perhaps even worse, agencies that believe they will win in court can and do engage in reckless behavior. An agency's taste for legal risk-taking—enormous under the best of circumstances—becomes magnified when courts are prone to let them do what they want.
    b. Courts are equally prone to sloth under the *Chevron* deference. A court can wade through thousands of pages of briefs and pleadings and endless testimony to distinguish between what the law says and what it does not; or the court can grant *Chevron* deference to the agency. The incentive for the court to clear its docket immediately, and with little work, is enormous.[80]
    c. Congress also becomes slothful when courts grant *Chevron* deference. Members and staff can fight for years to gain precise language when courts seek to interpret the language, but when courts grant *Chevron* deference to agencies willy-nilly, Congress has little incentive to be precise about language. The rational response of Congress is that the courts will defer to the agency on interpreting the language, so there is no reason to waste time getting the language just so. Indeed, *Chevron* deference discourages Congress from passing legislation at all for at least three reasons: (1) language is rarely if ever sent back to Congress as defective or vague, and consequently Congress rarely needs to pass legislation to remedy a court decision; (2) the agencies will interpret the law as they see fit regardless of the statute; and (3) the agencies can and do operate independently from Congress under *Chevron* deference meaning that Congress need not worry about an agency shutting down because of lack of Congressional authority. Entities that often win in court because the court is predisposed to accept their argument do not need to be careful in their behavior. They will, or so they assume, win in

[80] See, e.g., In Re FCC 11-161, No. 11-9900, 10th Circuit, (2012).

court no matter their behavior. This outcome merely encourages bad behavior by federal agencies such as the FCC.

d. Any detached reading of the Communications Act reveals that it is an almost irreparable document filled with contradictions, vague terms, and ambiguous language. Rather than rewrite the Communications Act, Congress lets it fester, with the understanding that courts do not require exact statutory language under *Chevron*.

The clearest advocates of *Chevron* deference implicitly indict the American government: Congress cannot be relied upon to pass legislation in a timely manner, and *Chevron* is needed to keep the federal government operating smoothly. In essence, the democratic process of legislating has failed, and the courts must necessarily assign legislative powers to executive and independent agencies. Contemporary jurists call this *Chevron* deference.

It is, of course, quite possible that Congress has become a mere museum housing politicians deluded into believing that they actually have and can exercise exclusively legislative powers under the Constitution. Rather than inform Congress that it has taken at least some of those legislative powers away and assigned them to the executive branch and independent agencies, the courts have constructed the face-saving concept of *Chevron* deference in which Congress in the past supposedly delegated authority to agencies. Paradoxically, Congress cannot easily by statute override *Chevron*. As long as courts recognize ambiguous language, courts can, under *Chevron*, assign the interpretation of that language to agencies.

The entire premise of *Chevron* is that Congress supposedly has already delegated to an agency certain authority, and that delegated authority includes the interpretation of statutes when language is ambiguous or vague or silent. Occasionally, Congress may explicitly delegate authority to interpret specific language and terms, but rarely if ever all language and terms. A far better approach than the current *Chevron* deference would be to disallow regulation based on ambiguous language that Congress could clarify. Then, rather than searching for vague language, agencies would seek only unambiguous language. Agency heads would not be tempted to become heroes. Courts would no longer be in the tawdry business of awarding to agencies discretion and legislative powers that Congress did not and could not delegate. If an agency or a court found language to be ambiguous, Congress would be left to revise it or not as it chooses. In this structure, Congress, rather than agencies or the courts, would be responsible for all important interpretations of statute.

Court precedents, such as *Chevron*, rarely change quickly. They may never change. The prospects under *Chevron* of a shift towards rational regulation and then of bureaucratic heroism at the FCC, at least on a permanent basis, are vanishingly small.

B. Diminution of states

The Administrative State thrives with centralized authority at centralized agencies. The system of federalism with authority diffused among federal, state, and local governments is not conducive the full expansion of the Administrative State.

For much of American regulatory history, the Administrative State was kept partially in check by competing forms of regulation at the federal and state levels. Historically, regulation under the progressive movement was at *both* the federal and state levels. Many of the earliest legal cases on the limits of regulation pertained to state, rather than federal, regulation.[81] Many early civil rights cases pertained to how state regulation of common carriers differentially treated people of different backgrounds.[82] By the turn of the 20th century, practically every state had its own state regulatory agencies.

The delineation of boundaries of responsibility between federal and state regulators was not easily drawn. By the early 20th century, the boundary appeared to be federal regulation of interstate commerce, and state regulation of intrastate commerce.[83] That demarcation lasted well into the 1980s.[84] Federal agencies such as the FCC often ignore or—worse—contravene state laws.

Although the Communications Act of 1934 was amended slightly in most years after passage, the Telecommunications Act of 1996 was the first and last major rewrite. The 1996 Act created tension between the role of states—prerogatives preserved under Section 152(b) and even expanded under Section 252—the federal role of the FCC. District and appellate courts held that Section 152(b) preserved state jurisdiction on intrastate matters, but the Supreme Court in an opinion written by Justice Scalia reversed the lower courts on state authority.[85] To expand federal authority, Justice Scalia relied on Section 201(b), a 1938 amendment of the Communications Act: "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."

The Supreme Court's decision that the 1996 Act gave the FCC authority to supersede state law appears to be wrong. The issue was not one of conflicting language about authority between federal and state agencies. The Telecommunications Act of 1996, also had a provision 601(c)(1) which stated:

> No implied effect--This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

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[81] See, e.g., *Munn v. Illinois*, 94 U.S. 113 (1877).
[82] See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[83] See, e.g., Houston & Texas Ry v U.S., 234 U.S. 342 (1914).
[84] See, e.g., La. Pub. Svc. Comm'n v. FCC 476 U.S. 355 (1986).
[85] *ATT v. IUB, Iowa Utilities*, 525 U.S. 366 (1999).

Section 601(c) is not mentioned in the *Iowa Utilities Board* decision. Had Justice Scalia given any weight to this plain language of the Telecommunications Act of 1996, the outcome might have been different.

The FCC regulated intensively after the Telecommunications Act of 1996. Substantial investment flowed into the communications sector with the expectation of that the FCC rules would persist. Some persisted. Others were tossed by the courts for reasons unrelated to state preemption. And still others never made any economic sense for investment. The net result was the dot.com and telecommunications sector bubble burst from 2000-2002.[86]

Since the Supreme Court's *Iowa Utilities Board* case, the FCC has largely superseded state laws with impunity. One recent counterexample was the FCC preemption of state laws regarding the limit of activities of municipalities, creations of the state governments. In March 2015, the FCC preempted state laws in Tennessee and North Carolina that limited municipalities in those states from offering broadband services outside of their jurisdictions.[87] Various parties objected.[88] The Sixth Circuit ultimately held the FCC Order was unlawful.[89] Instances such as this where the courts have sided with the states against FCC regulations are the exception rather than the rule.[90]

VII. CONCLUSION

Donald Trump was elected president in November 2016 in part with a promise to curtail the Administrative State, which has substantial influence over much of the federal government. Even with extraordinary leadership of chairman Ajit Pai at the FCC, it is difficult to see the Administrative State permanently disappearing, much less ever being vanquished. The Administrative State at the FCC presents substantial challenges to the FCC chairman, to Congress, and to the courts. Without the collective and concerted efforts of all of these entities, the Administrative State is almost certain to remain in substantial control of federal agencies such as the FCC.

The Administrative State, however, remains vulnerable, not to the frontal attack by an FCC chairman or the even more improbable assault by Congress or the courts. Far more

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[86] For a review, see H. Furchtgott-Roth, *A Tough Act to Follow*.
[87] See FCC https://www.fcc.gov/document/fcc-releases-order-preempting-tn-nc-municipal-broadband-restrictions,
[88] See amicus brief, at http://www.wlf.org/upload/litigation/briefs/TennesseevFCC-WLFamicus.pdf.
[89] See United States Court of Appeals for the Sixth Circuit, *State of Tenn., et al. v. FCC, et al,* Nos. 15-3291/3555 filed August 10, 2016, at http://www.opn.ca6.uscourts.gov/opinions.pdf/16a0189p-06.pdf.
[90] For the norm of court siding with the FCC, see, e.g., In Re FCC 11-161, No. 11-9900, 10th Circuit, (2012).

likely to prevail is a growing public awareness that the Administrative State does not work well, certainly not as well as the alternative of substantially less regulation. The Administrative State at the FCC is not as vulnerable to attacks from within government as to attacks from outside government. Ordinary consumers and small businesses, which historically have borne the brunt of excessive regulation, are the greatest threat to the Administrative State.