

**REGULATORY DISPARITY: THE CONSTITUTIONAL IMPLICATIONS OF COMMUNICATIONS
REGULATIONS THAT PREVENT COMPETITIVE NEUTRALITY**

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Spring 2007

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Journal of Technology Law and Policy

Abstract

In recent years, the communications industry has changed drastically as new technologies have created industry convergence. On its face, convergence is beneficial to the consumer because it provides more options when choosing services, which in turn should lead to decreased prices. However, convergence has also led to enormous problems in communications regulations. Traditionally, the FCC regulated the industry with regulations that focused on the type of service provider and the technology medium used to provide services. While this worked for many years, the recent onslaught of convergent technologies has led to an environment where companies selling essentially the same services to consumers face different regulations because they use different mediums of transmission. This leads to obvious competition problems because some companies have fewer restrictions and/or costs associated with their service offerings. At this point, the FCC has begun to update its regulations to conform with the newly converged industry, but it still has a long way to go. In the mean time, companies are using defective regulatory classifications to their benefit. This sort of a system is not only unfair, but it is unconstitutional. The United States has long adopted the idea that corporations are “persons” under the constitution, and for that reason, the constitution bestows equal protection guarantees upon them. Corporations have rarely challenged the FCC’s regulations on constitutional grounds because they would probably be valid if examined under rational basis review. Until now, the FCC could hide behind technological distinctions and antitrust concepts to protect its regulations from equal protection claims. However, with the convergence of markets, a valid argument could be made challenging the government’s interest in its regulations. If a corporation makes that claim, the courts will have to decide whether these regulatory distinctions further a legitimate

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government interest. If the courts take a closer look, they may realize that the distinctions are arbitrary and capricious and mandate regulatory parity on equal protection grounds.

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INTRODUCTION

Over the last two decades, the communications industry has undergone rapid technological advancements leading to the convergence of services.² New technological capabilities allow companies to compete in markets which previously had no competition.³ While potentially beneficial to the consumer, convergence within the communications industry has created a regulatory nightmare.⁴ The development of the Internet has facilitated a means by which cable companies and providers of other Internet Protocol (IP)-enabled services can offer telephone services through broadband connections using Voice over Internet Protocol (VoIP or Voice over IP) technology.⁵ Conversely, telephone companies now compete against cable companies in the broadband market by offering Digital Subscriber Line (DSL) broadband services.⁶ Furthermore, in the world of television, cable operators,⁷ Direct Broadcast Satellite

² Compare Alexandra M. Wilson, *Harmonizing Regulation by Promoting Facilities-Based Competition*, 8 GEO. MASON L. REV. 729, 729 (2000) (defining the word convergence in the public policy realm as the exploitation of technological advancements by service providers allowing them to enter new lines of business), with John F. Gibbs & Todd G. Hartman, *The Regulation of Convergence Technologies: An Argument for Technologically Sensitive Regulation*, 27 WM. MITCHELL L. REV. 2193, 2199 (2001) (clarifying the definition of convergence by stating that “convergence consists simply of the ability to provide a service using a technology different from that currently providing the same service”). Throughout this Comment, both definitions of convergence will be used interchangeably.

³ See, e.g., Antoinette C. Bush, John Beahn & Mick Tuesley, *Convergence and Competition – At Last*, 57 FED. COMM. L.J. 183, 183 (2005) (discussing the extensive investments of communications companies that will enable them to compete in the converging marketplaces); David Cohen & Edward D. Kania, *The Future of the Communications Industry: New Products, New Services, and Need for New Regulatory Paradigms*, 13 COMMLAW CONSPECTUS 1, 4-5 (2005) (mentioning that Cox Communications, traditionally a cable company, is now the nation's eleventh largest phone provider).

⁴ See Bush et al., *supra* note 2, at 183-84 (declaring that while convergence benefits consumers by decreasing prices, improving technologies, and increasing availability of services, it creates difficulties when trying to keep regulatory policies up-to-date).

⁵ See Rob Frieden, *The FCC's Name Game: How Shifting Regulatory Classifications Affect Competition*, 19 BERKELEY TECH. L.J. 1275, 1279 (2004) (noting the functional equivalency of the Voice over IP services and traditional dial-up services).

⁶ See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 967 (2005) (comparing the technologies used to transmit data via cable modem services with those used to by telephone companies offering DSL services).

⁷ See generally Telecommunications Act of 1996, 47 U.S.C. §§ 522(5)-(6) (1996) (defining a cable operator as the provider of “the one-way transmission to subscribers of video programming, or other programming service, and

(DBS) providers,⁸ and broadcasters⁹ all face different regulations despite offering similar content.¹⁰

Historically, a Congressional regulatory framework using technology-based classifications guided the Federal Communications Commission (FCC) in developing communications policy.¹¹ As convergence began to speed up in the 1990s, it became clear that the old statutory framework for communications regulation was outdated, so Congress amended the Communications Act of 1934 (1934 Act) with the Telecommunications Act of 1996 (1996 Act).¹² However, rather than solving convergence problems, the 1996 Act created further confusion, leading to constant legal battles between communications companies.¹³ The FCC has attempted to resolve the confusion by issuing declaratory rulings and orders that clarify the Congressional classifications in the 1996 Act.¹⁴ While the FCC's incremental policymaking is

subscribers interaction, if any, which is required for the selection of use of such video programming or other programming service”).

⁸ See generally Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 335(b)(5)(A)(ii) (1992) (defining a DBS service provider as “any distributor who controls a minimum number of channels . . . using a Ku-band fixed service satellite system for the provision of video programming directly to the home”).

⁹ See generally Telecommunications Act of 1996, 47 U.S.C. § 153(33) (1997) (defining a broadcast station as radio station that is equipped to engage in the transmission by radio of writing, signs, signals, pictures, and sounds intended to be received by the public).

¹⁰ See Sherille Ismail, *Parity Rules: Mapping Regulatory Treatment of Similar Services*, 56 FED. COMM. L.J. 447, 474 (2004) (concluding that broadcasters are regulated much differently than cable and DBS providers, which are still not regulated the same as one another).

¹¹ See Frieden, *supra* note 4, at 1276 (explaining that before the Internet, the Federal Communications Commission could easily classify different communications services into regulatory categories); see also Gibbs & Hartman, *supra* note 1, at 2195-96 (observing that the major struggle regulators face is the ability to classify the different communications services).

¹² See Leonard J. Kennedy & Lori A. Zallaps, *If it Ain't Broke . . . The FCC and Internet Regulation*, 7 COMMLAW CONCEPTS 17, 17 (1999) (articulating that when Congress amended the 1934 Act with the 1996 Act, they intentionally excluded the Internet-based communications services from the regulatory requirements that were imposed on similar communications services with the goal that the market shape the internet); see also Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L.J. 1, 9 (1996) (hypothesizing that the 1996 Act was developed to allow the marketplace to control the direction of communications technology while leaving enough power in the hands of the Federal Communications Commission that it could monitor the industry and regulate where necessary to preserve pro-social cross-subsidies).

¹³ See generally Bush, et al., *supra* note 2, at 185 (mentioning three FCC rulings that were important in establishing the outside markers of VoIP regulation).

¹⁴ See *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecomms. Nor a Telecomms. Service*, 19 F.C.C.R. 3307 (2004) (Mem. Opinion and Order) [hereinafter Pulver Order] (determining that pulver.com's Free World Dialup service is an information service and therefore, it should not be

finally catching up with technology and moving toward regulatory parity between different Internet-based communications services,¹⁵ it must continue to revisit and change other communications policies to ensure equality among competitors throughout the industry.

Rather than determining which regulatory approach the FCC should take when attempting to achieve regulatory parity, this Comment examines the Fifth Amendment implications created by the lack of regulatory parity in some areas of the communications industry. Section I of this Comment discusses the FCC's recent policy decisions that have helped move communications law towards regulatory parity. Section II considers the current discrepancies in communications mass media regulations and elucidates why the lack of regulatory parity prevents an equal playing field for different companies within the industry. Section III examines the notions of regulatory parity under the lens of the corporate personhood doctrine while considering the potential constitutional implications of regulatory disparity. This Comment concludes by arguing that the lack of regulatory parity in communications regulation is a violation of the equal protection guarantees of the Fifth Amendment's Due Process Clause.¹⁶

regulated under the Telecommunications Act of 1996); In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, 19 F.C.C.R. 7457 (2004) (Order) (declaring that AT&T's phone-to-phone Internet protocol phone service is a telecommunications service, which may be charged interstate access fees); In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, 19 F.C.C.R. 22404 (2004) (Mem. Opinion and Order) (preempting a Minnesota regulation by concluding that Vonage's DigitalVoice service is an interstate service, which can only be regulated by the FCC).

¹⁵ See In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853, 14858, para. 5 (2005) (Report and Order and Notice of Proposed Rulemaking) [hereinafter Broadband Access Declaratory Ruling] (classifying all broadband Internet access services as "information services" according to the Telecommunications Act of 1996); see also In the Matter of Universal Service Contribution Methodology, 21 F.C.C.R. 7518, 7536-37, paras. 34-35 (2006) (Report and Order and Notice of Proposed Rulemaking) [hereinafter Universal Service Contribution Methodology Declaratory Ruling] (requiring providers of Voice over Internet Protocol services to contribute to the Universal Service Fund because it is in the public's best interest).

¹⁶ The idea behind this argument is not that all mediums of transporting telecommunications services are the same, but rather that because convergence has created significant intermodal competition with the communications industry, the federal government must regulate the companies equally under the U.S. Constitution.

I. A FEW STEPS IN THE RIGHT DIRECTION: MODERNIZING COMMUNICATIONS REGULATION

Regulatory parity has been an issue since the onset of convergence, which started when the FCC asserted control over the emerging cable television industry in the 1960s.¹⁷ Ironically, parity issues between cable television, DBS, and broadcasting are still unresolved while the FCC has resolved (at least temporarily) many of the Internet-related issues that did not exist until the 1990s.¹⁸

A. The Broadband Internet Debate and Solution

The transition from narrowband (or dial-up) Internet connections to broadband Internet connections, which offer the consumer far greater transmission speeds, was not without controversy.¹⁹ The FCC faced the issue of classifying cable Internet services on a few occasions after the passage of the 1996 Act, but it failed to make an official ruling until 2002.²⁰ In the *Internet Over Cable Declaratory Ruling*, the FCC decided to classify cable Internet services as “information services.”²¹ Under the 1996 Act, “information services” were not subject to

¹⁷ See Ismail, *supra* note 9, at 467 n.99 (citing U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968)) (establishing that the Supreme Court upheld the FCC’s decision to regulate the cable television industry as an ancillary power to its right to regulate broadcasting).

¹⁸ See Anna J. Zicherman, *Developments in Regulating High-Speed Internet Access: Cable Modems, DSL, & Citywide Wi-Fi*, 21 BERKELEY TECH. L.J. 593, 604-05 (2006) (explaining that the regulatory differences regarding the classification of Internet services were resolved by the recent court decision in *Brand X* and the FCC’s *Broadband Access Declaratory Ruling*, leading to a market where multiple broadband service platforms can compete with each other).

¹⁹ See Frieden, *supra* note 4, at 1282 (discussing a series of three court cases in Oregon in which all three courts came to different conclusions about whether a cable broadband Internet connection was subject to the same regulations imposed on telecommunications providers based on the statutory definitions of the 1996 Act).

²⁰ See *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4800-01, para. 2 (2002) (Declaratory Ruling and Notice of Proposed Rulemaking) [hereinafter *Internet Over Cable Declaratory Ruling*] (explaining that the Commission faced a variety of issues concerning the regulation of cable Internet services, but never classified or regulated the service on an industry-wide basis).

²¹ See *Internet Over Cable Declaratory Ruling*, *supra* note 19, at 4801-03, paras. 4-7 (classifying cable Internet service as an “information service” under the 1996 Act in order to promote universal availability of broadband to Americans and encourage investment and innovation by communications companies).

governmental regulation.²² By classifying cable Internet services as “information services” and essentially precluding them from regulation, the FCC set itself up for lawsuits from traditional facilities-based telephony companies whose DSL services were classified as “telecommunications services,” subject to federal regulation, despite offering essentially the same service to consumers.²³ In essence, when trying to create a competitive marketplace for the growth of broadband services across the United States, the FCC gave a competitive advantage to the cable companies by deciding not to regulate their broadband services.²⁴ On the other hand, the FCC continued to regulate broadband services offered by common carriers²⁵ (i.e. telephony companies), requiring them to provide Internet Service Providers (ISPs) access to their telecommunications networks.²⁶

The courts struggled with this differentiation and while some courts gave the FCC deference under *Chevron*,²⁷ others were reluctant to do so.²⁸ In *National Cable & Telecommunications Association v. Brand X Internet Services*, the Supreme Court settled the issues that arose following the *Internet Over Cable Declaratory Ruling* by deciding that the

²² See generally Telecommunications Act of 1996, 47 U.S.C. § 153(20) (1997) (defining an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications”).

²³ See generally *id.* § 153(46) (defining a “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used”); see also

Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 977 (clarifying the difference between a “telecommunications service” and an “information service” as defined in the Telecommunications Act of 1996).

²⁴ See *In the Matter of Deployment of Wireline Services Offering Advanced Telecomms. Capability*, 15 F.C.C.R. 385, 388-89, para. 9 (1999) (Order on Remand) (affirming its decision to classify DSL services as “telecommunications services” subject to regulation under section 251(c)(3) of the 1996 Act).

²⁵ See generally Telecommunications Act of 1996, 47 U.S.C. § 153(10) (1997) (defining common carriers as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy” while exempting radio broadcasters from such classification).

²⁶ See *id.* § 251 (1999) (requiring that incumbent local exchange carriers provide unbundled network elements (UNEs) to any requesting telecommunications carrier for usage on a reasonable basis and at a reasonable cost).

²⁷ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (holding that when an agency ruling is challenged, courts must give deference to the administrative agencies on policies that are reasonable constructions under the power granted to them by Congress).

²⁸ See *Brand X*, 545 U.S. at 981-82 (2005) (explaining that agency inconsistency is not a reason for declining to offer *Chevron* deference and that for this reason, the courts should grant deference to the FCC with regards to the *Internet Over Cable Declaratory Ruling* unless it is unreasonable).

FCC's classification of cable broadband services in the *Internet Over Cable Declaratory Ruling* was a legitimate use of agency power.²⁹ *Brand X* only solved half of the issue, however, because the Court openly refused to address the issue of whether it was fair to regulate cable broadband services differently than DSL broadband services.³⁰

A few months after the Supreme Court decision in *Brand X*, the FCC resolved this controversy by changing the rules related to facilities-based wireline carriers.³¹ In doing so, the FCC created a regulatory framework that not only treated cable providers and DSL providers equally but also paved the way for a freely competitive market that will benefit consumers in the long run.³² While the FCC removed the requirement that facilities-based broadband Internet providers supply ISPs with a transmission medium, the FCC explained that such a requirement would not be necessary in a competitive marketplace because both cable and DSL Internet providers will have incentive to negotiate with ISPs in order to maximize network efficiency.³³ The evidence that some cable companies already made transmission mediums available to ISPs through private carriage agreements, even though they were not required to do so under the older regulatory framework, supports this conclusion.³⁴

²⁹ See *Id.* at 1000-03 (deciding that the FCC was better equipped to handle such complex issues than the courts, and since the FCC had a rational justification for its decision in the *Internet Over Cable Declaratory Ruling*, it should stand).

³⁰ See *Id.* at 1001-02 (failing to address the manner in which the FCC can lawfully regulate DSL because the FCC was planning to revisit the DSL regulations in the near future).

³¹ See Broadband Access Declaratory Ruling, *supra* note 14, at 14858, para. 5 (declaring that all facilities-based broadband services are "information services" as discussed in *Brand X*).

³² See Zichterman, *supra* note 17, at 605 (stating that the FCC recognized that the new policies would put DSL and cable providers on an equal regulatory standing); see also Broadband Access Declaratory Ruling, *supra* note 14, at 14896, para. 80 (arguing that the new regulatory framework will benefit consumers by facilitating the development of advanced broadband Internet access services as well as encouraging technological advancements that will speed up broadband Internet deployment).

³³ See Broadband Access Declaratory Ruling, *supra* note 14, at 14887, para. 64 (claiming that the incentive to spread fixed costs by maximizing network traffic will allow ISPs to negotiate competitive rates regardless of whether there is regulatory protection).

³⁴ See *id.* (noting that these arrangements probably existed because the Supreme Court determined that cable companies were not subject to common carrier regulations if they provided transmission mediums to ISPs).

The manner in which the FCC has dealt with the parity issues surrounding the regulation of broadband Internet services shows that its thinking is beginning to evolve. The FCC appears to understand that disparity in regulating similar services is not fair and may be susceptible to attack as being arbitrary or capricious. Another example of this evolution in the FCC's approach to regulation is evident in its handling of VoIP regulations concerning contribution to the Universal Service Fund (USF).

B. VoIP Providers' Contribution to the Universal Service Fund

Since its creation in 1995, Voice over Internet Protocol has benefited from the confusion of regulatory classifications and developed as a relatively unregulated technology.³⁵ The FCC has yet to determine whether paid VoIP services are “telecommunications services” or “information services” under the 1996 Act.³⁶ While VoIP certainly uses different technology than traditional phone services, it now offers essentially the same service to its customers—and usually at a lower price.³⁷ VoIP service is more convenient than traditional telephony services because it can be accessed anywhere in the world where a broadband connection is available.³⁸

³⁵ See Clinton H. Brannon, *Reach Out and Tax Someone: What Does the Future Hold for the Taxation and Regulation of Voice Over Internet Protocol Telephone Services?*, 57 ALA. L. REV. 173, 175 (2005) (indicating that when VoIP was first released it was a much different service than it is today in terms of overall quality and was generally only used by computer savvy people); see also Cherie R. Kiser & Angela F. Collins, *Regulation on the Horizon: Are Regulators Poised to Address the Status of IP Telephony?*, 1 COMMLAW CONSPECTUS 19, 19 (2003) (comparing the regulations of VoIP providers to those of traditional circuit-switched telephony providers).

³⁶ See Universal Service Contribution Methodology Declaratory Ruling, *supra* note 14, at 7537, para. 35 (determining that VoIP providers are providers of “interstate telecommunications,” but failing to classify VoIP services as “telecommunications services”). *But see* Pulver Order, *supra* note 13, at 3312-13, para. 10 (classifying pulver.com's Free World Dialup service as an information service because it does not offer telecommunications, nor does it charge for its service, both of which are required to be classified as a telecommunication service).

³⁷ See Brannon, *supra* note 34, at 174, 176 (differentiating VoIP telephony services from a traditional circuit-switched telephone services by explaining that with VoIP there is no dedicated connection between parties because the information being sent over the Internet can be split up and sent down different pathways to its destination where it is eventually reassembled); see also Frieden, *supra* note 4, at 1311 (warning that if the FCC classified VoIP as an “information service,” VoIP providers would have a substantial competitive advantage based on the financial savings of not being required to pay for the same regulations as conventional telecommunications providers).

³⁸ See Brannon, *supra* note 34, at 176 (clarifying that traditional phone lines associate a person's phone number with a physical location where VoIP uses an IP address to locate a caller, allowing a VoIP provider to offer mobility to its customers that is not available to users of traditional circuit-switched phone lines).

Additionally, VoIP offers a variety of other services that are not generally available to customers using traditional phone lines, such as the ability to forward calls to three different locations at the same time and the ability to send and receive voicemail messages via email.³⁹ However, despite the numerous advantages discussed above, VoIP is also much less reliable than traditional telephone service⁴⁰ and the enhanced 911 (E911) service is much less sophisticated because until recently VoIP service providers were not required to offer any E911 services at all.⁴¹

Congress first officially codified the Universal Service Fund in the 1996 Act to help fund the deployment of new telecommunications technologies to areas that lacked the financial resources to give service providers incentive to expand on their own.⁴² The Universal Service Administrative Company (USAC) collects USF contributions from providers of telecommunications services as a percentage of their end-user telecommunications revenues, which is determined by multiplying these revenues with the universal service contribution factor.⁴³ Although the FCC has been timid in deciding how to classify VoIP services (largely due to its conflicting views about wanting to keep the Internet unregulated and wanting to

³⁹ See *id.* at 176-77 (quoting a communications industry representative who was addressing Congress about the consumer benefits of VoIP).

⁴⁰ See *id.* at 177 (enunciating that VoIP telephony service is dependent on a broadband connection and will not work if that connection cannot be established or if the power is out, but noting that a traditional phone service has independent power source, which will allow a customer to make calls even during a power outage); see also *id.* (raising the security concerns related to the susceptibility to hackers that VoIP users must consider).

⁴¹ See In the Matters of IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, 20 F.C.C.R. 10245, 10246 (2005) (First Report and Order and Notice of Proposed Rulemaking) (requiring providers of interconnected VoIP service to supply E911 capabilities to all of their customers as a standard feature that will work regardless of the customers call location); see also Douglas C. Sicker & Lisa Blumensaadt, *The Layered Regulatory Model Debate: Misunderstanding the Layered Model(s)*, 4 J. ON TELECOMM. & HIGH TECH. L. 299, 315 (2006) (observing that VoIP in its current state is not a replacement for traditional circuit-switched phone services because of its reliability and service quality issues as well as the fact that E911 services are only now being adopted by VoIP providers).

⁴² See Telecommunications Act of 1996, 47 U.S.C. § 254 (2001) (listing the principles behind which the USF was to be created and administered); see also Kiser & Collins, *supra* note 34, at 24-25 (specifying that the USF was created to pay for the expansion of telecommunications services to schools, libraries, rural communities, and other locations where there would be no incentive for providers to develop because the costs would be too high). *But see* Cohen & Kania, *supra* note 2, at 2 (recognizing that the goal of making telecommunications service available to all Americans at a reasonable price was first codified in the 1934 Act).

⁴³ See Universal Service Contribution Methodology Declaratory Ruling, *supra* note 14, at 7522, n.23, 7521-22 paras. 6-7 (acknowledging that the USAC is responsible for collecting USF contributions and properly disbursing them).

regulate technologies using service-based classifications), it has made strides in leveling the playing field between traditional telecommunications providers and VoIP providers by asserting the authority necessary to require VoIP providers to contribute to the USF.⁴⁴

The need for VoIP providers to contribute to the Universal Service Fund became necessary because of the growth of wireless and VoIP services in the last five years, which has directly correlated with a decrease in revenues generated by long-distance calling on traditional telephone networks.⁴⁵ With a shrinking contribution base and a growing fund, the contribution factor has increased substantially, placing a significant burden on those who contribute to the fund.⁴⁶ In the *Universal Service Contribution Methodology Declaratory Ruling*, the FCC required VoIP providers to contribute to the USF for the first time, noting that principles of competitive neutrality played a role in its decision-making.⁴⁷ According to the FCC, “[c]ompetitive neutrality means that ‘universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.’”⁴⁸ The FCC further explained that it did not want USF “contribution obligations to shape decisions regarding the technology that interconnected VoIP providers use to offer voice services to customers or to create opportunities for regulatory

⁴⁴ See *id.* at 7537, para. 35 (realizing that the regulation of VoIP services is necessary to promote the advancement of universal service, which is in the public’s best interest).

⁴⁵ See *id.* at 7520, para. 3 (detailing the growth of wireless and VoIP customers in recent years as follows: “from December 2000 to December 2004, the number of wireless subscribers grew from approximately 101 million customers to approximately 181 million Similarly, the number of VoIP subscribers has grown from about 150 thousand at the end of 2003 to 4.2 million at the end of 2005”). But see Kennedy & Zallaps, *supra* note 11, at 20 (questioning the regulation of phone-to-phone IP telephony for universal service purposes by declaring that the public policy goal of universal services is outweighed by the necessity to keep new and innovative information services free of taxation).

⁴⁶ See *Universal Service Contribution Methodology Declaratory Ruling*, *supra* note 14, at 7528, para. 18 (emphasizing that the universal service contribution factor has grown from 5.9 percent in the first quarter of 2000 to 10.9 percent in the second quarter of 2006).

⁴⁷ See *id.* at 7541, para. 44 (rationalizing its decision on the premise that it will prevent carriers with universal service obligations from competing with those who are not required to contribute to the USF).

⁴⁸ *Id.*

arbitrage.”⁴⁹

The FCC’s new approach to regulating, which incorporates the ideas of competitive neutrality into its decision-making, is a step in the right direction. The problem, however, is that by failing to modernize its regulatory approach at the onset of convergence, the FCC is now trying to catch up with continually changing technologies, which is a far more difficult task than if they had properly regulated these technologies in the first place.⁵⁰ In the mean time, there are still some companies benefiting from the competitive advantage they receive due to regulatory differences and loopholes that currently exist.

II. ROOM FOR IMPROVEMENT: A LOOK AT THE PARITY ISSUES SURROUNDING MASS MEDIA

While there are parity issues surrounding many types of communications regulations, this section focuses on some of the issues that exist between the different mediums of mass media. Notably, many of the parity issues facing mass media regulations are the oldest because convergence in television services existed long before the Internet.⁵¹

A. Regulatory Disaster: Broadcast, Cable and DBS Television Regulation

While there are a variety of parity issues with mass media regulation, this section focuses on only two: barriers to entry and content regulation. The cost of entry to the provider for their medium of transmission is a major concern because broadcast, cable and DBS providers all face

⁴⁹ *Id.*

⁵⁰ See Barbara A. Cherry, Utilizing “Essentiality of Access” Analysis to Mitigate Risky, Costly, and Untimely Government Interventions in Converging Telecommunications Technologies and Markets, 11 COMMLAW CONSPECTUS 251, 251 (2003) (articulating that converging communications markets makes it much more difficult to develop, evaluate, and implement new government regulations without having adverse unintended consequences).

⁵¹ See Gibbs & Hartman, *supra* note 1, at 2199 (arguing that television technologies have faced more competition due to technological convergence than any other industry).

different barriers.⁵² In terms of content issues, the FCC regulates cable and DBS providers in a similar manner, while broadcasters face many unique regulations.⁵³

1. Barriers to Entry

According to the 1934 Act, as amended by subsequent acts of Congress, television broadcasters are “public trustees,” and for this reason, the FCC has granted them free use of spectrum so long as they meet certain standards designed to promote the public interest (known as the “public trust doctrine”).⁵⁴ Recently, the development of new digital television (DTV) technologies⁵⁵ and the approval of broadcast license auctions have changed the arena of free spectrum usage, but traditional licensed broadcast stations still enjoy the use of their old spectrum without paying.⁵⁶ Furthermore, since the 1996 Act requires the FCC to renew current broadcast licenses in most situations, these stations will continue to have this advantage.⁵⁷ Since the public trust doctrine has dwindled in recent years,⁵⁸ many believe that the traditional licensed

⁵² See Ismail, *supra* note 9, at 465-66, 476 (noting that traditionally broadcasters are given spectrum licenses free of charge, cable providers are required to pay for their entry into a market with franchising fees, and DBS providers are free of franchising fees, but do often need to pay for their spectrum usage through government auctions); see also David Seth Zlotlow, *Broadcast License Auctions and the Demise of Public Interest Regulation*, 92 CAL. L. REV. 885, 885, 891-92 (2004) (condemning the traditional approach of granting free spectrum use because it allowed for “political favoritism and cronyism” and explaining that the new approach of broadcast license auctions eliminates these issues).

⁵³ See Gibbs & Hartman, *supra* note 1, at 2203 (referring to the First Amendment problems the FCC would face if it tried to place more content restrictions on cable companies because the justification for content restrictions on broadcasters is spectrum scarcity).

⁵⁴ See Daniel P. Graham, *Public interest Regulations in the Digital Age*, 11 COMMLAW CONSPECTUS 97, 97 (2002) (mentioning the difficulties the FCC has faced when trying to define and enforce a broadcasters duty to the public).

⁵⁵ See *id.* at 101-03 (observing the new capabilities that DTV provides broadcasters, including sending multiple television signals over a single 6 MHz channel and noting that the FCC has decided to collect 5% of gross revenues received from spectrum uses for ancillary purposes).

⁵⁶ See Telecommunications Act of 1996, 47 U.S.C. § 309(j) (2006) (allowing the FCC to auction digital broadcast licenses, but exempting current license holders from participation in such auctions); see also Zlotlow, *supra* note 51, at 896 (clarifying the language of the 1996 Act by noting that it appears to mandate, not just encourage, the use of broadband auctions for future dispersal of spectrum).

⁵⁷ See Telecommunications Act of 1996, 47 U.S.C. § 309(k) (2006) (establishing that the FCC must renew a broadcasters license if the broadcaster submits an application for renewal and the FCC finds that the broadcaster has fulfilled its obligation to the public without any violations of the Act).

⁵⁸ See Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and redemption of American Broadcast Television Regulation*, 6 MINN. J. L. SCI. & TECH. 1, 30 (2004) (observing that the FCC has not revoked a broadcaster license in half a century even though there have been stations who applied for license renewals that

broadcast stations are getting a considerable competitive advantage and maybe even a windfall for their free access to the spectrum.⁵⁹ Similarly, DBS providers benefited from free use of spectrum when they first received licenses, but now only receive spectrum through auctions.⁶⁰

While these new regulatory approaches eliminated some of the competitive advantage bestowed upon traditional licensed stations and DBS providers, the new auctioned stations still have an advantage over cable operators because they are only required to pay for their spectrum one time.⁶¹ Cable providers, on the other hand, must negotiate franchise agreements with local franchising authorities (LFAs), which often include monthly fees for offering their service and equipment rentals.⁶²

The FCC needs to fix this regulatory disparity because it prevents fair competition between the different television services by giving providers different operational costs (it is particularly advantageous to those broadcasters who did not pay for their spectrum in the first place).⁶³

2. Content Regulations

Despite the obvious First Amendment concerns behind restricting content, and placing

failed to provide local news or public affairs programming); *see also* Charles W. Logan Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1727-28 (1997) (explaining that when Congress amended the Communications Act of 1934 with the 1996 Act, it eliminated the opportunity for competitors of broadcasters to submit competing applications to a renewal request).

⁵⁹ *See* Graham, *supra* note 53, at 112 (quoting the former Senate Majority Leader, Robert J. Dole, in estimating that the revenues lost by not requiring incumbent broadcasters to pay for DTV licenses could be up to 70 billion dollars).

⁶⁰ *See* In the Matter of Auction of Direct Broadcast Satellite Licenses, 19 F.C.C.R. 820, 821-22 (2004) (Order) (announcing that when DBS spectrum was first granted in 1982, the Commission set “interim” rules for its regulation, which were later modified in 1995 when the FCC was given the power to auction DBS spectrum).

⁶¹ *See* Ismail, *supra* note 9, at 476 (raising the difference in entry requirements for cable and DBS providers by highlighting the fact that DBS providers are not required to pay franchising fees once they have a spectrum license).

⁶² *See id.* at 467-68 (clarifying that while LFAs issue franchises, they are prevented from “unreasonably refus[ing] to renew franchises, collect[ing] excessive franchise fees, or grant[ing] exclusive franchises” by federal laws); *see also* Gibbs & Hartman, *supra* note 1, at 2200 (reconciling the difference in regulations to the fact that when cable was developed it was a local service that was not federally regulated).

⁶³ *But see* Jennifer A. Manner, *Emerging Communications Technologies: Wireless Developments and Beyond* 3 J. ON TELECOMM. & HIGH TECH. L. 417, 419 (2005) (arguing that while regulatory parity is a good long-term goal, placing less regulatory burdens on new technologies is essential to their development).

other requirements on providers of televisions services, the Supreme Court has upheld such public trust regulations because of spectrum scarcity.⁶⁴ The Radio Act of 1927 (1927 Act) is responsible for officially establishing the public trust doctrine.⁶⁵ When the FCC replaced the Federal Radio Commission in the 1934 Act, the new statutory language further codified the public trust doctrine by requiring the FCC to issue licenses in accordance with the public's interest.⁶⁶ From the passage of the 1934 Act to present, the concept of the public trust doctrine has never really gained much support, leading mainly to content restrictions on broadcasters.⁶⁷ Originally, content restrictions only applied to broadcasters; however, in some cases, content restrictions now apply to DBS and cable providers.⁶⁸ Nonetheless, there are still many discrepancies in the types of restrictions placed on each type of service.⁶⁹

To meet their public trustee requirements, broadcasters must offer at least three hours of programming per week that serves the informational needs of children under the age of sixteen and sell airtime to political candidates. They also must refrain from broadcasting obscene programming at all times and indecent material between 6 a.m. and 10 p.m.⁷⁰ Even though the FCC limits DBS content by requiring providers to allocate four percent of their airtime to non-commercial educational programming and by forcing them to sell "reasonable access" to

⁶⁴ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400-01 (1969) (holding that the FCC could place public interest standards on broadcasters in exchange for their spectrum usage because there is a limited amount of spectrum available).

⁶⁵ See Varona, *supra* note 57, at 14 (discussing the confusion caused by the vagueness of the 1927 Act, which empowered the Federal Radio Commission to restrict the usage of spectrum licenses for public interest purposes).

⁶⁶ See *id.* at 16 (noting that the 1934 Act also stated that all radio spectrum was publicly owned).

⁶⁷ See *id.* at 20-40 (detailing the history of the public trust doctrine since the passage of the 1934 Act).

⁶⁸ See Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 335(a) (1992) (mandating the FCC to impose public interest requirements on DBS service providers). *But see* Logan, *supra* note 57, at 1733-34 (bringing attention to the fact that when *Red Lion* was applied to DBS, the dissenters thought that the *Red Lion* analysis in itself was losing credibility and should not have been extended to another service medium).

⁶⁹ See generally Gibbs & Hartman, *supra* note 1, at 2205-06 (claiming that regulatory parity is not necessary to prevent market dominance by a new technology, as is exemplified by the growth in the number of broadcasters since the eighties).

⁷⁰ See generally Ismail, *supra* note 9, at 469-70 (detailing the manner in which the FCC determines whether the broadcasters are following the regulations).

political candidates, these requirements are far less severe than those that broadcasters must follow.⁷¹ Lastly, cable providers are not limited in their content specifically, but are required to limit commercials during children's programming (if they decide to offer children's programming), and they may not refuse to sell airtime to any opponents of a political candidate to whom they voluntarily decide to sell airtime.⁷²

Although the differences in content regulation between cable providers and DBS providers or broadcasters may be reconcilable in some cases because cable companies are not public trustees, there is no excuse to have disparity between traditional licensed broadcast stations and the new auctioned stations.⁷³

B. Auctioning: Creating an Inherent Disadvantage

As noted above, the new trend in both broadcasting and DBS is to charge for spectrum usage through competitive auctions.⁷⁴ Though auctions may be a good way to earn revenues, which is in the public's interest, they create a significant disparity between traditional licensed broadcast stations that use public spectrum at no cost and the new auctioned stations that must pay for their spectrum.⁷⁵ While payment for spectrum rights is not something that is entirely new to the system because traditional licensed broadcast stations' licenses were freely alienable,

⁷¹ See *id.* at 470-72 (asserting that DBS providers are also subject to a "carry one, carry all" requirement with regard to retransmitting local broadcasts).

⁷² See *id.* (discussing the "must-carry" requirements that cable operators face with regard to carrying broadcaster programming).

⁷³ See, e.g., Logan, *supra* note 57, at 1734 (contending that when DBS providers or broadcasters bid on a spectrum license, they can discount their bid on the basis that they know about the public interest requirements in advance).

⁷⁴ See generally Zlotlow, *supra* note 51, at 899 (describing the specific guidelines that the FCC places on the winners of broadcast license auctions).

⁷⁵ But see Graham, *supra* note 53, at 113 (relaying the argument of the "old" broadcasters that they should not have to pay for their new DTV licenses through auctions because they are already under vast financial burdens in their attempt to upgrade equipment for the public's benefit).

it adds to the problem rather than solves it.⁷⁶ The government's desire to charge for spectrum is not a problem in and of itself, but the fact that the government chose not to regulate traditional licensed stations and the new auctioned stations equally when distributing new DTV licenses is troubling.⁷⁷

III. CONSTITUTIONAL IMPLICATIONS OF REGULATORY DISPARITY

Dating back to 1886, society has recognized the concept of corporate personhood, giving corporations many of the same constitutional protections we enjoy as citizens. This includes the right to equal protection under the law.⁷⁸ The basic premise of corporate personhood is that when interpreting statutes, the word "person" should extend to include corporations wherever reasonable.⁷⁹ It is important to note that this classification is limited to the word "person" and courts have failed to create a similar legal fiction surrounding the word "citizen" as used in the Privileges and Immunities Clause of the Fourteenth Amendment.⁸⁰

If we consider corporations as "persons" protected under the Equal Protection clause, how is it that we do not treat corporations equally when we regulate communications

⁷⁶ See Zlotlow, *supra* note 51, at 894 (arguing that if the profits earned from free spectrum usage was not a windfall for broadcasters, it became one when they sold the license that they acquired for free).

⁷⁷ See Graham, *supra* note 53, at 114 (rebutting the government's assertion that granting free DTV licenses served the public interest by facilitating improvements in signal quality and expanded programming by arguing that non-broadcast video providers were already developing this technology).

⁷⁸ See *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886) (declaring that corporations are persons within the meaning of the Fourteenth Amendment); see also *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954) (ruling that the language of the Fourteenth Amendment Equal Protection Clause can be incorporated into the Fifth Amendment's Due Process Clause in cases of discrimination). See generally David Graver, Comment, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. CHI. L. SCH. ROUNDTABLE 235 (1999) (discussing the history of corporate personhood).

⁷⁹ See Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 563 (1987) (suggesting that while the doctrine of corporate personhood is based on a legal fiction, it has been widely accepted for some time by the American legal system).

⁸⁰ See *Paul v. Va.*, 75 U.S. 168, 177 (1868) ("The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed.").

technologies?⁸¹ The answer to this question has two parts: (1) it is easy to use technology-based regulatory classifications to justify discrepancies in regulations⁸² and (2) to promote development of competitors in previously monopolized industries.⁸³

The two justifications discussed above may legitimately protect the FCC from constitutional challenges to its regulations, but if the courts begin to recognize the regulatory arbitrage⁸⁴ occurring in the communications industry, they may decide to grant disadvantaged companies relief from unfair or other “legacy” regulations.⁸⁵ Our society was founded on the notions of fairness and equality, so it is hard to believe that the courts will ignore the issues of regulatory disparity forever.⁸⁶

As it stands, the disparity in our communications regulatory system promotes competitive inequality by allowing companies offering converging technologies to gain competitive advantages through loopholes in the system. This is a problem that must be resolved.⁸⁷ If the FCC is not going to level the playing field, the courts have the ability to do so on constitutional

⁸¹ See generally Robert S. Metzger & Benjamin P. Broderick, *Communications Convergence*, THE COMPUTER & INTERNET LAWYER, Oct. 2001, at 1 (urging communications companies to anticipate changes in regulation of traditionally distinctly regulated communications services).

⁸² See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000-01 (2005) (justifying the historical differential treatment of facilities-based carriers on the notion that telephone networks were the primary, if not exclusive means by which information service providers gained access to their customers).

⁸³ See Cherry, *supra* note 49, at 251 (asserting that traditionally telecommunications regulations were designed to meet public policy goals created by differentiated industries that relied on monopolies to provide service); Cohen & Kania, *supra* note 2, at 2 (enunciating that the FCC initially stabilized the telephone industry by imposing regulations on the phone companies that regulated market entry and exit, restricted service offerings, and required unbundled network access for competitors); see also Manner, *supra* note 62, at 419 (arguing that short-term regulatory disparity is essential for the development of effective competitors).

⁸⁴ See Rob Frieden, *Wither Convergence: Legal, Regulatory, and Trade Opportunism in Telecommunications*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 171, 184 (2002) (defining regulatory arbitrage as the exploitation of legislative or regulatory classifications in an attempt to secure a financial or competitive advantage).

⁸⁵ See Frieden, *supra* note 4, at 1277-78 (discussing how the FCC's regulatory system imposes “legacy” regulations on any technology that can fit under the definitions forming those regulations, even if the competitive conditions have changed, and regardless of whether those regulations should exist).

⁸⁶ See Ismail, *supra* note 9, at 448 (“Regulatory parity arguments are hard to ignore because they are grounded in notions of fairness and equality that are fundamental values in our society.”).

⁸⁷ See, e.g., Douglas C. Sicker, *The End of Federalism in Telecommunication Regulations?*, 3 NW. J. TECH. & INTELL. PROP. 130, 149-50 (2005) (indicating that regulatory policies which differentiate between two services that offer essentially the same end product merely because the medium of technology over which they are offered is different are not sound or rational policies).

grounds.⁸⁸

The courts have flirted with the idea of using the Equal Protection Clause to resolve issues of unequal taxation of companies, but have not yet needed to use these equal protection claims as the deciding factor in any case.⁸⁹ The most likely explanation for the lack of court cases surrounding the issue relates to the difficulty of making such a claim. However, there have been occasions where the companies have raised equal protection claims in FCC hearings.⁹⁰ If a court were willing to look past the smokescreen of technology-based regulatory classifications, the parties bringing the constitutional claim would need to provide enough information to convince a court that the development of competition in previously monopolized markets does not pass the rational relationship test⁹¹—which is a difficult standard to meet.⁹² Once a court is willing to dig deeper into the regulatory frameworks of the communications industry, it will realize that the distinctions the FCC makes regarding infrastructure and technology do not justify

⁸⁸ See generally Rob Frieden, *Regulatory Opportunism in Telecommunications: The Unlevel Competitive Playing Field*, 10 COMMLAW CONSPECTUS 81, 81 (2001) (recognizing that communications companies abuse the current regulatory framework by offering unregulated services that are functionally equivalent to those which are highly regulated and provided by their competitors).

⁸⁹ See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 251 (1936) (avoiding an equal protection discussion because the Court could decide the case on the merits of the First Amendment claims). Although the Court did not specifically rule on the equal protection claims in this case, the fact that it was willing to do so, if necessary, shows that the law allows courts to hear such claims. There is no doubt that the courts are timid when facing issues that involve corporate personhood and equal protection, but when they finally decide to hear such an issue, the disparities in communications regulations will certainly be considered suspect.

⁹⁰ See, e.g., *In the Matter of Market Entry and Regulation of Foreign-affiliated Entities*, 11 F.C.C.R. 3873, 3912-14, paras. 104-06 (1995) (Report and Order) (disregarding a claim made by a party that the disparate treatment by the FCC was “arbitrary and irrational” and in violation of the Equal Protection Clause).

⁹¹ But see Kathleen Abernathy, Commissioner, Fed. Commc’ns Comm’n, *Thoughts on the Proper Role of Federal Regulation in the Age of Digital Convergence* (June 21, 2005) (transcript available at 2005 FCC LEXIS 3489) (raising attention to her recommendation that the government should apply a “strict scrutiny” test to proposed regulations, so that only regulations that promote a compelling government interest and are narrowly tailored will pass scrutiny). See generally *In the Matter of Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, 15 F.C.C.R. 25020, 25041-42, paras. 45-46 (2000) (Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order) (explaining that unless there is racial or gender classifications, an FCC regulation should be evaluated using rational basis review, which requires that the party show that the government action is so unrelated to the achievement of a legitimate government purpose that it should be deemed irrational).

⁹² See Zlotlow, *supra* note 51, at 916 (admitting that all the FCC must do to justify differential regulations is show that they are necessary to serve a compelling governmental interest and that the regulations scope is limited in a reasonable manner).

the parity in regulations, nor do they further a legitimate government interest.

CONCLUSION

Recent policy decisions made by the FCC appear to show that it may be beginning to recognize that its past methods of regulating communications technologies were unfair to competitors. It appears as though the FCC founded its decision to change its regulatory policy on its desire to promote competition within the communications industry but not on its understanding of the constitution.⁹³ However, what this Comment has tried to show is that the FCC has taken some steps in the right direction regardless of their reasoning. Furthermore, the examples of regulatory disparity in the mass media world that this comment highlighted exist in all aspects of communications policy.⁹⁴ The goal for the future should be to fix current regulatory inconsistencies and develop a regulatory policy that examines potential future issues of convergence.⁹⁵ This would protect the constitutional rights of corporations while promoting a competitive marketplace.⁹⁶ The FCC must realize that a new regulatory framework is not just ideal⁹⁷ but that it is necessary under the equal protection guarantees of the Fifth Amendment's Due Process Clause.

⁹³ See Abernathy, *supra* note 90 (advancing that the price competition, availability, and innovation in the wireless industry is the result of regulatory restraint by the FCC, which has benefited the consumers in the end).

⁹⁴ See, e.g., Cohen & Kania, *supra* note 2, at 5 (noting that incumbent wireline carriers are still required to compensate other carriers for traffic that terminates on their network while VoIP providers are not always constrained by rules requiring intercarrier compensation).

⁹⁵ One potential issue that the FCC may face in the future is the regulation of IP-based television, which will be able to compete with cable, DBS and broadcasters by using the Internet as a means of transmitting television data.

⁹⁶ See generally Cohen & Kania, *supra* note 2, at 5 (conceding that there is considerable competition in the communications marketplace but asserting that the regulatory disparity disadvantages incumbent carriers, which restrains potential innovation).

⁹⁷ See Deborah T. Tate, Commissioner, Fed. Commc'ns Comm'n, Closing Remarks at Accenture Global Convergence Forum (May 12, 2006) (transcript available at 2006 FCC Lexis 2920) (recognizing that regulations need to guarantee competition and not give preference to different technologies).