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Federal Communications Commission Reforms Needed to Promote the Rule of Law

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Abstract

A bedrock element of the American constitutional system is the principle of the rule of law, which holds that the law is superior to and therefore binds the government and all of its officials. The rule of law principle recognizes the obligation of the government to limit itself by taking actions that are clear and predictable and avoiding delay, consistent with constitutional and other legal obligations. Recently, however, the Federal Communications Commission has taken a number of actions that are inconsistent with the rule of law principle. By ignoring the fundamental duty that the government owes its citizens, the FCC's actions are undermining public accountability for federal agencies. Accordingly, Congress should weigh major statutory reforms to rein in the FCC—reforms that will advance the rule of law and promote America's economic well-being.

The U.S. Federal Communications Commission (FCC) is a powerful, independent federal agency that "regulates interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and U.S. territories."[1] In recent years, the FCC has been criticized both on substantive policy grounds (for example, because of its efforts to regulate the terms of Internet service and broadband communications rates)[2] and on process-based grounds. In the latter instance, critics have charged the agency with failing to inform the public adequately of its regulatory actions or explain to affected parties the standards to which they are being subjected.

These failures not only impose potentially large costs on the private sector, but also undermine the rule of law by reducing the

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Key Points

- The rule of law principle recognizes the government's obligation to limit itself by taking actions that are clear and predictable and avoiding delay, consistent with constitutional and other legal obligations.
- This principle is a bedrock element of the American constitutional system, and agency actions that give it short shrift undermine the legitimacy of popular government.
- In recent years, the Federal Communications Commission has failed to adhere to rule of law principles in a number of instances including, but not limited to, its approval of mergers, enforcement practices, transparency during hearings, and regulatory oversight.
- Internal agency reforms might be somewhat helpful in rectifying this situation, but they inevitably would be limited in scope and inherently malleable as FCC personnel changes.
- Congress should weigh major statutory reforms to rein in the FCC—reforms that will advance the rule of law and promote American economic well-being.

accountability of the government's representatives to the people they serve. Accordingly, Congress and the FCC should implement substantial regulatory reforms to strengthen the commission's adherence to rule of law principles.

Why Agencies Should Adhere to the Rule of Law

The American concept of the rule of law[3] is embodied in the Due Process Clause of the Fifth Amendment to the U.S. Constitution[4] and in the constitutional principles "of separation of powers, an independent judiciary, a government under law, and equality of all before the law."[5] It holds that the executive must comply with the law because ours is "a government of laws, and not of men,"[6] and because, as Justice Anthony Kennedy put it in a 2006 address to the American Bar Association, "the Law is superior to, and thus binds, the government and all its officials."[7] More specifically, and consistent with these broader formulations, the great legal philosopher Friedrich Hayek wrote that:

> [The rule of law] means the government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to see with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[8]

In other words, as former Boston University Law School Dean Ronald Cass has noted, the rule of law involves "a system of binding rules" that have been adopted and applied by a valid government authority and that embody "clarity, predictability, and equal applicability."[9]

Practices employed by government agencies that undermine the rule of law ignore a fundamental duty that the government owes its citizens and thereby undermine America's constitutional system. Federal courts, however, will not review a federal administrative action unless an actual litigated "case or controversy" is presented to them, and they generally are reluctant to invoke constitutional "first principles" to strike down federal agency initiatives. Judicial intervention is thus a poor check on an agency's tendency to flout the rule of law—or merely give it lip service—by acting in an unpredictable and inequitable manner.

It follows, therefore, that close scrutiny of federal administrative agencies' activities is particularly important in helping to achieve public accountability for an agency's failure to honor the rule of law standard. Applying such scrutiny to the FCC reveals that it does a poor job of adhering to rule of law principles. Accordingly, specific legislative reforms to rectify that shortcoming warrant serious consideration by Congress.

Failure of the FCC to Meet Rule of Law Standards

The FCC has fallen short in meeting rule of law standards, both in its procedural practices and in various substantive actions that it has taken.

Process Problems. Opaque procedures that generate uncertainties regarding agency plans undermine the clarity and predictability of agency actions and thereby undermine the effectiveness of rule of law safeguards. Process-based reforms designed to deal with these problems, to the extent that they succeed, would strengthen the rule of law.

In 2013, the FCC launched a "process reform initiative" in response to complaints about delays, lack of transparency, and inefficiencies in agency proceedings (including "voting on secret texts and delaying the publication of orders"[10]); excessive cost burdens on regulated parties; outdated rules; and problems in agency interactions with the public. In February 2014, the commission issued a *Report on FCC Process Reform*[11] that outlined how the agency could conduct its business more efficiently and effectively; process items before it more quickly and transparently; streamline processes and data collections; eliminate or streamline outdated rules; improve interactions with external stakeholders; and improve internal management.

After receiving public input on the recommendations, FCC Special Counsel Diane Cornell reported that "[t]here's much work to be done, but we've made a lot of progress."[12] Specifically, Cornell cited improved interfaces with the public, the faster disposal of matters within FCC units, a significant reduction in the number of pending matters, increased efficiency in internal operations, and rule and process changes within FCC bureaus and offices to promote more effective regulation.

At present, Congress is considering imposing further procedural reform requirements on the FCC. In November 2015, the House of Representatives

passed H.R. 2583, the FCC Process Reform Act of 2015, which "require[s] the FCC to make certain changes to its rules within one year, with the goal of improving agency processes and making the commission more transparent, efficient, and accountable."[13] Most notably, H.R. 2583 would:

- Set minimum comment periods for rulemaking proceedings;
- Allow time for public comment by eliminating the practice of placing large amounts of information into the record on the last day of the public comment period;
- Increase public transparency of items before the commissioners;
- Require publication of the text of proposed rules; and,
- Set timelines for FCC action on certain types of proceedings.[14]

The somewhat similar Senate version of this legislation, S. 421, was reported out of the Senate Committee on Commerce, Science, and Transportation to the full Senate on April 27, 2016.[15] The outlook for enactment of this legislation remains uncertain.

Despite these initiatives, critical observers remain concerned that efforts to address the FCC's procedural inadequacies will be of minor utility at best.[16] For example, provisions requiring the FCC to publish the text of proposed rules weeks in advance of scheduled votes were removed from H.R. 2583 before its passage. Seton Motley, president of the market-oriented nonprofit organization Less Government, expressed concern that this "weakening [of] the bill allows [the] FCC to operate in an unaccountable manner" and noted that the two Republican FCC commissioners "didn't get the text of the new proposed [Internet] rules until a few hours before the vote."[17] In a similar vein, Heritage Foundation Senior Research Fellow James Gattuso stated that the problem of FCC overreach "requires substantive reforms, and will not be solved by procedural tinkering. I worry that a lot of the reforms [as currently proposed] will simply increase the number of reports and disclosures for the FCC without changing things too much."[18]

Substantive Problems. Substantive agency actions also undermine the rule of law if they fall outside the scope of the agency's constitutional, statutory, or regulatory authority. By their nature, such actions indicate that an agency does not view itself as bound by the law and is unwilling to clarify how the government's coercive powers will be applied. Significant FCC initiatives in recent years have involved such derogations from rule of law principles and have proved to be far more serious than mere procedural imperfections.

Mergers. The FCC's review of proposed mergers of companies subject to its jurisdiction[19] creates serious rule of law problems.[20] FCC merger reviews frequently feature the ad hoc imposition of conditions that merging parties must "voluntarily" accept in order to have their mergers cleared by the FCC on statutory "public interest" grounds. The conditions differ from transaction to transaction and often have nothing to do with the actual effects of a merger (for example, a requirement that specified donations be made to a nonprofit entity[21]). The unpredictable nature and timing of such conditions generate a lack of certainty for businesses and flout rule of law principles:

> While the merger applicants typically submit the proffered conditions in an ex parte letter that is included in the public file, by the time the proposed conditions are made public, frequently there is little, if any, time for the public to comment. Typically, the proposed conditions are made public as an appendix to the FCC's order when the latter is publicly released. The lack of transparency associated with commitments "volunteered" at the end of a long drawn-out process is unseemly. This lack of transparency makes the merger review process a far cry from rule of law concepts of knowability, predictability, and certainty.[22]

A possible statutory fix to FCC merger-related rule of law problems would be to require that any condition be narrowly tailored to remedy a transaction-specific harm, coupled with a requirement that the FCC impose only conditions that it would be authorized to impose by rule.[23] An even "cleaner" solution would be to strip the FCC of merger-related functions, leaving such assessments to the agencies possessing general statutory merger review authority—specifically, the U.S. Department of Justice and the U.S. Federal Trade Commission (FTC).

Regulations. Recent major regulatory initiatives by the FCC offend the rule of law. Although many of the FCC's regulatory proceedings may raise rule of law problems, a handful of significant regulatory actions illustrates the seriousness of the problem.

Perhaps the most problematic regulation was the FCC's 2015 Municipal Broadband Order preempting state laws in Tennessee and North Carolina that prevented municipally owned broadband providers from providing broadband service beyond their geographic boundaries.[24] As a matter of substance, this decision ignored powerful economic evidence that municipally provided broadband services often involve wasteful subsidies for financially troubled government-owned providers that interfere with effective private-sector competition and are economically harmful.[25]

As a legal matter, the Municipal Broadband Order went beyond the FCC's statutory authority and raised grave constitutional problems, thereby ignoring the constitutional limitations placed on the exercise of governmental powers that lie at the heart of the rule of law.[26] Because its authority was based on Section 706 of the Telecommunications Act of 1996, which merely authorizes the FCC to promote local broadband competition and investment (a goal that the order did not advance) and says nothing about preemption, the order lacked a sound legal footing.[27] Furthermore, preemption here trenches on the sovereign power of the states to control their subordinate governmental entities, a power guaranteed to them by the Constitution as an essential element of their sovereignty in the U.S. federal system.[28]

Additionally, the Chattanooga, Tennessee, and Wilson, North Carolina, municipal broadband systems that requested FCC preemption impose content-based restrictions on users of their network that raise serious First Amendment issues.[29] Specifically, their bans on the transmittal of various sorts of "abusive" language appear to be too broad to withstand First Amendment "strict scrutiny." Moreover, by requiring prospective broadband enrollees to agree not to sue their provider as an initial condition of service, two of the municipal systems may be unconstitutionally coercing users to forgo exercise of their First Amendment rights.

On August 10, 2016, in *Tennessee v. FCC*, the U.S. Court of Appeals for the Sixth Circuit struck down the Municipal Broadband Order, holding that the FCC lacked statutory authority to preempt "the allocation of power between a state and its subdivisions." Assuming that this decision is not subsequently overturned on appeal, it represents a valuable (albeit limited) vindication of rule of law principles.[30]

The FCC regulation that has garnered the most publicity and that could have the greatest negative economic impact is the 2015 Open Internet Order,[31] which imposes sweeping regulations on Internet service providers (ISPs) under the guise of "net neutrality."[32] That order includes a general, "catch-all" requirement that an ISP "shall not unreasonably interfere with or unreasonably disadvantage" end users or entities (sometimes referred to as "edge providers") that provide Internet content ("any content, application, or service [offered] over the Internet") or applications.

The "reasonableness" standard gives the FCC virtually unbounded discretion to impose sanctions on ISPs. It "does not provide, in advance, a knowable, predictable rule consistent with due process and rule of law norms,"[33] a problem underscored by the fact that the "FCC has no common-law of broadband network management to draw upon in order to establish clear, knowable, predictable, and equally applied rules of conduct."[34] In the dynamic and fast-changing "Internet ecosystem," this lack of predictable guidance is a major drag on innovation. Compounding these rule of law problems is the FCC's delegation of enforcement of the "catch-all" provision to its Enforcement Bureau, "which has been especially aggressive in imposing large fines on regulated parties for actions that arguably were not known in advance to be unlawful."[35]

Regrettably, in June 2014, a panel of the U.S. Court of Appeals for the District of Columbia, by a two-to-one vote, rejected a challenge to the order brought by ISPs and their trade association.[36] Even if the Supreme Court were to review and reverse the D.C. Circuit's holding, the risk that the FCC might seek to continue to pursue "Open Internet" and related "net neutrality" regulation (including price regulation) of ISP transmissions[37] under other existing statutory provisions would still remain.

The FCC's abrupt 2014 extension of its longstanding rules restricting common ownership of local television broadcast stations, to encompass Joint Sales Agreements (JSAs) likewise undermined the rule of law.[38] JSAs, which allow one television station to sell advertising (but not programming) on another station, have long been used by stations that had no reason to believe that their actions in any way

constituted "ownership interests" that were barred by rule, especially since many of them were originally approved by the FCC. Moreover, they have never been deemed anticompetitive by the federal antitrust enforcement agencies, and empirical evidence shows that they have reduced television station operating costs and improved program quality.[39]

On May 25, 2016, the U.S. Court of Appeals for the Third Circuit vacated the television JSA rule, stressing that the FCC had violated a statutory command by failing to carry out in a timely fashion the quadrennial review of the television ownership rules on which the JSA rule was based:

> [T]he Commission violated § 202(h) [of the 1996 Telecommunications Act] by expanding the reach of the ownership rules without first justifying their preexisting scope through a Quadrennial Review.... [U]nless the Commission determines that the preexisting ownership rules are sound, it cannot logically demonstrate that an expansion is in the public interest. Put differently, we cannot decide whether the Commission's rationale—the need to avoid circumvention of ownership rules—makes sense without knowing whether those rules are in the public interest. If they are not, then the public interest might not be served by closing loopholes to rules that should no longer exist.[40]

According to the Third Circuit, in other words, the FCC's JSA rule involved statutory delay and the unwarranted extension of regulations whose continuing existence had not been properly justified. Such agency actions plainly exceeded statutory legal constraints in derogation of the rule of law.

The FCC also appears to have acted in a manner inconsistent with both United States treaty and statutory obligations—another serious blow to the rule of law. The FCC's February 2016 proposed "set-top box" rules, which are designed to "open" the market for multichannel video programming distributor set-top box video interfaces,[41] have been criticized as a baseless and harmful intervention into a competitive market.[42] Apart from their policy demerits, the agency's proposed rules run afoul of important legal obligations.

- The set-top box rules are at odds with U.S. free trade agreements—for example, Article 18.4(10)(b) of the Korea–U.S. Free Trade Agreement and Article 17.4(10)(b) of the U.S.–Australia Free Trade Agreement—that contain provisions prohibiting the government from permitting the unauthorized retransmission of copyrighted television shows over the Internet.[43] Violations of those agreements could lead to trade sanctions against the United States.[44]

- By authorizing the uncompensated Internet transmission of copyrighted works, the set-top box rules appear to violate federal statutory language governing the retransmission of copyrighted works in both the Copyright Act and the Cable Act.[45]

In sum, the proposed set-top box rules seem to fly in the face of federal laws and treaty language protecting intellectual property rights, arbitrarily denying protection to intellectual property based solely on a particular mode of information transmission. Such a denial is repugnant to rule of law principles.

Enforcement Practices. Bringing public enforcement actions against private parties that could not reasonably have known that they were violating a legal norm likewise offends the rule of law in that it runs afoul of principles of clarity, predictability, and equal treatment in law enforcement. Recent FCC enforcement practices illustrate that the commission has ignored this principle.

For example, in July 2015, the FCC proposed imposing a $100 million fine on AT&T for allegedly violating a "transparency" rule adopted as part of its 2010 Open Internet Order.[46] The FCC claimed that AT&T had engaged in "misleading" conduct by failing to inform its "unlimited data" customers that they would be subject to slowdowns in transmission rates after a certain data threshold was met. The FCC, however, had long been aware of AT&T's practices and had never given any indication that offering an "unlimited" data plan precluded reducing speeds for network management purposes under the 2010 order.

Two other recent cases involved FCC sanctions against firms victimized by third parties, whose alleged violations were a failure to take actions that were never mentioned in statutory or regulatory language.

- In October 2014, the FCC's Enforcement Bureau proposed imposing a $10 million fine on TerraCom, Inc., and YourTelAmerica, Inc., two small

telephone companies, for a data breach that exposed certain personally identifiable information to unauthorized access.[47] The FCC cited provisions of the Telecommunications Act of 1996 and accompanying regulations that had never been construed to authorize sanctions for failure to adopt "reasonable data security practices" to protect sensitive consumer information.

- In November 2015, the FCC similarly imposed a $595,000 fine on Cox Communications for failure to prevent a data breach committed by a third-party hacker,[48] although no statutory or regulatory language supported imposing any penalty on a firm that was itself victimized by a hack attack.

TerraCom, YourTelAmerica, and Cox all opted to settle their cases rather than litigate—not surprisingly, given the potentially high costs, delays, and uncertainties of litigation.

An Agenda for FCC Reform

The FCC has demonstrated a profound lack of respect for rule of law principles, to the detriment of the public welfare. There is no reason to believe that the commission, acting on its own, will bring about needed reforms, in addition to which any regulatory, enforcement, and procedural improvements implemented by new commission leadership would be vulnerable to change with the swing of the political pendulum. Accordingly, congressional action is required.

One sure way to limit an agency's ability to flout the rule of law is to restrict the scope of its legal authority. As a matter of first principles, Congress should therefore examine the FCC's activities with an eye to eliminating its jurisdiction over areas in which regulation is no longer needed: For example, residual price regulation may be unnecessary in all markets where competition is effective. Regulation is called for only in the presence of serious market failure, coupled with strong evidence that government intervention will yield a better economic outcome than will a decision not to regulate.[49]

A significant body of thoughtful research carried out in recent years supports far-reaching statutory reforms to cabin FCC activity.[50] Congress should draw on that research in crafting legislation designed to minimize the scope of FCC authority in a manner that advances economic well-being. At a minimum, no matter how it decides to pursue broad FCC reform, the following five proposals merit special congressional attention as a means of advancing rule of law principles:

- **Eliminate the FCC's jurisdiction over all mergers.** The federal antitrust agencies are best equipped to handle merger analyses, and this source of costly delay and uncertainty regarding ad hoc restrictive conditions should be eliminated.

- **Eliminate the FCC's jurisdiction over broadband Internet service.** In light of the D.C. Circuit's affirmance of the Open Internet Order, there is a heightened probability of substantial and harmful FCC meddling in this area, based on inherently vague and untrammeled standards. Such meddling may generate costly delays and uncertainty and undermine innovation in Internet-related industries. Given the benefits associated with an open and unregulated Internet, Congress should provide clearly and unequivocally that the FCC has no jurisdiction, direct or indirect, to regulate broadband Internet service. (This would also, of course, preclude the possibility of the unwarranted FCC regulation of Internet pricing through a "net neutrality" regime.)

- **Shift FCC regulatory authority over broadband-related consumer protection (including, for example, deceptive advertising, privacy, and data protection) and competition to the Federal Trade Commission.** The FTC has long-standing experience and economic expertise in these areas, and Heritage Foundation research shows that its "highly structured, analytic, fact-based approach to these issues is superior to FCC net neutrality regulation based on vague and unfocused notions of the public interest."[51] This jurisdictional transfer would promote clarity and reduce uncertainty, thereby strengthening the rule of law.

- **Require the FCC to state on the record at the time of issuance that it has reviewed each proposed regulation and has determined, with the advice of the FCC General Counsel, that such regulation is fully consistent with constitutional federalism constraints; is fully consistent with (and does not extend beyond) specific statutory language; does not**

trench upon any international obligation of the United States; does not interfere with the exercise of jurisdiction by other federal agencies; employs wording that minimizes uncertainty, delay, and cost; and does not impose cost burdens on regulated parties that outweigh regulatory benefits. This language is merely suggestive. Its aim is to ensure that the FCC carefully scrutinizes regulatory language to seek to avoid the sorts of rule of law problems that have plagued prior commission rulemakings. The committee reports accompanying this legislative requirement could cite specific instances of rule of law problems in prior FCC rulemakings. While no panacea, such a list of "dos" and "don'ts" might well cause the FCC to exercise some caution in limiting itself when setting the requirements of new rules, consistent with rule of law ideals.

- **Require that the FCC not seek fines in an enforcement action unless the alleged infraction involves a violation of the precise language of a regulation or statutory provision.** This would prevent the FCC from seeking fines in cases where a private party could not reasonably have known in advance that it was running afoul of statutory or regulatory norms.

Conclusion

The rule of law principle recognizes the government's obligation to limit itself by taking actions that are clear and predictable and avoiding delay, consistent with constitutional and other legal obligations. This principle is a bedrock element of the American constitutional system, and agency actions that give it short shrift undermine the legitimacy of popular government.

In recent years, the FCC too often has acted in a manner that undermines the rule of law. Internal agency reforms might be somewhat helpful in rectifying this situation, but they inevitably would be limited in scope and inherently malleable as FCC personnel changes. Accordingly, Congress should weigh major statutory reforms to rein in the FCC—reforms that will advance the rule of law and promote American economic well-being.

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Endnotes

1. For a description of the FCC's authority, organization, and initiatives, see FCC, *What We Do*, https://www.fcc.gov/about-fcc/what-we-do (last visited Aug. 16, 2016).
2. *See, e.g.*, James Gattuso, *It's Time to Stop Net Neutrality Madness*, Daily Signal (Feb. 25, 2016), http://dailysignal.com/2016/02/25/its-time-to-stop-net-neutrality-madness/; James Gattuso, *The Government Might Outlaw Free TV Binge-Watching on Your Phone*, Daily Signal (Jan. 29, 2016), http://dailysignal.com/2016/01/29/the-government-might-outlaw-free-tv-binge-watching-on-your-phone/; James L. Gattuso, *Binge of Regulation: Wireless Pricing and the FCC*, Heritage Foundation Issue Brief No. 4512 (Jan. 27, 2016), http://www.heritage.org/research/reports/2016/01/binge-of-regulation-wireless-pricing-and-the-fcc.
3. While the Anglo–American understanding of "the rule of law" is traceable to Article 39 of Magna Carta (which obliges the government to act lawfully), some scholars argue that the rule of law concept dates back to Greek and Roman philosophy. *See* Paul J. Larkin, Jr., *A New Approach to the* Texas v. United States *Immigration Case: Discretion, Dispensation, Suspension, and Pardon—The Four Horsemen of Article II*, Heritage Foundation Legal Memorandum No. 181 (Apr. 15, 2016), text accompanying note 65 (describing Article 39), http://www.heritage.org/research/reports/2016/04/a-new-approach-to-the-texas-v-united-states-immigration-case-discretion-dispensation-suspension-and-pardonthe-four-horsemen-of-article-ii#_ftn65; Robert Stein, *Rule of Law: What Does It Mean?*, 18 Minn. J. Int'l L. 293, 297 (2009) (citing Friedrich Hayek's discussion of Greek and Roman philosophy and the rule of law).
4. U.S. Const. amend. V.
5. Stein, *supra* note 3, at 298.
6. Larkin, *supra* note 3, at note 69 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1802)).
7. Rich Cassidy, *The Rule of Law: Supreme Court Justice Anthony Kennedy Tells Us What It Means and Why It Counts*, On Lawyering (May 4, 2010) (citing Justice Kennedy's "provisional definition" of the rule of law), http://onlawyering.com/2010/05/the-rule-of-law-supreme-court-justice-anthony-kennedy-tells-us-what-it-means-and-why-it-counts/.
8. Friedrich A. Hayek, The Road to Serfdom 80 (1944).
9. Ronald A. Cass, The Rule of Law in America 4 (2001). *See also, e.g.*, Lon L. Fuller, The Morality of Law 39 (1964) (stressing that to comport with the rule of law, legal rules should be simple enough to give clear notice of what they require, have only prospective application, remain relatively constant over time, be internally consistent, and be administered by neutral officials).
10. *See* Scott Wallsten, *An Opportunity to Make Transparency the Norm at the FCC*, Hill (Mar. 5, 2015), http://thehill.com/blogs/pundits-blog/technology/234656-an-opportunity-to-make-transparency-the-norm-at-the-fcc. As Wallsten explains, before the 1970s, the FCC released the text of rules on the day of the vote or on the following day.
11. FCC, Report on FCC Process Reform (Feb. 14, 2014).
12. Diane Cornell, *Update on Process Reform at the FCC*, FCC Blog (July 13, 2015), https://www.fcc.gov/news-events/blog/2015/07/13/update-process-reform-fcc. For a discussion of specific FCC initiatives aimed at improving administrative efficiency, see also Diane Cornell, Special Counsel, FCC, *An Update on Process Reform Streamlining Initiatives*, FCC Blog (December 22, 2014, 12:10 pm), https://www.fcc.gov/news-events/blog/2014/12/22/update-process-reform-streamlining-initiatives.
13. *Fact Sheet, H.R. 2583, the FCC Process Reform Act of 2015*, energycommerce.house.gov (Nov. 15, 2015), https://energycommerce.house.gov/news-center/fact-sheets/hr-2583-fcc-process-reform-act-2015.
14. *Id.*
15. *All Bill Information (Except Text) for S.421—Federal Communications Commission Process Reform Act of 2015*, Congress.gov (Feb. 10, 2015), https://www.congress.gov/bill/114th-congress/senate-bill/421/all-info.
16. *See* Leo Pusateri, *Lawmakers Pass Weakened Version of FCC Reform Bill*, Heartland Inst. (Dec. 14, 2015), https://www.heartland.org/news-opinion/news/lawmakers-pass-weakened-version-of-fcc-reform-bill?source=policybot.
17. *Id.*
18. *Id.*
19. These include major telecommunications companies and holders of radio and television licenses, among others.
20. For a more detailed discussion of the rule of law problems posed by FCC merger reviews, see Randolph J. May and Seth L. Cooper, *The FCC Threatens the Rule of Law: A Focus on Agency Enforcement and Merger Review Abuses*, 17 Federalist Society Rev. No. 2, at 52–57 (June 2016), http://www.freestatefoundation.org/images/FedSocMayCooperFCC_052416.pdf.
21. *Id.* at 56 (citing an FCC-imposed condition that the merging parties "donate a specific amount of money to a non-profit or public entity which promotes public safety").
22. *Id.* at 56.
23. *See id.* at 57.
24. *See* FCC, *FCC Grants Petitions to Preempt State Laws Restricting Community Broadband in North Carolina, Tennessee* (Feb. 26, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-332255A1.pdf.

25. *See* Alden F. Abbott, *FCC Preemption of State Municipal Broadband Restrictions Is Legally Problematic and Bad for Taxpayers and Competition*, Truth on the Market (Apr. 9, 2015), https://truthonthemarket.com/2015/04/09/fcc-preemption-of-state-municipal-broadband-restrictions-is-legally-problematic-and-bad-for-taxpayers-and-competition/.
26. For a more detailed discussion of the statutory and constitutional issues, see Abbott, *id*., and Randolph J. May & Seth L. Cooper, *FCC Preemption of State Restrictions on Government-Owned Broadband Networks: An Affront to Federalism*, 16 Engage No. 1, at 47–52 (Feb. 2015), http://www.fed-soc.org/publications/detail/fcc-preemption-of-state-restrictions-on-government-owned-broadband-networks-an-affront-to-federalism. In particular, by trenching upon the states' sovereign ability to control the scope of their local political entities' activities, the Municipal Broadband Order inappropriately seeks to diminish the scope of state sovereignty. The Order thereby creates unwarranted confusion as to the proper constitutional division of authority between the federal government and the states, contrary to the rule of law.
27. Admittedly, in *Verizon v. FCC*, 740 F.3d 623, 639–40 (D.C. Cir. 2014), the U.S. Court of Appeals for the D.C. Circuit deferred to the FCC's reinterpretation of Section 706 as a source of regulatory power, but the U.S. Court of Appeals for the Sixth Circuit, in striking down the Municipal Broadband Order (see *infra* note 30,), was not obliged to—and did not—accept the D.C. Circuit's interpretation. See May & Cooper, *supra* note 26, and FCC, *Order and Notice of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capability et al.* ("Advanced Services Order"), 13 FCC Rcd. 2401, ¶ 77 (1998) (stating that "the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority.").
28. *See* Nixon v. Missouri Municipal League, 541 U.S. 124, 140 (2004) (rejecting federal preemption of Missouri's statute prohibiting its local governments from offering telecommunications services and declaring that "preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, 'are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'") (internal reference omitted).
29. *See* Enrique Armijo, *Municipal Broadband Networks Present Serious First Amendment Problems*, 10 Perspectives from FSF Scholars No. 11 (Feb. 23, 2015), http://www.freestatefoundation.org/images/Municipal_Broadband_Networks_Present_Serious_First_Amendment_Problems_022015.pdf.
30. The State of Tennessee, et al. v. FCC (No. 15-3291, 6th Cir., decided Aug. 10, 2016), slip op., http://www.opn.ca6.uscourts.gov/opinions.pdf/16a0189p-06.pdf. *See also* Alden Abbott, *Sixth Circuit's Decision Rejecting FCC Preemption of State Restrictions on Municipal Broadband Ownership Strikes a Blow in Favor of the Rule of Law (But a Broader Problem Remains)*, *Truth on the Market* (Aug. 19, 2016), https://truthonthemarket.com/2016/08/19/sixth-circuits-decision-rejecting-fcc-preemption-of-state-restrictions-on-municipal-broadband-ownership-strikes-a-blow-in-favor-of-the-rule-of-law-but-a-broader-problem-remains/.
31. The Order is set forth at FCC, *FCC Releases Open Internet Order* (Mar. 12, 2015), https://www.fcc.gov/document/fcc-releases-open-internet-order. Concern about the procedural twists and turns that preceded the FCC's promulgation of that Order no doubt was one of the motivations behind congressional interest in FCC procedural reform. *See* text accompanying notes 13–18, *supra*.
32. For a discussion of how the Open Internet Order undermines the rule of law, see May & Cooper, *supra* note 20, 53–54,. For a discussion of other serious legal and policy problems raised by the Order, see, e.g., Randolph J. May, *Thinking the Unthinkable: Imposing the 'Utility Model' on Internet Providers*, 9 Perspectives from FSF Scholars No. 32 (Sept. 29, 2014), http://freestatefoundation.org/images/Thinking_the_Unthinkable_092914.pdf; Randolph J. May, *Why Chevron Deference May Not Save the FCC's Open Internet Order—Part 1*, 10 Perspectives from FSF Scholars No. 19 (Apr. 23, 2015), http://www.freestatefoundation.org/images/Why_Chevron_Deference_May_Not_Save_the_FCC_s_Open_Internet_Order_-_Part_II_050415.pdf.
33. May & Cooper, *supra* note 20, at 53.
34. *Id*.
35. *Id*. at 54.
36. *See* U.S. Telecom Ass'n, et al. v. FCC (No. 15-1063, D.C. Cir., decided June 14, 2016), slip op., https://www.cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/$file/15-1063-1619173.pdf.
37. Heritage Foundation Senior Research Fellow James Gattuso has pointed out that FCC net neutrality rules banning the blocking or slowing of Internet content inherently involve a form of price regulation, since the mere act of enforcing these rules means that the FCC will be in the business of deciding what prices are reasonable and what prices are not. James Gattuso, *FCC Looks to Regulate Internet Rates (After It Said It Wouldn't)*, Daily Signal (Apr. 14, 2016), http://dailysignal.com/2016/04/14/fcc-looks-to-regulate-internet-rates-after-it-said-it-wouldnt/.
38. *See* Geoffrey Manne & Ben Sperry, *The Third Circuit Pushes Back on FCC's Unjustified Rule on Joint Sales Agreements*, Truth on the Market (May 25, 2016), https://truthonthemarket.com/2016/05/25/the-third-circuit-pushes-back-on-fccs-unjustified-rule-on-joint-sales-agreements/.
39. "[T]he 2014 Order [] dramatically expand[ed] its scope by amending the FCC's local ownership attribution rules to make the rule[s] applicable to JSAs, which had never before been subject to it. The Commission thereby suddenly declare[d] unlawful JSAs in scores of local markets, many of which ha[d] been operating for a decade or longer without any harm to competition. Even more remarkably, it d[id] so despite the fact that both the DOJ and the FCC itself had previously reviewed many of these JSAs and concluded that they were not likely to lessen competition.... [In addition], [empirical] evidence shows that many of these JSAs have substantially reduced the costs of operating TV stations and improved the quality of their programming without causing any harm to competition, thereby serving the public interest." *Brief of Amici Curiae International Center for Law and Economics and Affiliated Scholars in Support of the Petitions for Review*, at 4 (Apr. 20, 2015), Howard Stirk Holdings, LLC v. FCC (No. 14-1090, D.C. Cir.), http://laweconcenter.org/images/articles/icle_stirk_amicus_as_filed.pdf. (This case was transferred from the D.C. Circuit to the Third Circuit in November 2015.).

40. Prometheus Radio Project v. FCC, Nos. 15-3863, 15-3864, 15-3865, and 15-3866, at 51–52 (slip. op., 3rd Cir. May 25, 2016), http://www.nab.org/documents/newsRoom/pdfs/052516_Media_Ownership_Decision.pdf.
41. Press Release, FCC, FCC Moves to "Unlock the Box" to Spur Competition, Choice, & Innovation in Set-Top Box and App Marketplace, Feb. 18, 2016, https://apps.fcc.gov/edocs_public/attachmatch/DOC-337795A1.pdf.
42. *See Comments of the International Center for Law and Economics*, In the Matter of Expanding Consumers' Video Navigation Choices, FCC, MB Docket No. 16-42 (Apr. 22, 2016), http://apps.fcc.gov/ecfs/document/view;ECFSSESSION=SCPBXGRNMytb9LpL4hWHhtL6ZYp1bsdLl9gjDfzBvGnNcBJ82yL0!-1952303686!-848745534?id=60001690837.
43. *See id*. at 3–5. The U.S. Supreme Court has made clear that federal agencies have no authority to violate treaties that bind the U.S. government. Head Money Cases, 112 U.S. 580, 598 (1884).
44. *See id*. at 3–4.
45. *See id*. at 2, 5–10.
46. *See* May & Cooper, *supra* note 20, at 54. This Order is entirely separate from the 2015 Open Internet Order, discussed above.
47. *See id*. at 54–55.
48. *See id*. at 55.
49. The many examples of "government failure," when government interventions *reduce* economic well-being, suggest a need to be skeptical about justifications for government "fixes" of market imperfections. *See generally* Gordon Tullock, Arthur Seldon & Gordon L. Brady, Government Failure: A Primer in Public Choice (2002).
50. Congress could profitably turn to the considerable body of scholarly research on FCC reform already carried out by the free market–oriented Free State Foundation, http://www.freestatefoundation.org/publications/allfsfpublications.html (last visited Aug. 17, 2016), and by James Gattuso of The Heritage Foundation. See The Heritage Foundation, http://www.heritage.org/about/staff/g/james-gattuso (last visited Aug. 17, 2016).
51. Alden F. Abbott, *You Don't Need the FCC: How the FTC Can Successfully Police Broadband-Related Internet Abuses*, Heritage Foundation Backgrounder No. 154 (May 20, 2015), http://www.heritage.org/research/reports/2015/05/you-dont-need-the-fcc-how-the-ftc-can-successfully-police-broadband-related-internet-abuses.