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**Biden Broadband Plan Favoring Government-Owned Networks Lacks a
Constitutional Foundation**

by

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On March 31, the Biden Administration announced that its Broadband Plan would prioritize and subsidize the construction and operation of government-owned broadband Internet networks over and against privately owned networks. The Biden Administration's Plan also indicated it would dislodge duly adopted state laws that limit the ability of local governments to own and operate broadband networks. So aside from its other significant flaws as a matter of policy, the Biden Broadband Plan poses serious constitutional problems. This is another reason it should be rejected.

American constitutionalism strongly favors the acquisition and use of private property, thereby promoting commerce by private market participants, including private broadband Internet service providers. But by prioritizing government-owned networks, the Biden Plan expands the occasions for local governments to serve the dual roles of regulator *and* competitor, thereby discouraging private investment in communications networks that are an integral part of the stream of interstate commerce. Moreover, federal preemption of state law limits on local governments operating broadband networks, as the Biden Plan implies, would be at odds with principles of federalism.

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Furthering federal objectives by regulating states' internal political authorities like cities and counties violates the states' core sovereignty. Local governments are political subdivisions of states, and the Constitution provides local governments no basis for providing broadband or other business services contrary to the will of their own states.

According to the Constitution's Framers, one of the primary purposes of government is to protect individual rights to keep, use, and acquire property. Importantly, the political philosophy of the Framers strongly favored *private* property ownership. It was the Framers' background expectation that commerce is to be carried out among private market providers of goods and services. And they viewed it the government's responsibility to promote that commerce, including by prescribing rules regarding how it ought to be conducted. In the Article I, Section 8 Commerce Clause, the Framers expressly entrusted Congress with the role of regulating commerce among the states.

Federal communications policy has long emphasized and relied on free market competition among private providers of broadband Internet services. In the Telecommunications Act of 1996, Congress established the policy of the U.S. "to preserve the vibrant and competitive free market that presently exists for the Internet." Additionally, federal law establishes the distinct role of the Federal Communications Commission regarding spectrum allocations for private networks providing commercial broadband Internet services. Meanwhile, federal law recognizes the roles of other federal agencies in carrying out public safety, military, and other distinctly governmental purposes.

This policy favoring private market providers operating in a free market environment has successfully propelled the U.S. to world leadership in commercial broadband Internet services. Private broadband providers have invested massive resources developing and deploying next-generation broadband networks that benefit our nation's economy. Fixed wireline broadband providers invest about \$80 billion or more per year in network infrastructure used to deliver advanced services. [USTelecom](#) estimates that the private sector has invested \$1.8 trillion in U.S. communications networks over the past twenty-five years. [Wireless providers](#) have invested \$261 billion in 4G networks over the past decade, increasing wireless gross domestic product (GDP) by 253%, and creating nearly 10% of the total increase in U.S. GDP during that brief time span. Also, it is [estimated](#) that \$225 billion in private capital expenditures will be needed over 2019 – 2025 to fully deploy 5G in the U.S., and that this investment will create 1.2 million new jobs each year and create \$1.7 trillion in additional output during that time span.

According to a March 2021 [White House Fact Sheet](#), the Biden Broadband Plan "prioritizes support for broadband networks owned, operated by, or affiliated with local governments, non-profits, and co-operatives – providers with less pressure to turn profits and with a commitment to serving entire communities." Altering federal policy to prioritize local government entry or expansion in broadband Internet markets would be contrary to the idea that government's primary role is to promote private property ownership and private market enterprise. A shift away from private market competition would thwart the investment-backed expectations of broadband Internet service providers. And the threat of competition with federally-assisted

government providers would deter vitally needed private investment in next-generation network upgrades and new deployments to unserved Americans.

Additionally, the White House Fact Sheet states that the Biden Broadband Plan seeks to promote competition by "lifting barriers that prevent municipally-owned or affiliated providers" from "competing on an even playing field with private providers." About [eighteen](#) states restrict local government entry into the broadband business. Some states outright prohibit government-owned broadband networks. And other states impose procedural safeguards or conditions, such as public hearing requirements, preparation of business plans subject to public disclosure, and local voter approval. These state restrictions reflect genuine policy concerns about the inherent risk of a conflict of interest in government serving as both a regulator and a market participant. For example, local governments that possess powers over use of rights-of-way and infrastructure siting permit processes can act on incentives to give special treatment to government-owned networks, thereby putting private market providers at a regulatory disadvantage. In addition to the foregoing, states also rightly have been concerned about potential financial harm to taxpayers resulting from municipalities engaging in highly capitalized and financially risky business ventures.

The Biden Administration's implied prescription of federal preemption of those state laws clashes with fundamental principles of constitutional federalism. Local governments derive their authority from the states, and states retain the power to alter or dissolve them. Longstanding Supreme Court precedents recognize that local governments are subdivisions or instrumentalities of states. Accordingly, states are well within their sovereign rights to impose safeguards or restrictions on the ability of their local governments to enter into business markets and compete against private market providers.

In [Nixon v. Missouri Municipal League](#) (2004), the Supreme Court expressly rejected claims that Communications Act Section 253(a) preempted Missouri's statute prohibiting its cities and counties from offering telecommunications services. The decision in *Nixon* was based on the clear statement rule, according to which Congress must make "clear and manifest" in a statute any intention to alter the historic balance between the federal government and the states. The Court in *Nixon* determined that it was far-fetched to treat Section 253(a)'s language prohibiting state or local laws or regulations that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service" as expressing Congress's intent to preempt states' control over their own political subdivisions.

Similarly, in [Tennessee v. FCC](#) (2016), the U.S. Court of Appeals for the Sixth Circuit vacated the Commission's 2015 order that attempted to preempt state laws prescribing jurisdictional limits as to where government-owned broadband networks can operate. The Commission's 2015 order claimed that those laws were preempted by Section 706 of the 1996 Act, which includes a general directive to "promote competition in the telecommunications market." Applying *Nixon*, the Sixth Circuit observed that the states' laws implicated "core attributes of state sovereignty" and that the Commission's 2015 order essentially served to "re-allocate decision-making power between the states and their municipalities." It determined that Section 706's pro-competition language fell "far short" of a clear statement of intent by Congress to make such a reallocation of power.

Even if Congress passed a law that manifested a clear intent to preempt state limits on government-owned broadband networks, such a law would still conflict with federalism principles. The clear statement rule is a method for statutory interpretation, and cases decided according to the rule are not direct adjudications of constitutional questions. In other words, even if Congress expressly and unambiguously declared its intent to preempt state laws regarding government-owned networks, states still have strong objections based on state sovereignty interests protected by constitutional provisions such as the Tenth Amendment.

As the Supreme Court explained in [*Printz v. United States*](#) (1997): "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." But preempting states' decisionmaking about local government authority to engage in business ventures would amount to an unconstitutional regulation of states as states. It would be constitutionally improper for Congress to turn counties or cities into enclaves with powers that their own states never delegated to them in the first place. And it would create a scenario in which local governments would enjoy special federal rights to enter broadband markets without accountability to their states.

Such a bizarre scenario would be starkly at odds with precedents such as [*Ysursa v. Pocatello Education Association*](#) (2009), which reaffirmed that a political subdivision "created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." By that same reasoning, no local government should be able to claim rights under a federal statute to enter into the broadband business or expand its operations contrary over and against the will of the state to which it belongs.

In sum, favoring government-owned networks with subsidies and implausible preemption, as the Biden Plan proposes, would be detrimental to private market investment. And lacking any proper constitutional foundation, implementation of the Biden Plan's preferential treatment of local governments would foul up federal, state, and local government relations. Congress should decline to pursue those misguided proposals. Instead, Congress should prefer a constitutionally responsible path by continuing to promote private investment in next-generation broadband networks within a free market enterprise context.

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Previous Publications This Series on the Constitutional Foundations of Communications Law and Policy

Randolph J. May and Seth L. Cooper, "[The Constitutional Foundations of Communications Law and Policy](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 11 (March 3, 2021).

Randolph J. May and Seth L. Cooper, "[Congress Should Put Universal Service on a Firmer Constitutional Foundation](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 22 (April 22, 2021).

Further Readings

Randolph J. May and Andrew Long, "[Biden Broadband Plan: - Claims That Broadband Is 'Too Expensive' Are Unfounded](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 23 (May 7, 2021).

Randolph J. May and Andrew Long, "[Biden Broadband Plan: Misdirected Broadband Subsidies Hurt Competition and Consumers](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 21 (April 28, 2021).

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Theodore R. Bolema, "[Hiding the Subsidy: The Financial Transparency Problem with Municipal Broadband Systems](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 8 (February 12, 2021).

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Theodore R. Bolema, "[Local Governments Find New Ways to Evade State-Level Municipal Broadband Restrictions](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 33 (June 18, 2020).