

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of Section 103 of the STELA)	MB Docket No. 15-216
Reauthorization Act of 2014)	
)	

ADDITIONAL REPLY COMMENTS
OF
MEDIACOM COMMUNICATIONS CORPORATION

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January 14, 2016

SUMMARY

If one begins with the very reasonable proposition that a duty of good faith was introduced in order to increase the odds that the so-called “market” for retransmission consent would operate as Congress expected when it was created in 1992, then the Commission’s good faith rules have been an abject failure. While no disrespect is intended, we believe that the weakness of the good faith rules traces back to several serious flaws in the Commission’s attitude and approach when it adopted them in 2000.

One error, in our view, was the Commission’s conclusion that it was required to narrowly construe Section 325(b)(3)(C) because it is in derogation of the common law. That determination was wrong for the following reasons:

- The dichotomy “narrow construction” and “broad construction” is not a useful tool for making interpretative decisions in a rulemaking, as opposed to a court case involving an actual real-world situation where a specific narrow reading versus a particular broad interpretation of the statute in question may make a difference in the outcome for the parties.
- The Supreme Court cases cited by the Commission do not actually support strict construction.
 - The derogation doctrine is a discredited idea.
 - Agencies should not, and cannot effectively, apply judicial construction canons.
 - A broad but reasonable construction of the good faith obligation would be best suited to achieve the purposes of the good faith obligation and would be entitled to *Chevron* deference.

A second error was in concluding that Congress failed to provide a definition of the good faith requirement in the statute itself or its legislative history because it thought that the meaning of a pre-contract duty to negotiate in good faith was well understood. In fact, there is no generally accepted, comprehensive and unambiguous definition against which specific conduct can be measured and a judgment rendered. That is true even in the case of the good faith duty in labor negotiations under Section 8(d) of the Taft-Hartley Act, which is where the Commission thought Congress intended it to go for guidance.

A third mistake, in our opinion, was concluding that, in defining the good faith duty, the good faith bargaining requirement of Section 8(d) of the Taft-Hartley Act was the best reference point. Congress, of course, was well aware of the existence of Section 8(d) of the Taft-Hartley Act, but chose not to insert into Section 325(b)(3)(C) or its legislative history a directive for the Commission to base its rules on labor law precedents. Congress failed to provide a specific definition of “good faith” or to direct the Commission to adapt and adopt labor law standards because it wanted and expected the Commission to craft a definition that best served the purposes that led Congress to create the retransmission consent requirement in the first place. Accordingly, the “most appropriate source of guidance” consists of the purposes, goals and expectations that motivated Congress to create the retransmission consent regulatory structure, of which the good faith duty is merely a complementary part.

Whatever the Commission may have done in 2000, this is a different year and a different proceeding and so there is an opportunity for a fresh look. In this proceeding, the Commission should avoid the reflexive application of the outdated, judicially-created canon of statutory construction to the effect that statutes in derogation of the common law must be strictly construed. As Justice Antonin Scalia has said: “A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.” [Antonin Scalia, *A Matter of Interpretation* 23 (1997)]

In the case of the good faith obligations of broadcasters and MVPDs, the text is so sparse and open-ended in nature that it can be said to “fairly mean” many things, substantive as well as procedural. As Justice Scalia’s words suggest, and *Chevron* Step Two demands, the Commission’s interpretation must be reasonable and it cannot simply read whatever it wants into the term “good faith.” The reasonableness standard, however, still gives the Commission a lot of

room within which to construct a regulatory scheme that restores to the retransmission consent marketplace a large measure of the balance that was destroyed by the introduction of effective competition on the MVPD side while broadcasters retained their local monopolies over popular network and syndicated programs.

We think that the right way of proceeding in order to restore that balance is to start with the recommendation made by James Stankiewicz over forty years ago that a judge or agency seeking to ascertain the meaning of a good faith obligation imposed in a particular context should consider “the historic and classical import of the good faith concept, the normal commercial expectations of the parties, the . . . intent of the drafters, integrated readings of the [relevant statute] as a whole and the effect of the courts' decision on [the policies underlying the statute in which the obligation appears].” [James J. Stankiewicz, *Good Faith Obligation in the Uniform Commercial Code: Problems in Determining Its Meaning and Evaluating Its Effect*, 7 Val. U. L. Rev. 389, 393-94 (1973)]

That approach leaves ample room to consider labor law and other relevant precedents and the suggestions for specific actions made in filings in this proceeding. It will, however, necessitate choices between alternatives. In making those choices, we think that the Commission’s primary responsibility is to ensure that its rules implementing the good faith requirement create conditions that make it more likely than not that the parties will reach agreements that advance the consumer interests that retransmission consent is supposed to serve. Given the failure of the approach taken in 2000 that focused entirely on process, this time around the Commission needs to address both the substance of retransmission consent negotiations and the tactics employed during such negotiations, and must provide meaningful remedies for violations.

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Somewhere around 23 BC, the Roman poet Sextus Propertius wrote that “By gold all good faith is banished.”¹ If we did not know it is impossible, we might think that this was an extraordinary feat of prescience in foreseeing the state of the market for retransmission over two thousand years later.

In 1999, Congress created a duty of good faith negotiation on the part of broadcasters electing retransmission consent instead of must-carry², and in 2000 the Commission published implementing rules that it expected would ensure that negotiations were “conducted in an atmosphere of honesty, purpose and clarity of process.”³ Instead, retransmission consent negotiations today take place in an opaque miasma of deceit, unbridled greed, threats and coercion. In our view, the corporate parents of some broadcasters give lip service to honesty

¹ He also coined the aphorism “Absence makes the heart grow fonder.”

² Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113 - Appendix I, § 1009, 113 Stat. 1501A, 538 (codified as amended at 47 U.S.C. § 325(b)).

³ See *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 24 (2000) (the “Good Faith Order”).

while manipulating the process for the purpose of extracting billions of dollars from consumers that are used for anything and everything except increasing the availability, quantity or quality of locally originated programming.

If one begins with the very reasonable proposition that a duty of good faith was introduced in order to increase the odds that the so-called “market”⁴ for retransmission consent would operate as Congress expected when it was created in 1992, then the Commission’s good faith rules have been an abject failure. The inadequacies of those rules, combined with the Commission’s laissez faire regulatory posture, have resulted in consumers suffering the double whammy that Congress expressly said it wanted to avoid: significant increases in basic cable rates and loss by pay TV subscribers of access to local broadcast stations through their preferred provider.⁵

While no disrespect is intended, we believe that the weakness of the good faith rules traces back to several serious flaws in the Commission’s attitude and approach when it adopted them in

⁴ A favorite refrain of broadcasters is that retransmission consent negotiations take place in a “free market.” In reality, the only time that a truly free market for retransmission consent existed was prior to government intervention into that market through adoption of the Cable Television Consumer Protection and Competition Act of 1992, which created the retransmission consent requirement. Of course, the irony is that when there was a truly free market for retransmission consent, there was no market for retransmission consent. Prior to the 1992 Cable Act, broadcast stations did not have any legal right in their signals that enabled them to prevent or demand compensation for the retransmission of their signals by cable operators. The market for retransmission consent is entirely a government invention, and is, therefore, the very antithesis of a “free market.”

Moreover, whether a market develops from the voluntary interaction of consumers and producers or is created artificially by government, once it exists, the interactions that take place can fall anywhere on the scale from unregulated or “free” to completely regulated. In general, the degree of regulation is a function of the importance of the product or service in the estimation of legislators and the degree of risk that market freedom will produce results thought to be contrary to the public interest. Regulation of a market can be heavy handed, with the government intimately involved at all stages, or demonstrate a lighter touch, with no, limited or graduated governmental oversight. The Commission’s authority to regulate the market for retransmission consent is broad, and to whatever degree it is “free” at the present time is due to forbearance by the Commission. The broadcasters, we know, disagree with that statement, but that is an old debate that need not be repeated here.

⁵ See, e.g., 138 Cong. Rec. S14600 (Sept. 22, 1992) (remarks of Sen. Fowler); *id.* at S14602 (Sept. 22, 1992) (remarks of Sen. Bradley); *id.* at S14604 (Sept. 22, 1992) (remarks of Sen. Wellstone); *id.* at S14224 (Sept. 21, 1992) (remarks of Sen. Inouye); *id.* at S14248 (Sept. 21, 1992) (remarks of Sen. Gorton); *id.* at S14615 (Sept. 22, 1992) (remarks of Sen. Lautenberg).

2000, including its decision to narrowly construe the good faith obligation because it was said to be in derogation of the common law. This proceeding presents an opportunity to correct those errors, but some of the filings by those with a vested interest in the status quo argue against the advisability and legal permissibility of change. Our goal in the comments that follow is to convince the Commission that it took the wrong path in 2000 and should take a different route this time around.⁶ This is a worthwhile endeavor both because some commenters in this proceeding have referred to the Commission’s 2000 finding that it must narrowly construe the good faith obligation as binding on the Commission in this proceeding.⁷

We proceed by quoting, in bold type, language from the numbered paragraphs in the Good Faith Order where we think something went awry and then discussing the basis for that opinion.

“20. We agree with those commenters that assert that Section 325(b)(3)(C) should be narrowly construed. As commenters indicate, congressional language in derogation of the common law should be interpreted to implement the express directives of Congress and no further.”

For reasons presented at often tedious length below, we think that the Commission’s conclusion that it was required to narrowly construe Section 325(b)(3)(C)⁸ was wrong. However, even if it had been correct, it was impossible for the Commission to act on that determination.

⁶ Mediacom, through its outside counsel, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., submitted comments in this proceeding on December 1, 2014 and will be filing concurrently with this document a separate reply to certain of the comments filed by others. This document focuses on our belief that the Commission is not legally required to narrowly construe the good faith obligation as it did in 2000. Instead, we believe, it may take a more liberal view in order to address an increasingly dysfunctional marketplace by adopting solutions suggested by Mediacom in our other comments and by others such as the American Television Association. We are filing our comments on this topic separately in order to avoid detracting from our other points addressed in our separate reply comments filed through Mintz, Levin.

⁷ See, e.g., Comments of Gray Television Group, Inc., MB Dkt. No. 15-216, 4 n.4 (filed Dec. 1, 2015) (“Gray Comments”)

⁸ That section, in its current form, now appears as Section 325(b)(3)(C)(ii) of the Communications Act of 1934, as amended (the “Communications Act”).

Aside from one statement about the propriety under some conditions of an agreement by a broadcaster to different terms with various MVPDs, the statutory language says nothing more than that the Commission should adopt rules that prohibit a station granting retransmission consent from “failing to negotiate in good faith.” It is literally impossible to interpret that language to carry out Congress’s “express directive” and go “no further” because there is absolutely no indication of what Congress meant or intended by the phrase “failing to negotiate in good faith.” It did not, either through statutory language or in the legislative history, draw a line in the sand and say “this far, but not further.” In the sense meant by the Commission, Congress’s “directive” is really a non-directive. Quite simply, Congress punted and left to the Commission the job of establishing the dividing line between good and bad faith.

There are of course, many different places where the boundary could be established, and they range along a continuum of potential combinations of proscribed acts and omissions that could be labeled as “narrowest” at one end and “broadest” at the other. As discussed in more detail below, there is no consensus as to the meaning of an obligation of “good faith” in any legal context in which it has been imposed, and so defining the “sets” of behavior that are at each end of the continuum or at any point in between is a formidable task that requires judgments which different people would make in different ways.

Even if we were able to identify the different sets that most of us thought represented the “right” choices to place along the continuum according to some standard or another, we would then have to pick one as the congressionally intended stopping point. The proposition that the statutory language should be “narrowly construed” is a platitude that gives no meaningful guidance in picking that point. How narrowly? The most narrow possible interpretation (whatever that is)? The third, fourth or twenty-sixth most narrow? What are the principles that

guide that judgment? The Good Faith Order does not recognize, let alone solve, these issues. In 2000, the Commission did not pick the narrowest plausible interpretation of the term “good faith” and articulated no rationale that explains how the choices that it did make result in conformity with to the claimed commandment that the statute be narrowly construed.

Our point is that the dichotomy “narrow construction” and “broad construction” is not a useful tool for making interpretative decisions in a rulemaking, as opposed to a court case involving an actual real-world situation where a specific narrow reading versus a particular broad interpretation of the statute in question may make a difference in the outcome for the parties. The doctrine that statutes in derogation of the common law should be narrowly construed, in other words, is a judicial creation that was meant to be applied, where appropriate, by a court seeking to decide a specific issue between contending parties, and it is ill-suited for guiding an administrative agency seeking to adopt rules of general applicability to guide the future behavior of multiple market participants in a wide variety of settings. Aside from this practical problem, the Commission’s conclusion that it was required to honor the principle that statutes in derogation of the common law must be narrowly construed was misguided for all of the following reasons:

The Supreme Court cases cited by the Commission do not actually support strict construction. The Commission cited two cases in support of its decision to apply the alleged “rule” that statutes in derogation of the common law should be strictly construed: *Herd & Co. v. Krawill Machinery Corp.*⁹ (“*Herd*”) and *Isbrandtsen Co., Inc. v. Johnson*¹⁰ (“*Isbrandtsen*”).

⁹ 359 U.S. 297 (1959).

¹⁰ 343 U.S. 779 (1952).

Neither case actually supports the Commission's decision in the Good Faith Order to narrowly construe Section 325(b)(3)(C).

The issue in *Herd* was whether a carrier's subcontractor was relieved of liability to a shipper for its negligence by a specific statute or a limitation-of-liability provision of the carrier's contract with the shipper that expressly covered the carrier, but did not mention its agents. The Court ruled that the statute did not limit the liability of an agent, but it did not cite the derogation principle as the reason. Instead, its interpretation was based on an analysis of "the provisions, legislative history and environment of the [statute]." ¹¹

The court rejected the argument that the liability limit in the carrier's contract also extended to agents because it was inconsistent with prior rulings in which the Court had refused to imply such a limitation because that would be contrary to the common law rule that an agent is responsible for its own negligence unless expressly relieved of liability by a statute or contract. The Court referred to the derogation doctrine that pertains to statutory interpretation only to explain that it applied a similar principle to contract interpretation.

Thus, the holding in *Herd* has no precedential weight in the interpretation of Section 325(b)(3)(C), and provided no support for the Commission's view that it was required to narrowly construe that Section. At most, the case merely states as dicta something that no one would ever dispute—namely that, in 1959 when it was decided, the Court was prepared to apply the derogation doctrine in the appropriate case involving statutory interpretation.

At issue in *Isbrandtsen* were certain claimed rights of a seaman, and statutory interpretation was needed in order to reach a decision. Noting that "congressional legislation

¹¹ 359 U.S. at 301-302.

now touches nearly every phase of a seaman's life" and "has now covered this field,"¹² the Court rejected the derogation doctrine in favor of the competing principle that remedial statutes should be broadly construed:

Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident. No rule of construction precludes giving a natural meaning to legislation like this that obviously is of a remedial, beneficial and amendatory character. It should be interpreted so as to effect its purpose. "The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure." *Jamison v. Encarnacion*, 281 U.S. 635, 640, 50 S.Ct. 440, 442, 74 L.Ed. 1082; *Texas & P.R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437, 440, 27 S.Ct. 350, 354, 355, 51 L.Ed. 553.¹³

In effect, the Court ruled that when the body of law relevant to a subject has evolved, through legislation or otherwise, to a point where it deviates significantly from "long-established and familiar principles" of common law, then it would be wrong to reflexively apply the derogation doctrine because the statutory provision being interpreted was inconsistent with from the common law in its original, pristine state. The reference point is not the common law in 1492 or at some other distant time, but the current state of the body of common and statutory law taken as a whole.

Moreover, the Court found the developmental trend to also be important. It remarked that the "direction of the current of maritime legislation" was toward improving the legal rights of seamen as compared to those recognized by the common law¹⁴ and that for more than 70 years, Congress's policy had been to protect and expand the rights of seamen, rather than those

¹² 343 U.S. at 781.

¹³ *Id.* at 783.

¹⁴ *Id.* at 784.

of ship owners.¹⁵ The legislation in issue was consistent with that trend, being “largely remedial,”¹⁶ in that it was intended by Congress to address perceived problems for which the common law provided either no or an inadequate solution. These facts, the Court concluded, dictated “liberal interpretation in favor of the seamen.”¹⁷

Thus, although the Commission in the Good Faith Order cited *Isbrandtsen* as though it dictated an application of the derogation principle and a narrow construction of Section 325(b)(3)(C), the Court’s decision in that case actually requires the Commission to do the exact opposite. Everything that the Court said about the body of law relating to seamen’s rights could also be said about the law governing television broadcasting. Obviously, federal legislation “covers the field” of the legal rights and obligations of broadcasters, and for more than 70 years, Congress’s policy has been to protect consumers and expand their access to communications services. The Communications Act as originally adopted and the amendments enacted over the years have been “largely remedial.” That is indisputably true of the addition of the good faith obligation, which was enacted to close a perceived flaw in the market for retransmission consent.

Indeed, the common law did not even recognize the “freedom of contract” of broadcasters to bargain over retransmission consent.¹⁸ The requirement that MVPDs obtain consent is entirely a product of a federal statute and, therefore, its scope is entirely within the discretion of Congress, which delegated to the Commission the power to “establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission

¹⁵ *Id.* at 782.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ For the history of retransmission consent, see Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision of the 1992 Cable Act*, 49 Fed. Comm. L. J. 99 (1996).

consent”¹⁹ and rules implementing the good faith requirement. The common law, quite frankly, has nothing to say on the matter of retransmission consent. If Congress wants the retransmission consent right or the good faith duty to be narrow, then it will be so and if it wants either one to be broad, then that will be the case, because neither the right nor the duty can be anything more or less than what Congress says it is. In other words, the law relating to retransmission consent is an invention of Congress and “where a statute disposes of the whole subject of legislation, it is the only law.”²⁰ To say that the good faith requirement is in derogation of a common law right of broadcasters to decide if and how to bargain over retransmission consent is simply wrong because there never was such a common law right.

In short, the precedents cited by the Commission in support of its decision to narrowly construe Section 325(b)(3)(C) not only fail to furnish that support, but actually dictate the opposite result.²¹ The Court in *Herd* did not apply the derogation principle to interpret the statute in issue but, instead, took a more reasoned approach based on an analysis of “the provisions, legislative history and environment of the [statute].”²² In *Isbrandtsen*, the Court also took a more nuanced and rational approach to statutory interpretation and expressly rejected the derogation doctrine in favor of the principle that remedial statutes should be liberally construed.

¹⁹ Communications Act §325(b)(3)(A).

²⁰ H. Black, *Handbook on the Construction and Interpretation of the Laws* 237 (1896).

²¹ In its comments in this proceeding, Gray Television Group, Inc. repeats the Commission’s error in the Good Faith Order of citing *Herd* as requiring that the good faith obligation be narrowly construed. See Gray Comments at 4 & note 6.

²² 359 U.S. at 301-302.

The derogation doctrine is an “old (and discredited) idea.”²³ The “rule” that statutes in derogation of the common law must be strictly construed is a centuries-old judicial invention that was used by judges in the nineteenth and the first half of the twentieth century “to emasculate social welfare legislation.”²⁴ It is a “canon of construction”²⁵ that represents, in the words of Supreme Court Justice Antonin Scalia, a “judicial power-grab.”²⁶ Today, the derogation doctrine is “[a]t best . . . an historical hangover from the time when judges were generally suspicious or distrustful of legislatures”²⁷ or, as Judge Richard Posner recently said, a “fossil remnant of the traditional hostility of English judges to legislation.”²⁸

²³ See Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 246 (2006), available at http://www.virginialawreview.org/sites/virginialawreview.org/files/187_0.pdf. See also C. Farina, *Deconstructing Nondelegation*, 33 Harv. J.L. & Pub. Policy 87, 97. (2010), available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1032&context=facpub> (“It now seems quaint, if not actually undemocratic, to treat statutes as a suspect incursion on judge-made law.”). A statute “in derogation” of the common law apparently included “one which took away a “common-law right,” or added to ‘common-law disabilities,’ or provided ‘for proceedings unknown or contrary to’ common law.” Lawrence M. Friedman, *The Legal System: A Social Science Perspective* 264 (1975).

²⁴ Richard A. Posner, *Statutory Interpretation-in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 821 (1983). Roscoe Pound said: “As no statute of any consequence dealing with any relation of private law can be anything but in derogation of the common law, the social reformer and the legal reformer, under this doctrine, must always face the situation that the legislative act which represents the fruit of their labors will find no sympathy in those who apply it, will be construed strictly, and will be made to interfere with the *status quo* as little as possible.” Roscoe Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383, 387 (1908). See also Michael C. Dorf, *The Supreme Court, 1997 Term: Forward: The Limits of Socratic Deliberation*, 112 Harv. L. Rev. 4, 16n.60. (1998) (“It was . . . antidemocratic opponents of statutes in derogation of the common law who, in the early part of [the twentieth] century, construed statutes narrowly, thereby defeating legislative objectives.”).

²⁵ “[A] canon is an interpretive principle that judges have customarily used. Ultimately, judges decide what is a canon. Judges sometimes create entirely new canons and apply them to pending cases.” Bradford Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 Ky. L.J. 527, 543 (1997-98).

²⁶ Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 29 (Ann Gutmann ed. 1997).

²⁷ Reed Dickerson, *The Interpretation and Application of Statutes* 206, 207 (1975). As Justice Jackson said in *SEC v. Joiner*, 320 U.S. 344, 350-51 (1943): “Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself, and thought it generally wise to restrict operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.”

Modern legal scholars uniformly think that the doctrine should itself be narrowly construed (and applied) or, preferably, abolished²⁹ because it makes no sense³⁰ and is contrary to current views of the appropriate relationship between courts and legislatures.³¹ Most of the states have eliminated the doctrine.³² A legal database search we conducted failed to produce a single Supreme Court case after 1984 (the year of the *Chevron* decision) in which the doctrine has been applied to invalidate or alter an interpretation by a federal agency eligible for *Chevron* deference.³³

The Supreme Court today takes a much more complicated and analytical approach to statutory interpretation than blindly applying so-called “canons” of construction such as the derogation doctrine.³⁴ Instead of misciting *Herd* and *Isbrandtsen*, the Commission could have—and should have—cited any number of cases in which the Supreme Court has rejected reflexive

²⁸ *Liu v. Mund*, 686 F.3d 418, 421 (7th Cir. 2012).

²⁹ See Warren R. Maichel, *Legislation—The Role of the Common Law in Interpretation of Statutes in Missouri*, 1952 Wash. U. L. Q. 101, 105 (1952), available at http://openscholarship.wustl.edu/law_lawreview/vol1952/iss1/ (“it has . . . been quite generally agreed by legal commentators that the canon is entirely unsatisfactory and should be abolished”).

³⁰ See, e.g., Reed Dickerson, *The Interpretation and Application of Statutes* 206 (1975) (“Except with respect to pure statutory codifications of existing common law, the rule makes little sense, because most statutes that affect the common law are enacted for the very purpose of changing it.”); Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* 371(1911) (“this rule is no longer supported by reason”).

³¹ As the federal and state governments began to increasingly rely on administrative agencies to govern, the problems of the doctrine were recognized by some of our best legal thinkers. For example, Harlan Stone remarked in 1936 that “in the construction of statutes establishing administrative agencies and defining their powers there is little scope for the ancient shibboleth that a statute in derogation of the common law must be strictly construed, or for placing an emphasis on their particulars which will defeat their obvious purpose.” Harlan Stone, *The Common Law in the United States*, 50 Harv.L.Rev.4, 18 (1936).

³² See, generally, Jacob Scott, *Codified Cannons and the Common Law of Interpretation*, 98 Geo. L.J. 341 (2010).

³³ Specifics of the search, including search terms used, are available upon request.

³⁴ See, generally, David M. Driesen, *Purposeless Construction*, 48 Wake Forest L. Rev. 97 (2013); Yule Kim, Congressional Research Service, *Statutory Interpretation: General Principles and Recent Trends* 18 (2008), available at <https://www.fas.org/sgp/crs/misc/97-589.pdf>; Antonin Scalia, *A Matter of Interpretation* (1997).

resort to canons of construction. For example, in *SEC v. C. M. Joiner Leasing Corp.*³⁵ the Court, obviously referring to the derogation doctrine, noted that “[s]ome rules of statutory construction come down to us from sources that were hostile toward the legislative process”³⁶ and then explicitly declared that those rules were “subordinated” to the “doctrine that courts will construe the details of an act in conformity with its dominating general purpose, . . . and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.”³⁷

In short, “[t]he whole tendency of modern statutory construction. . . is to escape from the domination of fixed and unalterable rules, which often are arbitrary and tend only to becloud justice, and to seek, first and always, the actual intention and meaning of the legislature.”³⁸

Agencies should not, and cannot effectively, apply judicial construction canons. The derogation doctrine and similar interpretative principles sometimes resorted to by courts are not requirements imposed by the Constitution or federal legislation; instead, they are purely judicial

³⁵ 320 U. S. 344 (1943).

³⁶ 320 U. S. at 350.

³⁷ 320 U. S. at 350-51. Another instance of congressional purpose and statutory context trumping a “canon” occurred in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004), where the Court determined that the word “age” is used in different senses in different parts of the Age Discrimination in Employment Act, and that consequently a rigid application of the presumption of uniform usage throughout a statute would lose sight of “the cardinal rule that ‘[s]tatutory language must be read in context’” citing *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)). 540 U.S. at 595, 596. See also *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981), where the Court noted that federal common law has always been “subject to the paramount authority of Congress” (quoting *New Jersey v. New York*, 283 U. S. 336 at 348 (1931)); that “it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law;” and that if Congress speaks on a “problem formerly governed by federal common law,” then its decision rules. After examining the legislation in question in that case, reviewing the legislative history and determining that there was nothing to suggest that Congress intended the common law to be preserved, the Court ruled that the relevant common law was entirely pre-empted. See also *U.S. v. Rodgers*, 461 U.S. 677, 706 (1983), where the Court said that the “common-sense principle of statutory construction” to the effect that the word “may” contained in a statute “usually implies some degree of discretion . . . is by no means invariable.”

³⁸ Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* 242 (1896). See generally W. Popkin, *Statutes in Court: The History and Theory of Statutory Interpretation* (1999).

inventions that are supposed to guide judges when they are the primary interpreters of a statute. That fact raises the question of the status of those rules in our legal system. As Yale law professor Abbe Gluck has written:

[M]odern federal statutory interpretation is a field dominated by judicially created legal presumptions. At the same time, the question of the legal status of statutory interpretation methodology remains unanswered and almost completely unexplored. What *are* the rules of statutory interpretation? Almost all jurists and scholars resist the notion that they are 'law.' Instead, most contend that these tools, often called "canons" of interpretation, are "rules of thumb"—a legal category that seems to sit in between law and individual judicial philosophy.³⁹

Indeed, the Supreme Court itself has said that “[c]anons of construction are simply 'rules of thumb' which will sometimes 'help courts determine the meaning of legislation.’”⁴⁰

If, as pretty much everyone seems to agree, the canons of construction are not “law,” then which, if any, actors in our legal system are required to follow them? That is another inquiry that falls within Professor Gluck’s realm of the “unanswered and almost completely unexplored” questions. Given that the canons of construction are judicially created and the Supreme Court sits at the top of our federal judiciary, it is plausible to argue that the canons endorsed by the Supreme Court should be followed by federal courts. It is much more difficult to make a case that they should also be given cognizance by Congress and the President in enacting legislation or by an agency in arriving at its own interpretation of the statute it administers. There are constitutional issues with even allowing judges to honor judicially created rules of construction because to the extent that those rules allow courts to invalidate or alter legislation on grounds

³⁹ Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 57 Wm. & Mary L. Rev. 753, 755-6 (2013).

⁴⁰ *Varity Corp. v. Howe*, 116 S. Ct 1065, 1067 (1996) (quoting *Connecticut Nat'l Bank v Gennam*, 503 U.S. 249, 253(1992)).

other than violation of the Constitution, they are an encroachment by the judiciary upon the powers granted to the other two branches of government.

Moreover, in our legal system, the courts and administrative agencies differ significantly in their roles, authority, responsibilities, purposes and procedures. In at least some cases, the rules or guidelines for statutory interpretation that judges follow are not the ones that agencies should apply.⁴¹ The derogation doctrine is one of those cases.

The primary role of an administrative agency is not to serve as a guardian of the common law but, rather, to implement the statute it administers in a way that is best designed to give effect to its meaning, carry out the underlying congressional intent and further the public interest goals that motivated its adoption. The reason Congress enacts legislation is almost always to change the status quo, and virtually all significant federal legislation in existence alters in some fashion the common law rights and obligations of the persons affected.⁴² That is especially true in the case of remedial legislation—that is, a law intended to correct, stop or prevent some perceived mischief, problem of deviation of reality from the legislature’s preferred norm.

Unless Congress expressly and clearly says otherwise in adopting legislation that requires interpretation, the role of the administrative agency is to neither construe it narrowly nor interpret it broadly, but, rather, to give it the meaning that is most consistent with its language

⁴¹ On the subject of administrative agency statutory interpretation generally, see Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 Admin L. Rev. 501 (2005).

⁴² For a long time, federal law has been overwhelmingly statutory law. That was true even in the 19th century when a leading authority on statutory interpretation noted that and “there is hardly a rule or doctrine of positive practical jurisprudence in England or in the United States today, which is not the result, in part at least, of legislation; hardly a rule or doctrine of the original common law which has not been abolished, or changed, or modified by statute.” Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* 271 (2nd ed 1874), available at http://www.forgottenbooks.com/readbook_text/A_Treatise_on_the_Rules_Which_Govern_the_Interpretation_and_1000250093/319.

and congressional intent and most conducive to achieving the congressional purpose.⁴³ If the common law needs a protector, then it already has a powerful one in the presence of the federal judiciary. The Commission, which has more than enough work to do in performing its own duties, should not take on the Supreme Court's job as well.

Another reason that the Commission should reject the proposition that it must or should apply judicial canons of construction is that it is incapable of doing that job properly. There is simply no reliable and principled way for the Commission to figure out, in any given case requiring statutory interpretation, whether the Supreme Court would apply the canons or, if so, which ones or how. That inability is due to the enormous inconsistency in the application of the canons by the courts. As Professor Stephen Rich has concluded based on his own and others' research:

The [Supreme] Court is not bound to follow interpretive practices employed in a prior case even if successive cases concern the same statute. Instead, the Court's interpretive practices may change without warning or explanation, and at times they do so as part of a broader transition between interpretive regimes independently of any substantive change to the statute interpreted. Stare decisis appears to require no justification for changes in the Court's interpretive practices.⁴⁴

While we do not know if the Supreme Court thinks that lower courts should have the same latitude, in practice they are just as inconsistent. In any event, at whatever level they may occur, the inconsistencies do not seem to be explainable by any ascertainable principle that is itself consistently followed.

⁴³ See Antonin Scalia, *A Matter of Interpretation* 23 (1997).

⁴⁴ Stephen M. Rich, *A Matter of Perspective: Textualism, Stare Decisis and Federal Employment Discrimination Law*, 87 S. Calif. L. Rev. 1197 (2014). See also Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 57 Wm. & Mary L. Rev. 753, 757 (2013) (“[the idea] that the rules of interpretation should receive *stare decisis effect* . . . has been rejected by all federal courts and most scholars”).

The inconsistency in the application of the canons of construction indicates that the Supreme Court does, indeed, consider them to be “rules of thumb” that are not supposed to be reflexively followed in the case of every interpretative issue that arguably could fall within their scope. Whether that is true or not, the inconsistency certainly means it is impossible for an agency like the Commission in any given case requiring statutory interpretation to figure out with any degree of certainty whether the Supreme Court would or would not apply the doctrine if it were interpreting or reviewing an agency’s interpretation of the same statute. That uncertainty is especially acute in the case of the derogation doctrine because, in modern times, it has been rarely applied by the Supreme Court even though it has heard a very large number of cases in which a challenged statute could certainly be read as being in derogation of the common law.

Compounding the uncertainty is the observation of Karl Llewellyn and others that many of the interpretative canons have opposite counter-canons.⁴⁵ As we have seen in discussing *Isbrandtsen*, the counter for the canon that statutes in derogation of common law must be strictly interpreted is the principle that remedial statutes must be broadly construed.⁴⁶ If a remedial statute also alters the common law, then it appears that the canon requiring a broad construction wins the battle of the conflicting canons.⁴⁷

What all of this means is that back at the time when the Commission first turned to the task of interpreting Section 325(b)(3)(C), it was not required by law to apply the judicially

⁴⁵ See Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395 (1950). Llewellyn identified over 80 canons, which he listed at the end of his article, identifying those which were in opposition to one or more of the others on the list. *Id.* at 401-06.

⁴⁶ See H. Black, *Handbook on the Construction and Interpretation of the Laws* 242 (1896), noting that statutes coming within the scope of the derogation doctrine may also be within “the equally well settled rule that remedial statutes are to be liberally construed.”

⁴⁷ As discussed above, in one of the two cases cited by the Commission in support of its decision in to apply the derogation doctrine in 2000, the Supreme Court actually rejected that doctrine in favor of the competing canon requiring liberal construction of remedial legislation.

created “rule of thumb” that statutes in derogation of the common law should be strictly construed. If the Commission thought that it should nonetheless follow the doctrine because of a belief that the federal courts would apply it in a review of the Commission’s interpretation, then that belief was misguided. As noted, we have not been able to find a Supreme Court case after the *Chevron* decision in which the doctrine was applied to invalidate or cut back an agency interpretation entitled to *Chevron* deference. Even if there were such cases that we missed, the fact remains that there are many more in which the doctrine was not applied even though it could have been because the agency’s interpretation in question clearly altered the common law. The fact that non-application seems to be the norm, the general inconsistency and unpredictability of the application of the judicial canons and the existence of the counter principle that remedial legislation should be liberally construed would have provided more than ample justification for a decision by the Commission to ignore the derogation doctrine.

The Commission has not consistently applied the derogation doctrine. As many have pointed out, "it seems clear that the purpose of an overwhelming majority of statutes is to make some change in the existing legal order."⁴⁸ In other words, “[e]xcept with respect to pure statutory codifications of existing common law, the rule makes little sense, because most statutes that affect the common law are enacted for the very purpose of changing it.”⁴⁹ Taken to its logical conclusion, the doctrine means that “all statutes potentially may be strictly construed because they are in derogation of the common law.”⁵⁰

⁴⁸ 3 *Sutherland Statutory Construction* 171 (N.J. Singer, 5th ed. 1992).

⁴⁹ Reed Dickerson, *The Interpretation and Application of Statutes* 206 (1975).

⁵⁰ Frank E. Horack Jr., *The Disintegration of Statutory Construction* 24 *Ind. L. J.* 335, 344 (1949), available at <http://www.repository.law.indiana.edu/ilj/vol24/iss3/1>.

Given both the potential for the derogation doctrine to reach virtually every nook and cranny of every significant federal statute that has ever been or ever will be adopted and the large number of provisions of the Communications Act that impinge upon the common law status and rights of regulated entities, one would think that the Commission would be constantly applying the doctrine time in its rulemaking proceedings. After all, the logic of the Commission's position in the Good Faith Order is that once it concludes that a provision of the Communications Act limits regulated entities' freedom of contract or other common law rights or liberties, the Commission becomes duty-bound to apply the derogation doctrine and narrowly construe the statutory language in question.

In fact, nothing could be further from reality. Throughout its history, when the Commission has perceived a need for remedial action and has mustered the will to act, it has taken anything but a strict constructionist's view of its powers. The Commission has often imposed restrictions and requirements on regulated entities that not only are in derogation of the common law, but also cannot be justified by a strict interpretation of the relevant statutory language. The most striking example is the Commission's decision to regulate the cable television industry at a time when cable was nowhere mentioned in the Communications Act.⁵¹ Other examples include the adoption of rules imposing network program non-duplication, syndicated program exclusivity and sports blackout requirements on cable systems, even though no reference to any of these subjects can be found in the Communications Act.

As an example in the area of retransmission consent, the Commission has ruled that cable systems must give stations electing retransmission consent several of the rights of must-carry stations under Section 614 of the Communications Act, even though Section 325(b)(4) says that

⁵¹ Upheld by the Supreme Court in *U.S. v. Southwestern Cable*, 392 U.S. 157 (1968),

Section 614 does not apply to cable system carriage of the signal of a station electing retransmission consent. In other words, the Commission acted as if has the authority to create rights and obligations that are not only in derogation of the common law, but also completely contrary to the clear, unambiguous language of Section 325(b)(4). Yet, it claims to be legally bound to strictly construe the good faith obligation, despite the fact that a broad reading is not contrary to the express language of the statute and would have far less impact on the common law rights of the regulated entities than the imposition of Section 614 obligations despite the language of Section 325(b)(4).

Many other important rights that regulated entities would enjoy under the common law have been eliminated or altered by rules adopted under authority of the Communications Act without even lip service being given to the derogation doctrine. For example, Section 222 of the Communications Act limits the common law freedom of telephone companies and, since adoption of the latest iteration of the net neutrality rules, ISPs to determine how CPNI is handled in their service terms or by agreement with their customers. Yet, we are not aware of any pronouncements by the Commission that Section 222 should be narrowly construed because it is in derogation of the common law. The prohibitions against discrimination and paid prioritization in the net neutrality rules are also limitations on freedom of contract without precedent under the common law and they would not exist in their present form if the Commission strictly construed the underlying statutory provisions. Numerous other examples from the Commission's history could be offered in which the Commission broadly, rather than narrowly construed the relevant statutory provisions, thereby compounding rather than minimizing the damage done to the common law.

It is peculiar, to say the least, that of all the possible provisions of the Communications Act to which the derogation doctrine could be applied, the Commission singled out Section 325(b)(3)(C). There is no obvious reason for that selection. Frankly, the Commission's decision in 2000 to dust off the archaic derogation doctrine in the case of Section 325(b)(3)(C) while ignoring it in other situations involving far more serious assaults upon the common law is hard to justify in a principled manner. To the cynical, it may seem to either reflect what some have perceived as a long-standing bias against cable operators in favor of broadcasters or simply the agency's strange reluctance to involve itself in the realm of retransmission consent despite the serious adverse consequences to consumers flowing from its passivity.⁵²

Whatever the explanation may be, the fact remains that the derogation doctrine is an outdated judicial invention that the Commission has chosen not to apply in many situations seemingly within its scope and could also have chosen not to apply to the good faith obligation. . Indeed, we are not aware of a single case since *Chevron* where a Commission interpretation has been struck down or cut back by the Supreme Court based on the derogation doctrine.

The impact of *Chevron*. As the Commission knows, the Supreme Court's 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Council, Inc.*⁵³ ushered in a new era in administrative law. To use the Court's own summary of its holding: "*Chevron* requires a federal court to defer to an agency's construction, even if it differs from what the court believes to be the best interpretation, if the particular statute is within the agency's jurisdiction to administer, the

⁵² The Commission's highly selective approach to applying the derogation doctrine seems to confirm Professor Sentell's observation that because just about every significant piece of federal legislation alters the status quo, a court or agency applying the derogation canon "possesses unlimited discretion in selecting cases for the maxim's application and in determining its role in resolving the cases selected."⁵² R. Perry Sentell, Jr., *Statutes in Derogation of the Common Law: In the Georgia Supreme Court*, 53 Mercer L. Rev. 41, 79 (2001). That kind of open-ended discretion is yet another reason that the doctrine has been discredited—the decision to apply it or not in a particular case is a highly subjective one, not dictated or constrained by the doctrine itself or any universal principle.

⁵³ 467 U.S. 837 (1984).

statute is ambiguous on the point at issue, and the agency's construction is reasonable."⁵⁴ *Chevron*, as refined by later decisions, involves a two-step test: (1) Is the statutory language ambiguous? and (2) If so, is the agency interpretation reasonable?

In *Brand X*, the Court ruled that an agency's interpretation of a statute entitled to *Chevron* deference prevails not only over a possible alternative interpretation that a court thinks is better, as it ruled in *Chevron* itself, but also "trumps" a different judicial interpretation previously rendered unless "the prior decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."⁵⁵

Obviously, *Chevron* altered the balance of power between courts and agencies in statutory interpretation.⁵⁶ The relevant question for our present purposes is, "What is the role of the judicial canons of construction in the post-*Chevron* world?" The *Chevron* Court gave a partial answer, saying that agency interpretations qualified for deference only if the statute in issue continued to be ambiguous after the "traditional tools" of statutory interpretation were applied.⁵⁷ The Court did not say which of the more than 80 interpretative canons identified by Karl Llewellyn were included within the "traditional tools" to be used to determine if the

⁵⁴ *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 969 (2005) (citation omitted) ("*Brand X*"). In 2001, the Court said that *Chevron* deference is required only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead*, 533 U.S. 218, 226-7 (2001) ("*Mead*"). In *Brand X*, the Court held that the FCC satisfies the prerequisite established in *Mead*. See 545 U.S. at 969.

⁵⁵ *Brand X*, *supra*, note 51, 545 U.S. at 969.

⁵⁶ See Linda D. Jellum, *The United States Court of Appeals for Veterans Claims: Has it Mastered Chevron's Step Zero?*, 3 *Veteran's L. Rev.* 67 (2011) (*Chevron* "shifted interpretative power from the courts to the agencies.").

⁵⁷ See *Chevron*, 467 U.S. at 842-43 n.9 (declaring that the Court remains responsible for determining the law if its content is clear from application of "traditional tools" of statutory construction). We think that it is indisputable that in the case of the interpretation of Section 325(b)(3)(C)(ii), the so-called *Chevron* step-zero does not short-circuit application of the *Chevron* framework. None of the rationales articulated in Supreme Court decisions for applying step-zero fit that case, and Congress clearly delegated to the Commission authority to make rules defining the obligation. See generally Thomas W. Merrill, *Step Zero After City of Arlington*, 83 *Fordham L. Rev.* 753 (2014).

necessary ambiguity existed, but for the sake of argument we can presume that the derogation doctrine is one of them.

It is not at all clear that applying the derogation canon to narrowly construe the language of Section 325(b)(3)(C) in order to see if any ambiguity remained would in any sense be a meaningful exercise. As we point out below, the retransmission consent requirement did not exist at common law and is entirely a congressional creation. Even outside the realm of retransmission consent, the common law does not recognize a duty of good faith in pre-contract negotiations. So what does it mean to strictly construe a duty that is not defined in the statute or recognized by the common law? Naturally, there is no answer to that question in any of the cases that apply the derogation doctrine.

The fact is that there is no reasonable way of using the derogation doctrine “tool” to eliminate the ambiguity in Section 325(b)(3)(C)(ii). If a reviewing court announced that it was going to narrowly construe the good faith obligation, that would not instantly lead to a specification of what the duty entails. There is no case or treatise that establishes a legally binding or generally accepted menu of meanings that includes recipes for “narrow,” “broader” and “broad” definitions of a duty to conduct pre-contract negotiations in good faith. In other words, even if a reviewing court applied the derogation doctrine, there would still be lots of interpretative choices that needed to be made and application of the doctrine itself would not dictate which of the alternatives were, in some sense, the right ones. Ambiguity would remain.

When ambiguity remains after applying the “traditional tools” of statutory interpretation, then those tools get returned to the shed because they have no job to do in *Chevron* Step Two. The inquiry at that stage is whether the Commission’s interpretation is reasonable, not whether it comports with the derogation principle. Logically, *Chevron* and *Brand X* mean that the deference

that an agency's reasonable interpretation is to be given extends explicitly to the content of that interpretation and implicitly to any background interpretive principles used by the agency in arriving at that interpretation. Thus, if there are two alternative interpretations that otherwise meet *Chevron's* conditions for deference, one based on a narrow reading of the statute and the other reflecting a broad construction, then whichever choice the agency makes is entitled to deference, and a reviewing court that preferred the broad to the narrow construction or vice versa cannot substitute its own preference for the agency's.⁵⁸ In other words, the Commission in 2000 could have, and in this proceeding may, adopt a narrow, broad or intermediate interpretation of the statutory language creating the good faith obligation and in each case its interpretation would be sustained if reasonably consistent with the text and purpose of the provision.

“22. Given the dearth of guidance in the statute and legislative history, we believe that Congress signaled that the good faith negotiation requirement adopted in Section 325(b)(3)(C) was sufficiently well understood that further explication was unnecessary.”

Here's a riddle: How is good-faith negotiation like hard-core pornography? The answer lies in the famous remark of Supreme Court Justice Potter Stewart that “perhaps I could never succeed in intelligibly [defining ‘hard-core pornography,’] . . . [b]ut I know it when I see it.”⁵⁹

“Good faith” is like that. There is no generally accepted, comprehensive and unambiguous definition against which specific conduct can be measured and a judgment rendered.⁶⁰ As one scholar has said, “the [good faith] principle itself is an empty shell.”⁶¹

⁵⁸ See *Babbitt v Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 697-98, 701-02 (1995). See also Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 *Fordham L. Rev.* 607 (2014); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 57 *Wm. & Mary L. Rev.* 753 (2013); Linda D. Jellum, *Heads I Win, Tails You lose: Reconciling Brown v. Gardner's Presumption That Interpretative Doubt be Resolved in Veterans' Favor With Chevron*, 61 *Amer. U. L. Rev.* 59 (2011).

⁵⁹ See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁶⁰ For example, “good faith” is defined in the Uniform Commercial Code as “honesty in fact in the conduct or transaction concerned.” U.C.C. §1-201(19). That is so vague as to be useless in determining whether a particular

Whether the field is general contract law,⁶² the Uniform Commercial Code,⁶³ labor law,⁶⁴ Chapter 9 of the Bankruptcy Code⁶⁵ or international law,⁶⁶ our efforts to craft a comprehensive general definition “either spiral into the Charybdis of vacuous generality or collide with the Scylla of restrictive specificity.”⁶⁷ Yet, we usually know it when we don’t see it. In other words, it is easier to attach the label “bad faith” to an actual act or omission by a specific actor in particular circumstances than to define the concept of good faith generally.⁶⁸

act or omission is or is not in good faith. By itself, it would not allow someone without knowledge of the outcomes of decided cases which have applied the standard to accurately predict those outcomes.

⁶¹ Sanja Đajić, *Mapping the Good Faith Principle in International Investment Arbitration: Assessment of its Substantive and Procedural Value*, 46 *Zbornik Radova* 207, 209 (2012), available at <http://scindeks-clanci.ceon.rs/data/pdf/0550-2179/2012/0550-21791203207D.pdf>.

⁶² See Section 205 of the Restatement of Contracts Second, stating that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”

⁶³ Section 1-304 of the Uniform Commercial Code states that “Every contract or duty within this Act imposes a duty of good faith in its performance or enforcement.” The Code also incorporates the concept of “good faith” in numerous other provisions. See, e.g., Section 2-305(2).

⁶⁴ See Michael J. Zimmer, Comment, *The Increasing Control of Collective Bargaining by the NLRB Under the Good Faith Duty*, 50 *Marq. L. Rev.* 526 (1967), available at: <http://scholarship.law.marquette.edu/mlr/vol50/iss3/4>.

⁶⁵ The availability to a municipality of protection under Chapter 9 of the Bankruptcy Code depends, in part, on whether the municipality first “negotiated in good faith with creditors” in an effort to reach a mutually satisfactory plan that would forestall the filing of a Chapter 9 case. 11 U.S.C §109(c)(5)(B). The Bankruptcy Code, however, does not define “good faith.” See generally John Boersma, *The Reciprocal Duty of Good Faith Negotiations in Chapter 9 Bankruptcies*, 6 *St. John’s Bankr. Research Libr. No.* 3 (2014).

⁶⁶ Unfortunately, of all the principles of international law, the principle of good faith is perhaps the hardest to define.” Andrew D. Mitchell, *Good Faith in WTO Dispute Settlement*, 7 *Melbourne Journal of International Law* 14, 19 (2006).

⁶⁷ Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 *Va. L. Rev.* 195, 206 (Mar. 1968).

⁶⁸ As one commentator said way back in 1968:

[I]n cases of doubt, a lawyer will determine more accurately what the judge means by using the phrase “good faith” if he does not ask what good faith itself means, but rather asks: What, in the actual or hypothetical situation, does the judge intend to rule out by his use of the phrase? Once the relevant form of bad faith is thus identified, the lawyer can, if he wishes, assign a specific meaning to good faith by formulating an “opposite” for the species of bad faith [identified]. . . .

The process of distinguishing the good from the bad is made even uglier by the fact that our conclusion varies with the context—for example, behavior may violate a good faith obligation under one statute, but not under another law that has a different purpose.⁶⁹ Even if we are applying the same statute to two instances of essentially the same conduct, variations in seemingly incidental facts may lead to different outcomes.⁷⁰

All of this is true even in the case of the good faith duty in labor negotiations under Section 8(d) of the Taft-Hartley Act, which, of course, is where the Commission thought Congress intended it to go for guidance. Far from being “well understood” as the Commission stated, figuring out whether the obligation to bargain in good faith is “an inescapably elusive inquiry”⁷¹ because “[t]here is no single established definition of good faith in the context of labor relations.”⁷² As the National Labor Relations Board (NLRB), the federal agency responsible for administering the Taft-Hartley Act, has itself said:

The only safe generalization which can be made as to the requirements of good-faith bargaining is that it is risky to generalize. The courts and the

Robert S. Summers, “*Good Faith*” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 200 (1968), available at <http://scholarship.law.cornell.edu/facpub/1137>. In the almost 50 years since that passage was published, lawyers, judges and legal scholars have not made any appreciable progress in crafting a general definition of “good faith.”

⁶⁹ For example, in the case of general contract law, the obligation of good faith arises only after a contract is signed, and there are very few precedents involving pre-formation negotiations. In the case of labor law, there is an obligation to conduct pre-agreement negotiations in good faith, and there are lots of precedents addressing that duty.

⁷⁰ To illustrate this point, Professor Charles Fried has postulated two similar scenarios. In the first, a farmer agrees to sell land to an oil company. The oil company has determined through its own efforts that the land sits on a rich pool of oil, but the farmer is ignorant of that fact and, therefore, agrees to sell the property for far less than it is worth. In the second iteration, the facts are the same, except that the seller is a large natural resources holding company. Many of us will have different intuitive responses to the two situations, and argue that the decision in a case challenging enforceability of the contract should reflect that difference. We might, for example, hold that the oil company’s failure to disclose the true value of the land was wrongful in the case of the farmer, but not in the case of the natural resources company. See Charles Fried, *Contract as Promise* 78-85 (1981).

⁷¹ *NLRB v. Big Three Indus., Inc.*, 497 F.2d 43, 46 (5th Cir. 1974).

⁷² Marc Mandelman & Kevin Manara, *Staying Above the Surface—Surface Bargaining Claims Under the National Labor Relations Act*, 24 Hofstra Labor & Employment L. J. 261, 263 (2007).

Board have made it abundantly clear that the determination of whether there has been compliance with the obligation to bargain in good faith, depends ultimately on the facts and circumstances of a particular case.⁷³

“22. [T]he good faith bargaining requirement of Section 8(d) of the Taft-Hartley Act is the most appropriate source of guidance [for the Commission in defining the good faith obligation in retransmission consent negotiations].”

In the very same paragraph as the Commission expressed this conclusion, it noted “the dearth of guidance in the statute and legislative history” as to the meaning of the newly created good faith requirement. Given that fact, what is the basis for picking Section 8(d) of the Taft-Hartley Act as the reference source? If the answer is that labor negotiations are the only other area in which a pre-contract duty of good faith is imposed, then the obvious response is that Congress was aware of the existence of Section 8(d) of the Taft-Hartley Act and if it intended that to be the “the source of guidance” for the Commission, then why didn’t it say so in Section 325(b)(3)(C) or the legislative history?” One logical conclusion that flows from the failure to do so is that Congress intended the Commission to craft a definition of good faith that would be most appropriate for the retransmission consent arena, rather than import standards from one or more entirely different fields governed by different bodies of law with different purposes.

Congress did not rule out examining precedents such as the language of, and NLRB and court rulings under, Section 8(d) of the Taft-Hartley Act, but, in the end, the most appropriate source of guidance for the Commission can be found in the congressional purposes, goals and expectations underlying creation of the retransmission consent obligation in the first place.⁷⁴

⁷³ *McLean-Arkansas Lumber Co.*, 109 N. L. R. B. 1022, 1036-1037 (1954).

⁷⁴ To avoid misunderstanding or mischaracterization of our position, we emphasize that we are not saying that the Commission should not consult precedents in labor law or other fields. Indeed, as other comments we have filed in this proceeding indicate, we think that there are a number of important precedents, ideas and tools that exist under Section 8(d) of the Taft-Hartley Act that the Commission should incorporate into its good faith rules. However, that opinion is based on a conclusion, after analyzing the statutory text and legislative history, that borrowing those items

If Congress adopts a statute with uncertain meaning, the responsible agency is not free to act based on the preferences, prejudices or whims of the agency’s officials or even their common sense, logic and reasoning. Instead, its interpretative choices must be guided by one or more of the three bases that Professor Ronald Dworkin has identified as being legitimate in our legal system—rules, principles and policies.⁷⁵ In his terminology, a “rule” is a standard contained in a statute, a judicial precedent or another authoritative source that, when applicable, is absolute and dispositive.⁷⁶ “Principles” are standards, other than rules, that can be used by judges or officials to guide their decision-making.⁷⁷ A principle provides a justification or reason for making one decision instead of another but, unlike a rule, does not dictate that decision. Principles, like rules, can have an authoritative source, such as a statute or court decision, but can also be derived from a moral precept commonly accepted within the society, such as “fairness” or “justice.” Finally, a “policy” is “a kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community.”⁷⁸ Policies are authoritatively established by legislatures and implemented by government officials and agencies.

As noted above, “good faith” does not lend itself to a rule-based scheme because it is “an unusually ‘circumstance-bound’ doctrine ... [that] excludes highly varied forms of bad faith,

(in appropriately modified forms) is the best way of carrying out the legislative purposes and goals underlying the creation of retransmission consent.

⁷⁵ See Ronald M. Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14 (1967) (“*Rules*”); Ronald M. Dworkin, *Taking Rights Seriously* (1978). Dworkin’s lexicon is useful, but his theories have many critics as well as supporters. See, generally, Donald H. Regan, *Glosses on Dworkin: Rights, Principles, and Policies*, 76 Mich. L. Rev. 1213 (1978).

⁷⁶ See *Rules* at 25. Dworkin gives as an example of a “rule” a statute that makes a will valid only if signed by three witnesses. *Id.*

⁷⁷ *Rules* at 23. An example of a “principle” Dworkin gives is “No man may profit from his own wrong.” *Id.* at 26.

⁷⁸ *Rules* at 23. One example of a policy Dworkin presents is “automobile accidents are to be reduced.” *Id.*

many of which become identifiable only in the context of circumstantial detail of a kind that defies comprehensive statutory formulation.”⁷⁹ Consequently, in virtually every case in which a good faith obligation has been imposed, there are no dispositive rules dictating the result in most cases of first impression.

While dispositive rules are invariably absent, in some cases, such as the UCC, the legislature or other creator of a good faith obligation specifies one or more underlying principles. In those cases, as difficult as applying the principles may be in practice, judges and officials must try to be faithful to the creator’s choices.

If the legislature has been so thoughtless or cruel as to omit both rules and principles, then decision-making must be consistent with the policy that the good faith obligation was adopted to further. In fact, that policy must also be consulted even when a set of principles has been provided because of the difficulties inherent in translating vague principles like “honesty” into detailed prescriptive commandments. The touchstone for making interpretative choices, in other words, must be which alternative is most likely to further the legislature’s policy goals.

The fact that the judge or official must be faithful to the rules, principles and policies established by the legislature does not preclude looking for guidance from sources ordinarily consulted by decision makers in our legal system. For example, one may consider precedents in other areas of the law where a good faith obligation exists, customary practices and usual expectations in negotiations generally and the understanding prevalent within our society of

⁷⁹ Robert S. Summers, “*Good Faith*” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*,” 54 *Va. L. Rev.* 195, 215 (Mar. 1968).

ethical principles like equity, fairness and justice.⁸⁰ In the end, however, if decisions and choices are made, they must be the ones that do not violate any rules laid down by the legislature, are most consistent with the statute's text and the creator's articulated principles and will best serve to advance the creator's ascertainable policies and goals.

Of course, as all of us are aware (painfully, for all but broadcasters, who profit from the ambiguity), in creating the good-faith obligation in retransmission consent negotiations and, likewise, in ordering the review undertaken through this proceeding, Congress did not supply any rules or principles that help to definitively and comprehensively distinguish the good from the bad. Congress has, however, given us very clear guidance about the policies that it intended the creation of retransmission consent to serve and its expectations as to the behavior of broadcasters and cable companies if its public interest goals were to be realized.

Consistently with the policies that have guided federal communications law from the beginning, in creating the must-carry right and retransmission-consent requirement in 1992, Congress was motivated not by the desire to advance the private interests of broadcasters, but, rather, by the public interest. Specifically, it sought to preserve continued access by American households to local news and public affairs programming through the option of free over-the-air television. Rightly or wrongly, Congress believed that vertically integrated cable companies had an economic incentive to deny carriage to broadcast stations because they competed with cable networks for advertising dollars. In addition, it was argued that by being able to carry broadcast signals without consent or compensation, cable companies enjoyed an unjustified "subsidy" at

⁸⁰ See James J. Stankiewicz, *Good Faith Obligation in the Uniform Commercial Code: Problems in Determining Its Meaning and Evaluating Its Effect*, 7 Val. U. L. Rev. 389, 394 (1973), available at <http://scholar.valpo.edu/vulr/vol7/iss3/5>.

the expense of broadcast stations. Congress created the must-carry right to address the first problem and the retransmission consent requirement to deal with the second.

The legislation creating the retransmission consent obligation⁸¹ makes all of this perfectly clear. Section 2 lists congressional “findings” that explain the policy reasons underlying the statute (the “Findings”).⁸² Findings 10, 11 and 12 confirm that Congress was spurred to action by its view that there was a strong public interest in preserving the availability of “free” television through a local broadcasting system.⁸³ Other Findings pointed out that the growth of cable television had resulted in “a marked shift in market share from broadcast television to cable television services”⁸⁴ as well as “increasing compet[ition] for television advertising revenues,”⁸⁵ meaning that “proportionately more advertising revenues will be reallocated from

⁸¹ The obligation was added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. 1460 (1992), which is referred to in these comments as the “1992 Act” or “1992Cable Act.”

⁸² 1992 Act § 2(b).

⁸³ Those Findings read as follows:

“(10) A primary objective and benefit of our Nation’s system of regulation of television broadcasting is the local origination of programming. A primary objective and benefit of our Nation’s system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation. . .

“(11) Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate

“(12) Broadcast television programming is . . . free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.”

⁸⁴ 1992 Act § 2(b)(13).

⁸⁵ *Id.* § 2(b)(14).

broadcast to cable television systems.”⁸⁶ Finding 15 stated that the ability of cable systems to carry the signals of local stations “without the consent of the broadcaster or any copyright liability” had “resulted in an effective subsidy of the development of cable systems by local broadcasters.”⁸⁷ The result of all this, according to Finding 15, was “a competitive imbalance between the 2 industries.”⁸⁸

Over time, broadcasters and, unfortunately, some at the Commission, have lost sight of the fact that Congress wanted to restore balance, not to tip the scales in the other direction. While cable’s competition with broadcast television was seen as a danger, it was also recognized that cable was essential to realization of Congress’s goals of promoting universal availability of local broadcast programs. According to Finding 9, cable carriage of local broadcast stations “is necessary to serve the goals contained in section 307(b) of the Communications Act of providing a fair, efficient, and equitable distribution of broadcast services.”⁸⁹

Congress was also perfectly transparent with regard to its view on the two issues generating the most heat in contemporary discussions of retransmission consent: service

⁸⁶ *Id.*

⁸⁷ *Id.* § 2(b)(15).

⁸⁸ *Id.* § 2(b)(15).

⁸⁹ *Id.* § 2(b)(9). Congress also recognized in Findings 15 and 17 that cable companies make an important contribution to the financial health of broadcast stations by increasing their viewership and revenues. Those Findings read as follows:

“(15) A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. . . .

“(17) Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services. . . .”

interruptions and the cost to consumers. Finding 17 notes that because of geography or other reasons, “most” cable subscribers were (and remain today) unable to have reliable access to local broadcast television programs, as Congress wanted, otherwise than through their cable service.⁹⁰ In the case of cable subscribers who could receive off-air signals, that fact alone was not thought to render a loss of access through their preferred provider acceptable to Congress: Finding 18 expressly rejects the notion that the ability of some subscribers to view broadcast signals over-the-air mitigates the impact of a carriage interruption, saying that “alternative distribution systems for cable subscribers, such as the ‘A/B’ input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest.”⁹¹ During the debate over retransmission consent on the floor of the House and Senate, a number of legislators clearly stated that the intent of the legislation was to ensure the continued availability of broadcast television to all Americans, including cable subscribers.⁹² Moreover, the grant of rulemaking power to the Commission now codified at Section 325(b)(3)(A) of the Communications Act was added to the 1992 Cable Act expressly for the purpose of ensuring that the Commission had the authority to minimize or prevent blackouts.⁹³

With regard to the economic impact of retransmission consent, it is crystal clear from the congressional record that Congress neither wanted nor expected the new requirement to cause

⁹⁰ 1992 Act. § 2(b)(17).

⁹¹ 1992 Act. § 2(b)(18).

⁹² During the debate over the enactment of the retransmission consent provisions of the 1992 Cable Act, Congressional leaders expressly discussed the issue of “what will happen if a local station is unable to reach an agreement with the local cable operator, which could result in the loss of local programming to cable customers.” Responding to this and similar inquiries, Senator Inouye, floor manager of the 1992 Act and the author of the retransmission consent provision, noted that ensuring the “universal availability of local broadcast signals” was a major goal of the legislation. He also remarked that in the rare situation where a retransmission consent dispute threatens the public’s access to local broadcast stations, “the FCC has the authority under the Communications Act” to “ensure that local signals are available to all the cable customers.” 138 Cong. Rec. S643 (statement of Sen. Inouye).

⁹³ See 138 Congo Rec. S564 (Jan. 29, 1992) (remarks of Sen. Inouye).

basic cable rates to increase or service interruptions⁹⁴ To insure that its expectation and desire were realized, it added language to the statute specifically intended to adopted safeguards to prevent that from happening.

Read as a whole, as they must be, the findings set forth in Section 2 of the 1992 Act and the legislative history unquestionably establish that in creating the must-carry right and retransmission consent obligation, Congress wanted to endow local broadcast stations with sufficient countervailing power against cable operators to restore a rough balance in their relationship, but not so much power that they could drive up cable subscribers' basic rates or deprive them of access to local station signals through their cable service.

It is equally clear that Congress hoped that it could rely on market forces to achieve its goals. As we have noted before, the market for retransmission consent created by Congress took the form of a bilateral monopoly consisting of a single seller (the broadcast station) and a single buyer (the cable company). The market power of the local broadcast station resulting from contractual exclusivity rights and enhanced by the must-carry right, was expected to enable the station to secure guaranteed distribution to cable subscribers and possibly also gain concessions or consideration that might ameliorate the negative impact on the ability to produce local programs caused by loss of advertising revenues to cable networks. However, it was believed that the countervailing monopsony power of the local cable system would enable it to resist

⁹⁴ See, e.g., 138 Cong. Rec. S562-63 (Jan. 29, 1992) (remarks of Sen. Inouye); 138 Cong. Rec. S643 (Jan. 30, 1992) (remarks of Sen. Inouye); 138 Cong. Rec. S14224 (Sep. 21, 1992) (remarks of Sen. Inouye); 38 Cong. Rec. S14248 (Sep. 21, 1992) (remarks of Sen. Gorton); 138 Cong. Rec. S14615-16 (Sep. 22, 1992) (remarks of Sen. Lautenberg).

demands for significant cash payments and make broadcasters extremely reluctant to withhold consent.⁹⁵

Congress recognized the possibility that sometimes the market might not work as desired, although it expected those situations to be rare. To ensure that that its creation would not turn into a Frankenstein's monster, the Cable Act granted the Commission broad authority in Section 325(b)(3)(A) to make rules "governing the exercise of the retransmission consent right."⁹⁶

By 1999, the emergence of direct-broadcast satellite service (DBS) as a viable competitor for cable and other market developments led Congress to take the unusual step of imposing upon broadcasters an express statutory duty to negotiate retransmission consent in good faith, charging the Commission with responsibility for defining and enforcing that duty.

In formulating its original good faith rules, the Commission seems to have treated the mandate essentially as though it were an independent entity, rather than a complementary part of an integrated whole with the retransmission consent requirement itself. The message that leaps out of a reading of the Good Faith Order is that the Commission thought that Congress's purposes would be fully satisfied as long as the negotiation process was conducted in the right way, even if the outcome of the negotiations was antithetical to its goals in establishing the retransmission consent requirement in the first place.

⁹⁵ As detailed in prior filings by Mediacom in MB Docket 10-71, the legislative history contains numerous references to the expectation that negotiations would be conducted by the local cable system and station, so that the rough equivalence of their bargaining leverage would make the market largely self-regulating. Thus, there are predictions that most local stations would elect must-carry, rather than retransmission consent; that many of the stations electing retransmission consent would accept non-cash consideration; that, where cash payments were required, they would be sufficiently small that cable operators would absorb the costs rather than pass them through to consumers; that interruptions of cable carriage would be rare because cable systems, characterized as "local monopolies," and local broadcast stations, armed with program exclusivity rights in their markets, would have roughly equal bargaining power and would be equally motivated to reach a deal.

⁹⁶ See Section 325(b)(3)(A) of the Communications Act.

That approach was a mistake. To see why, we must appreciate just how unusual a step it was for Congress to impose upon broadcasters a duty of good faith in pre-contract negotiations—to our knowledge, it was only the second time in history that Congress chose to deviate from the principle that has guided the common law for centuries—namely, that, with very few exceptions, the parties to a potential contractual relationship have no obligations to each other unless or until a contract is actually signed.⁹⁷ Because a federal duty to negotiate in good faith has been imposed in only two instances out of the myriad of commercial settings in which there is pre-contract bargaining, it is clear that Congress did not act because of a belief that the parties to all pre-contract negotiations should always act in good faith. Instead, it created a second exception to the general principle that parties are free to refuse to contract for any reason or no reason because it thought that retransmission consent negotiations were invested with special significance for important societal interests and it wanted to increase the odds that the outcome of the bargaining would advance those interests. In this sense, the Commission’s various statements in the Good Faith Order to the effect that Congress was concerned only with process, and not with the outcomes or substance of negotiations are misguided.

In short, Congress added the good faith duty in 1999 in order to make its 1992 creation more complete—to resort to a useful cliché, it thought it was adding a tail to the dog. Unfortunately, after the surgeon given the job of attaching it was finished, the tail was wagging the dog. Or, to use another cliché, in adopting its original rules in 2000, the Commission lost sight of the forest for the trees, paying far too much attention to the generic process of

⁹⁷ See, generally, White & Case, “*Good Faith*” *Negotiations and Exclusivity Agreements*, <http://events.whitecase.com/pdfs/autumn2014/03-Good-Faith-Negotiations-and-Exclusivity-Agreements.pdf> (English law). The primary exceptions are the duty to not commit fraud, engage in active deceit or act in a way detrimental to another party who acts or forebears in justifiable reliance upon the expectation that a commercial relationship will be created.

negotiation and far too little to the larger purpose that the good faith duty was meant to serve, forgetting “the cardinal rule that ‘[s]tatutory language must be read in context.’”⁹⁸

This point should not be misunderstood—there is nothing wrong with taking into account precedents, customary practices, reasonable commercial expectations and ethical principles that are thought to be applicable to negotiations generally or in specific fields; however, the determinative factor in the Commission’s decision-making regarding the scope and content of its good faith rule must be the relative contribution of each choice and alternative before it to the achievement of the public policy goals underlying creation of the retransmission consent right, rather than to the improvement of the negotiating process as an end in itself. In other words, “[m]easurement of the proper scope of the good faith obligation requires understanding its intended function”⁹⁹ in the larger legislative scheme of which it is a complementary part, and when there are different plausible constructions of a particular provision that is part of a larger statute, the correct interpretation is the one “most compatible with the surrounding body of law into which the provision must be integrated.”¹⁰⁰

Based on the analysis of the congressional purposes and expectations underlying creation of the retransmission consent obligation presented above, if the Commission had proceeded

⁹⁸ *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 596 (2004), citing *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)). 540 U.S. at 595, 596.

⁹⁹ Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 Duke L.J. 619, 621 (Sep. 1981), available at: <http://scholarship.law.duke.edu/dlj/vol30/iss4/1>.

¹⁰⁰ *Green v Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring). See also Yule Kim, Congressional Research Service, *Statutory Interpretation: General Principles and Recent Trends* CRS-2 (2008), available at <https://www.fas.org/sgp/crs/misc/97-589.pdf>: “A cardinal rule of construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purpose. The various canons of interpretation and presumptions as to substantive results are usually subordinated to interpretations that further a clearly expressed congressional purpose.” The good faith obligation, of course, is only a piece of a larger statutory creation and should be interpreted to serve the “clearly expressed congressional purpose” underlying the creation of the retransmission consent obligation.

correctly in initially crafting its good faith rules, it would have first identified the “intended function” of the duty to negotiate in good faith as something such as this: “enhancing the probability that bargaining will produce a mutually satisfactory contract consistent with the congressional intent that creation of the retransmission consent obligation would not result in increases in basic cable subscription rates or loss by cable subscribers of the ability to view locally originated programs through their cable service provider.” Next, it would have evaluated, and made selections from among, the range of options suggested by those filing comments in its rule-making proceeding or by scholars, based on each suggestion’s likely contribution to the performance of that function.

Instead, as noted, the Commission focused on the negotiating process itself. There is very little in the Good Faith Order devoted to a discussion of the overarching goals underlying retransmission consent and how best to ensure that they would be advanced by its good faith rules, while a whole lot of space is spent developing rules that would be suitable for just about any sort of negotiations, regardless of the particular context. Again, too much attention was paid to the process in and of itself, and there was insufficient appreciation that the process was supposed to be merely a tool for increasing the odds that outcomes desired by Congress would be realized. Thus, the Commission consulted not the legislative history of the 1992 Cable Act, but materials defining good faith in other fields, especially labor law. It analyzed the behavior and expectations of parties in commercial settings generally, rather than Congressional expectations with regard to the retransmission consent market. Instead of seeking guidance in the Findings and the legislative history of the 1992 Cable Act, it resorted to ethical precepts that are not especially relevant in the context of retransmission consent and most certainly qualify for inclusion in “the Charybdis of vacuous generality,” such as the notion that Congress intended for

negotiations be conducted “in an atmosphere of honesty, purpose and clarity of process.”¹⁰¹

Who could possibly argue with that? At the same time, who could possibly know what it means?

The Commission’s reference to “honesty” as one of the touchstones for good faith brings to mind the UCC’s definition of good faith as “honesty in fact in the conduct or transaction concerned.” The problem, in both cases, is that the standard is too vague to be useful as a guide to market participants and is so susceptible to subjective interpretation that applying sanctions based on it in a case of first impression would necessarily smack of ex post facto lawmaking. It is worth quoting at length from observations about the UCC’s definition by Professor Clayton Gillette:

"Honesty" may be interpreted to preclude only active misrepresentations or, more broadly, to prohibit obligors from taking unfair advantage of an obligee's weak position, although the obligor bears no responsibility for the creation of that position. In the absence of a clear concept of "honesty," one can envision a number of functions of the good faith obligation that the drafters of the Code might have contemplated. Possible functions include: to impose liability only for lying, deceit, or fraud; to create a gap filler that permits judges to impose liability for condemnable commercial behavior that does not fit within traditional categories of actionable conduct; to impose liability on commercial actors who fail to satisfy their voluntarily assumed obligations, consistent with the ethical imperative to keep one's promise (even if that requires personal sacrifice); and to encourage commercial actors to behave in the most reasonable manner under the circumstances, considering the interests of other parties.¹⁰²

In fact, the list of reasonable and supportable interpretations of the term “honesty” included in the quote is far from complete. The existence of so many choices means that simply identifying “honesty” as one of the principles underlying the good faith obligation without also

¹⁰¹ Good Faith Order ¶ 24.

¹⁰² Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 Duke L.J. 619, 622 (Sep. 1981), available at <http://scholarship.law.duke.edu/dlj/vol30/iss4/1> (each possible interpretation of the word “honesty” in the UCC’s definition of good faith “proscribes a different range of conduct and requires a different sanction”).

specifying which of the alternative interpretations of that word are meant to apply gives us little guidance as to the parameters of the obligation. And, if anything, the Commission's concept of "clarity of process" lends itself to an even greater number of possible interpretations.

Additional ambiguity is introduced if we turn from trying to define such generalized principles as "honesty" to applying whichever definition we select to specific acts. For example, if we said that the function of the word "honesty" is only to exclude lying, deceit and fraud, then how do we classify a statement by a broadcaster that increases its offered price during negotiations by saying that the bump reflects "competitive market conditions" when it is the sole source of supply in the relevant DMA?

More questions arise if we move up, rather than down, the analytical chain and ask why the Commission selected the three principles of honesty, purpose and clarity of process rather than others that have been held to be, or suggested as being, inherent in the concept of good faith negotiations? As already noted, in contract law, the "good faith" obligation usually applies after contract formation, and so case law is of limited utility where the issue is behavior during pre-contract bargaining. However, there have been exceptions, and Professor Robert Summers, a seminal thinker on the subject of "good faith," once found, based on a comprehensive review of cases, that "forms of bad faith at the negotiation and contract formation stage include . . . abusing the privilege to break off negotiations . . . , failing to disclose known [material facts] and taking undue advantage of superior bargaining power to strike an unconscionable bargain."¹⁰³ Additionally, as Professor Gillette remarked in the quotation above, the concept is certainly capable of sustaining a prohibition against one party "taking unfair advantage" of another party with less leverage, "although the obligor bears no responsibility for the creation of that position."

¹⁰³ Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 220 (Mar. 1968).

In labor law, it is well-established that variations of all of these kinds of behavior can amount to bad faith.

Why, then, did the Commission not base its rules on principles like those Professor Summers and Professor Gillette identified in addition to the “atmosphere” principle? Frankly, it is impossible to figure out an answer from the text of the Good Faith Order.

Having decided that Congress meant for “honesty, purpose of clarity of process” to be the defining principle, the Commission failed to give explicit recognition to the fact that the three terms within that standard could each have many different interpretations. Accordingly, it did not engage in an analysis to determine which of the alternative interpretations was most appropriate in the specific context of retransmission consent negotiations.¹⁰⁴ In fact, it did not make even a passing effort to explain what the standard was supposed to mean. Even if the Commission had done a better job of telling us what it meant by the “atmosphere” phrase, that still might not have helped us figure out how it reasoned from that meaning to arrive at its list of the specific acts and omissions that it said constitute bad faith.¹⁰⁵

¹⁰⁴ Surprisingly, after introducing the “atmosphere” principle in paragraph 24 of the Good Faith Order, the Commission never once mentioned it again in the dozens of pages that followed. Indeed, an electronic search reveals that none of the terms “honesty,” “honest,” “purpose” (in the sense used in the atmosphere principle) and “clarity of process,” were ever used again. As a consequence, the chain of reasoning leading the Commission from the atmosphere principle, which it identified as residing at the heart of the good faith obligation, to the specific content of its rule is invisible to us.

¹⁰⁵ For example, if we knew that the Commission thought that the function of the word “honesty” is to exclude lying, deceit and fraud, then that implies a duty to tell the truth if a broadcaster chooses to speak, but does not imply an obligation to say anything in the first place. That interpretation, however, is inconsistent with the fact that the Commission made it a *per se* violation of the good faith obligation for a broadcaster to fail to give its reasons for rejecting an MVPD’s proposed terms. The duty to explain a rejection necessarily means that good faith does sometimes affirmatively require the broadcaster to speak when it prefers to remain silent. But if so, then what principle dictates a duty to speak in only one of the host of situations that arise during the course of negotiations? For example, how is it that a broadcaster must explain its rejection of the other party’s proposal, but not the basis for its own offered terms?

CONCLUSION

Whatever the Commission may have done in 2000, this is a different year and a different proceeding and so there is an opportunity for a fresh look. As was true in 2000, in this proceeding there are decisions to be made. The first one is whether the Commission's existing rules should be revised. If so, how? Given that scholars unanimously agree that a wide range of ethical principles can fairly be said to be encompassed by the concept of good faith and that different principles may dictate varying mixtures of permissible and proscribed behaviors,¹⁰⁶ should the Commission stick with the ones it chose in 2000 or make a different selection? What specific kinds of conduct that the selected principles suggest could constitute bad faith should actually be prohibited?

So, how should the Commission proceed to answer questions like these? We respectfully submit that the first step is to deposit the derogation doctrine into the dumpster. The Commission should avoid "a parrot-like repetition and unreflecting application of the old judicial maxim that statutes in derogation of the common law are to be strictly construed." Justice Scalia, who considers himself a "textualist" when it comes to statutory interpretation, has said that "no one ought to be [a strict constructionist] A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."¹⁰⁷

In the case of the good faith obligations of broadcasters and MVPDs, the text is so sparse and open-ended in nature that it can be said to "fairly mean" many things, substantive as well as procedural. As Justice Scalia's words suggest, and *Chevron* Step Two demands, the Commission's interpretation must be reasonable and it cannot simply read whatever it wants into

¹⁰⁶ See Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 Duke. L.J. 619, 621-22 (Sep. 1981), available at <http://scholarship.law.duke.edu/dlj/vol30/iss4/1>

¹⁰⁷ Antonin Scalia, *A Matter of Interpretation* 23 (1997).

the term “good faith.” The reasonableness standard, however, still gives the Commission a lot of room within which to construct a regulatory scheme that restores to the retransmission consent marketplace a large measure of the balance that was destroyed by the introduction of effective competition on the MVPD side while broadcasters retain their local monopolies over popular network and syndicated programs.

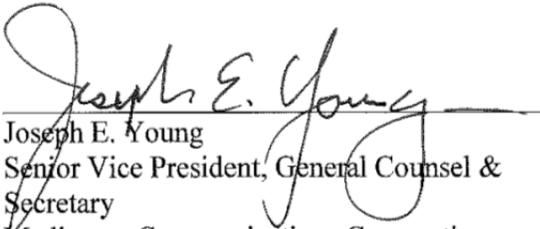
We think that the right way of proceeding in order to restore that balance is to start with the recommendation made by James Stankiewicz over forty years ago that the a judge or agency seeking to ascertain the meaning of a good faith obligation imposed in a particular context should consider “the historic and classical import of the good faith concept, the normal commercial expectations of the parties, the . . . intent of the drafters, integrated readings of the [relevant statute] as a whole and the effect of the courts' decision on [the policies underlying the statute in which the obligation appears].”¹⁰⁸ That approach, of course, leaves ample room to consider labor law and other relevant precedents and the recommendations and suggestions for specific actions made in comments filed in this proceeding.

In the end, this approach will unavoidably necessitate a number of choices between alternatives all of which can be said to fairly and reasonably fall within the statute’s text and purpose. In making those choices, we think that the Commission’s primary responsibility is to ensure that its rules implementing the good faith requirement create conditions that make it more likely than not that the parties will reach agreements that advance the consumer interests that retransmission consent is supposed to serve. Given the failure of the approach taken in 2000 that focused entirely on process, this time around the Commission needs to address both the substance of

¹⁰⁸ James J. Stankiewicz, *Good Faith Obligation in the Uniform Commercial Code: Problems in Determining Its Meaning and Evaluating Its Effect*, 7 Val. U. L. Rev. 389, 393-94 (1973), available at <http://scholar.valpo.edu/vulr/vol7/iss3/5>.

retransmission consent negotiations and the tactics employed during such negotiations, and must provide meaningful remedies for violations.

Respectfully Submitted

A handwritten signature in black ink, reading "Joseph E. Young", is written over a horizontal line. The signature is fluid and cursive, with the first name "Joseph" and last name "Young" clearly legible.

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January 14, 2016