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Off the Hook

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By Kevin Werbach

ABSTRACT

Communications networks are the basic infrastructure of the digital age. The future of news, business, interaction, entertainment, health care, education, and many other areas will be built on top of these platforms. Network infrastructure is the dividing line between the old physical economy of scarcity and the new information economy of abundance. The legal framework for networks will therefore shape not only the telecommunications businesses that provide connectivity, but also the applications, services, content, and user activities that depend on it.

Unfortunately, communications networks are entering a vast legal grey area. As telecommunications and media converge into the Internet, they are escaping from the regulatory frameworks of the Communications Act of 1934. In its effort to engage the Internet, the Federal Communications Commission (FCC), the regulatory agency responsible for communications, has backed its way into a dead-end statutory theory that provides insufficient basis for effective regulation.

The solution lies within the Communications Act itself, but not where the FCC and others have been looking. The essential requirement for a flourishing network infrastructure platform is open interconnection. By locating its authority to regulate the Internet in its obligations to oversee interconnection under Title II of the Communications Act, the FCC could reorient communications law for the challenges of a new era.

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I. INTRODUCTION

Consider the iPhone. An ingenious and wildly successful device, Apple's iPhone 3G is simultaneously a handheld computer, a Global Positioning System location sensor, a digital music and video player, and a platform for tens of thousands of third-party software applications.[1] It is also, as the name suggests, a phone. And that, from a public policy standpoint, ought to make all the difference. The iPhone and devices like it are endpoints of communications networks. Such networks have been regulated for more than a century to safeguard the public interest. Yet today, as telecommunications and media converge into the Internet, networks are becoming a vast legal grey area. It is unclear, for example, whether the Federal Communications Commission (FCC) can apply its rules mandating open interconnection and non-discrimination to the platforms supporting the iPhone ecosystem. And the same analysis applies to any device or service connected to the Internet – which is, increasingly, all of them. Without a theory for Internet regulation, both competition and user interests are imperiled.

A recent example shows the danger of the present course. In a landmark August 2008 decision, the FCC sanctioned Comcast for discriminating against peer-to-peer file-sharing applications on its broadband access network.[2] To justify its legal authority, the FCC relied on the bold but unfounded discovery of a Congressional "national

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[1] *See* Sara Silver, *Mobility – What's In Store: More Companies are Copying Apple, Offering Software Programs that You can Download Directly to Your Cellphone*, WALL ST. J., Feb. 17, 2009, at R4. Since June 2007, customers have purchased over 20 million iPhones and downloaded over 500 million applications. *See* Phillip Elmer-Dewitt, *Apple's App Store: 25,000 Apps and Counting*, FORTUNE APPLE 2.0 BLOG, March 5, 2009, *at* http://apple20.blogs.fortune.cnn.com/2009/03/05/apples-app-store-25000-apps-and-counting/

[2] *See infra* Part III. Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion & Order*, 23 FCC Rcd. 13,028 (2008) *[hereinafter Comcast Order]*; Bob Fernandez, *FCC orders Comcast to Change Internet Practices*, PHILA. INQUIRER, Aug. 2, 2008, at C1 ("The enforcement action was hailed as a landmark victory by 'net neutrality' advocates for extending FCC authority to the Internet….).

Internet policy" in Section 230 of the Communications Act of 1934.[3] The agency misread its own governing statute, placing the entire effort in jeopardy. Even if it survives judicial review, the FCC's decision provides little guidance for future action. This should be a grave concern for anyone who cares about the vast and growing range of activity that depends on the Internet – from data-enabled mobile phones to digital video distribution to smart grid systems for energy monitoring.

Fortunately, the answer lies within the Communications Act, but not where everyone has been looking. As this Article will demonstrate, the FCC has expansive authority over the Internet, pursuant to the interconnection provisions of Title II of the Act.[4] This is an unfashionable view. The dominant perspectives in contemporary communications and cyberlaw scholarship support a limited role for the FCC, either because the FCC cannot be trusted to regulate wisely, or because the Commission's legal authority over the Internet is narrow. Commentators have been content with the notion that Internet-based services are somehow subject to "ancillary jurisdiction" under the vague and procedural Title I of the Communications Act.[5] However, this approach represents a legal dead end. It cannot support the needs of a national and global economy increasingly built around the Internet.

The basic problem with prior theories of Internet regulation is that they dismiss or ignore the existing statutory framework that delegates authority to the FCC. The Internet was once on the periphery of the communications industry; it is now at the core.[6] It should not be subject

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[3] Communications Act of 1934, 48 Stat. 1064, 1064 (1934) (codified as amended at *47 U.S.C. 151* (2000)).

[4] This does not mean that the FCC should regulate more aggressively in every area. On the contrary, giving the FCC a sound basis to address the contemporary challenges of Internet policy is a way to allow deregulation of many areas where the Commission was historically active. *See* Lawrence Lessig, *Reboot the FCC*, NEWSWEEK.COM, Dec. 23, 2008, *available at* http://www.newsweek.com/id/176809. In spectrum policy, for example, the FCC should abandon its paternalistic command-and-control licensing regime for an approach that relies on courts, market transactions, and self-regulatory organizations. *See* Kevin Werbach, *Supercommons: Toward a Unified Theory of Wireless Communication*, 82 TEXAS L. REV. 863 (2004).

[5] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) [hereinafter Brand X]; James B. Speta, *FCC Authority To Regulate the Internet: Creating It and Limiting It,* 35 LOY. U. CHI. L.J. 15 (2003); Philip J. Weiser, *Toward A Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41 (2003); Jim Chen, *The Authority to Regulate Broadband Internet Access Over Cable*, 16 BERKELEY TECH. L.J. 677, 717 (2001); Susan P. Crawford, *The Ambulance, the Squad Car, and the Internet*, 21 BERKELEY TECH. L. J. 873 (2006); Susan P. Crawford, *Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 FORDHAM L. REV. 695 (2005).

[6] *See* Susan P. Crawford, *Transporting Communications*, _ B.U. L. REV. ___ (forthcoming 2009); IP-Enabled Servs., *Notice of Proposed Rulemaking*, 19

to outdated regulatory restraints, but neither should it forfeit the protections that an administrative agency affords. Without a legal basis for the FCC to regulate Internet services, network operators will have the power to limit innovation that might challenge their traditional business models. Those who control chokepoints will be able to pervert market forces that would otherwise promote competition. And the opportunity for new communications and media channels to reinvigorate democratic discourse will be missed. The network of networks that we call the Internet is more fragile than it seems.[7]

Such problems will only become worse. As new platforms such as social networks and smart mobile devices become significant, no forum will be empowered to address the competitive dynamics of standards or the proper limits on exploitation of user information. We cannot know what Facebook and YouTube and Skype and Twitter will become, but clearly they and their ilk are what AT&T and radio broadcasters were at the beginning of the 20th century: the emerging infrastructure of communication and community for a changing society. Neither Congress nor the courts are likely to address all the critical issues that these children of broadband networks pose.

A theory of FCC Internet jurisdiction also represents an essential missing piece in the debate over network neutrality rules for broadband providers. A group of leading policy scholars, including Lawrence Lessig, Jonathan Zittrain, Barbara van Schewick, and Yochai Benkler, have advanced powerful arguments for an open, "end-to-end," or "generative" model of communications systems, which they see represented in the original implementation of the Internet.[8] However, none of them has yet provided the essential *legal* analysis to ground open Internet rules in a valid statutory foundation. This Article offers that foundation.

F.C.C. Rcd. 4863, 4864-68 (2004) ("the rise of [Internet Protocol]-enabled communications promise to be revolutionary...."); Jonathan Weinberg, *The Internet and "Telecommunications Services," Universal Service Mechanisms, Access Charges, and Other Flotsam of the Regulatory System*, 16 YALE. J. ON REG. 211, 225 (1999) ("Packet-switched networks are taking over, and the communications world is changing."); Weiser, Next Generation, *supra* note 5, at 41 ("the advent of digital, packet-switched broadband networks that carry all forms of communication will restructure traditional telecommunications markets....")

[7] *See* Kevin Werbach, *The Centripetal Network: How the Internet Pulls Itself Together and the Forces Tearing it Apart*, __ U.C. DAVIS L.REV. __ (2009).

[8] *See generally* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (Random House 2001); YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006); Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974 (2006); BARBARA VAN SCHEWICK, ARCHITECTURE AND INNOVATION: THE ROLE OF THE END-TO-END ARGUMENTS IN THE ORIGINAL INTERNET (MIT Press, forthcoming 2009).

The arrival of the new Presidential Administration gives new importance to these questions. President Obama stated during the campaign that he "will ensure that these critical communications pathways [of the Internet] remain accessible to all Americans...."[9] He and his nominee to lead the FCC support non-discrimination rules for broadband.[10] Already, the economic stimulus package enacted by Congress in February 2009 includes seven billion dollars of funding for broadband infrastructure, subject to open access requirements to be developed in concert with the FCC.[11] Grants for health care, education, energy and the environment are also tied to network-based services.[12] Classic communications policy issues of interconnection, universal access, competition, pricing, and discrimination are bound to arise. Yet, at least at present, there are no clear answers about the scope of FCC authority to address them.

This Article develops the core framework to understand the Internet within communications law. Part II explains how Internet-based services have been handled by the FCC to date. It traces the development of the "information services" category, and summarizes the FCC's effort to fashion rules for broadband access providers in its recent decision regarding Comcast's broadband network management practices. Part III attacks the FCC's reasoning. It shows how the FCC decision mis-read the Telecommunications Act of 1996 and suffered from procedural flaws, undermining the entire project. Part IV provides a new interpretation of the FCC's ancillary jurisdiction to oversee Internet-based communications platforms. It explains how the central policy mandates of Title II of the Telecommunications Act can only be effectuated through application to Internet services. Part V concludes.

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[9] Barack Obama, Connecting and Empowering All Americans Through Technology and Innovation, *at* http://www.barackobama.com/pdf/issues/technology/Fact_Sheet_Innovation_and_Technology.pdf.

[10] "Barack Obama supports the basic principle that network providers should not be allowed to charge fees to privilege the content or applications of some web sites and Internet applications over others." *Id. See also* Ryan Singel, *Obama Nominates Net Neutrality Backer for FCC Chief*, WIRED EPICENTER BLOG, March 3, 2009, *at* http://blog.wired.com/business/2009/03/obama-nominates.html (describing FCC Chairman-designate Julius Genachowski).

[11] American Recovery and Reinvestment Act, H.R. 1, Section 6001(j) (2009).

[12] *See* Sue Kirchhoff, *How will the $789B Package Affect You?,* USA TODAY, Feb. 13, 2009, at 3B.

II. THE PHANTOM NATIONAL INTERNET POLICY

The FCC is an independent regulatory agency established during the New Deal to oversee telephone and radio services.[13] Today, its jurisdiction covers a broad collection of major industries, including broadcasting, telephone service, mobile phones, satellite communications, and cable television.[14] The FCC oversees universal service funding mechanisms, content regulation, and other mechanisms with significant impacts in shaping mass culture.[15] The agency's authorizing statute, the Communications Act of 1934, has been updated over the years to incorporate new industries as well as new policy options such as spectrum auctions. It was substantially overhauled by the Telecommunications Act of 1996.[16]

Like any administrative agency, the FCC is technically a creature of Congress.[17] It can interpret Congressional mandates, but not go beyond them. The scope of agency authority thus becomes a question when new technologies develop that Congress did not contemplate. The Internet is a perfect example.

A. The Rise of Information Services

From the communications policy perspective, the Internet is a rather odd duck. It demonstrably involves "interstate and foreign communication by wire or radio,"[18] the touchstone for FCC jurisdiction. It uses facilities of all major types of regulated communications providers, including telecommunications carriers, cable television operators, broadcasters, wireless operators, and satellite providers. It delivers services that mimic and compete with those of the regulated providers, including voice over IP phone service[19] and video

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[13] *See* Kevin Werbach, *The Federal Computer Commission*, 84 N.C. L. REV 1 (2005).

[14] *See* PETER W. HUBER, MICHAEL K. KELLOGG & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW (2d. 1999); JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE (2005).

[15] *See id.*

[16] Telecommunications Act of 1996, Pub. L. 104-104, § 509, 110 Stat. 56 (1996).

[17] *See* Crawford, Shortness of Vision, *supra* note 5.

[18] 47 U.S.C. 152(a).

programming.[20] And yet the Internet is somehow part of the entire regulated communications world while standing outside of it.

The Telecommunications Act of 1996 makes a distinction between "telecommunications" and "information services."[21] "Telecommunications" means "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[22] In other words, it involves an unaltered communications pipe, analogous to traditional voice telephone service.[23] "Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications…."[24] In other words, it involves some computer processing that acts upon the content transmitted across the network. Internet-based services are generally understood to be information services.[25]

The telecommunications/information service distinction added in the Telecommunications Act of 1996 codified an earlier FCC-developed division between basic and enhanced services.[26] In its *Computer Inquiry*

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[19] *See* Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45 (April 10, 1998), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf [hereinafter *Stevens Report*]; E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116 (rel. June 3, 2005)

[20] *See* Kevin Werbach, The Implications of Video P2P on Network Usage, in PEER TO PEER VIDEO AS A MASS MEDIUM (Columbia Institute for Tele-Information, 2008).

[21] *See* Weinberg, *supra* note 6.

[22] 47 U.S.C. 153(43).

[23] In reality, voice calls may involve protocol conversions and other technical manipulations, but these are not visible to the user. Moreover, there is no net change in kind of information put into and taken out of the network. Voice goes in, voice comes out.

[24] 47 U.S.C. 153(20).

[25] *See* Jason Oxman, The FCC and the Unregulation of the Internet (Fed. Communications Comm'n Office of Plans and Policy, Working Paper Series 31, July 1999), *at* http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf; Rob Frieden, The FCC's Name Game: How Shifting Regulatory Classifications Affect Competition, 19 Berkeley Tech. L.J. 1275 (2004).

[26] *See id.; Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14853, 14871 (2005) *[hereinafter Wireline Broadband Order]* ("The Commission has previously determined that Congress intended the statutory categories [of information service and telecommunications service] to parallel the categories [of enhanced service and basic service that] the Commission established in the Computer Inquiry proceeding"); Robert Cannon,

decisions between the late 1960s and the early 1990s, the FCC wrestled with the treatment of data processing services that interacted with the telephone network.[27] For most of that time, telephone service was provided primarily by AT&T and other heavily regulated monopolies. In the *Computer Inquiries*, the FCC had to consider both how to treat new data processing services, such as voicemail and electronic data links between companies, as well as whether AT&T and other local monopolies could compete in those markets.

The Commission created a distinction between basic services, which were traditional regulated transmission offerings, and enhanced services, a new invention. The basic/enhanced framework was a simple two-layer model: basic service underneath and enhanced services on top.[28] Providers of enhanced services were considered users of the network, and therefore not subject to regulation. They purchased capacity and features from AT&T under the same tariffs as businesses. AT&T and its successor companies were limited in their ability to offer enhanced services, so they would not snuff out new services that depended on their underlying transmission capabilities. The basic/enhanced distinction became a sort of shorthand for regulated vs. unregulated services. That concept largely followed through in the 1996 Act.

Generally speaking, the regulatory commands of Title II of the Act apply to providers of telecommunications services.[29] Information services are defined in the statute, but there are no particular mandates imposed on them. The FCC has interpreted the statutory provisions as a mandate to continue its prior practice of treating information service providers as unregulated users of the network.[30] In the initial years after the passage of the 1996 Act, the telecommunications/information services distinction came up primarily in connection with new entrants. Voice over IP (VOIP) providers such as Vonage offered services that strongly resembled regulated telecommunications services, but they did so using technologies that fit within the definition of information

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The Legacy of the Computer Inquiries, 55 FED. COMM. L.J. 167 (2003) Cites that telecom/info services formalize this distinction.

[27] *See* Cannon, *supra* note 26; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Notice of Proposed Rulemaking, 10 F.C.C.R. 8360 (1995) (recounting the history of the Computer Inquiries); Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, Notice of Inquiry, 7 F.C.C.2d 11 (1966).

[28] *See* Kevin Werbach, *Breaking the Ice: Rethinking Telecommunications Law for the Digital Age*, 4 J. ON TELECOMM. & HIGH TECH. L. 59 (2005).

[29] *See* Nuechterlein & Weiser, *supra* note 14, at 217.

[30] *See supra* note 26.

services. [31] In a 1998 report to Congress and a 2004 declaratory ruling, the FCC outlined its approach to VOIP services.[32] It generally avoided treating as telecommunications any offering that did not exactly mimic classic telephone service.[33]

The issue before the Commission in these early decisions was whether an information service provider could be found to engage in telecommunications; it was not whether telecommunications service providers could be classified as offering information services. Although the possibility existed that incumbent operators could switch to IP-based transmission, it was not considered a serious threat to the regulatory structure.[34] When AT&T tried to avoid regulated "access charges" by routing some of its voice backbone traffic through an Internet protocol link, the FCC rebuked it.[35]

And then, something funny happened: The biggest providers of regulated telecommunications services became the biggest providers of unregulated broadband access.[36] The major network operators largely missed the initial wave of the Internet, ceding to standalone Internet service providers such as AOL and Earthlink the leading position in the dial-up Internet access market.[37] Dial-up Internet traffic passes through the telephone network like voice or fax calls. High-speed broadband

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[31] Vonage Holdings Corp. v. Minn. Pub. Util. Comm'n, 290 F. Supp. 2d 993 (D. Minn. 2003); Sunny Lu, Cellco Partnership v. FCC & Vonage Holdings Corp. v. Minnesota Public Utilities Commission: VoIP's Shifting Legal and Political Landscape, 20 Berkeley Tech. L.J. 859 (2005).

[32] *See Stevens Report, supra* note 19; Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, 19 FCC Rcd. 3307 (2004)

[33] *Id.* However, the Commission did impose some "social policy" obligations such as 911 emergency service and law enforcement access on VOIP providers. *See* Crawford, The Ambulance, *supra* note 5.

[34] *See* Robert Cannon, *Where Internet Service Providers and Telephone Companies Compete: A Guide to the Computer Inquiries, Enhanced Service Providers and Information Service Providers*, 9 COMMLAW CONSPECTUS 49, 53-56 (2001). *But see* Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional* Connections, 88 CORNELL L. REV. 885, 1013 (2003) ("Although some commentators have suggested that the Telecommunications Act of 1996 superseded the Computer III regime, both regimes continue to govern in slightly different spheres.")

[35] *See* Petition for Declaratory Ruling that AT&T's Phone-To-Phone IP Telephony Services Are Exempt From Access Charges, 19 FCC Rcd. 7457 (2004). This was AT&T the post-divestiture long-distance carrier, not the local incumbent carrier that purchased it and subsequently took its name.

[36] TK statistics on incumbents as leading broadband providers.

[37] This was partly due to the pre-1996 Act restrictions on the Baby Bells carrying traffic across local exchange boundaries were still in effect.

connections, on the other hand, involve end-to-end data transmission. The cable industry was the first to deploy broadband aggressively.[38] Cable was not subject to the common carriage requirements of Title II. It developed its cable modem networks as closed systems, rejecting calls to offer access to independent ISPs. Telephone companies initially had to offer unbundled access to their competing digital subscriber line (DSL) networks under the infrastructure sharing rules of the 1996 Act.[39]

Faced with a choice between expanding the scope of open access mandates and reducing it, the Republican-led FCC during the Bush Administration chose to cut back on regulation. It determined that broadband offerings of both cable and DSL providers, as well as other similar services, were indivisible information services.[40] The FCC rejected the claim that network operators should always have to provide a regulated telecommunications service as distinct from the higher-level information service they offered to their customers.[41] From that point on, network operators providing broadband access would be information service providers.

The Supreme Court ratified the FCC's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services (Brand X)*.[42] Subsequently, in *Pacific Bell v. Linkline Communications*, the Court rejected the use of antitrust claims to gain unbundled access to the telecommunications component of those broadband information services, deferring to the Commission's finding of robust competition between cable modem and DSL services.[43]

The FCC's caveat for its broadband reclassification decisions was that information services are not entirely without regulatory obligations. In addition to the specific mandates of Title II, the Commission has general housekeeping authority under Title I of the Act. In theory, that authority could be used to fashion a new set of rules for information services. Obligations that would apply Internet-based services are therefore

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[38] Mark Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 928-29 (2001); Kevin Werbach, *The Architecture of Internet 2.0*, RELEASE 1.0, Feb. 1999, *available at* http://downloads.oreilly.com/radar/r1/02-99.pdf; Van Schewick, *supra* note 8.

[39] *See* Lemley & Lessig, *supra* note 38.

[40] *See* Wireline Broadband Order, *supra* note 26; Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 F.C.C.R. 4798 (2002) (decl. ruling and notice); Kevin Werbach, *Only Connect*, 23 BERKELEY TECH. L.J. 1234 (2008).

[41] *See* Wireline Broadband Order, *supra* note 26.

[42] *See* Brand X, *supra* note 5.

[43] Pacific Bell Telephone Co. v. LinkLine Communications, Inc., 555 U.S. ___ (2009) (hereinafter LinkLine).

generally labeled as "Title I" mandates.[44] The concept of Title I regulation, however, is quite vague today.[45] The FCC and the courts have asserted that the FCC could establish some rules for information services. The boundaries for that action must be determined.

B. The Open Access Movement and Network Neutrality

As the FCC was considering the proper treatment of Internet-based services, a collection of academics made the case for an open Internet as a goal of communications policy. "Infrastructure-oriented" communications policy scholars, including Yochai Benkler, Susan Crawford, Jonathan Zittrain, Barbara Van Schewick, and Brett Frischman, articulated rationales for the unique potential of the Internet.[46] These academics generally reject Chicago School economic arguments for treating network operators like any other business. Instead of the old, vague notions that certain industries were "imbued with the public interest" or subject to regulation solely based on their size and influence, these scholars define a class of *infrastructure* that forms the platform for an array of other activities.[47] Drawing on newer literatures in common pool resources and complexity theory, the approach seeks legitimize infrastructure within the framework of neo-classical economics, while also drawing on communitarian and related theories of political economy.[48]

Susan Crawford, for example, argues that the Internet represents a new kind of complex system, radically different from the static

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[44] *See* Nuechterlein & Weiser, *supra* note 14, at 213. The Supreme Court in Brand X referred to them in this way. *See* Brand X, *supra* note 5.

[45] Nuechterlein & Weiser, *supra* note 14, at 218 ("To say that a given communications technology… should be regulated under Title I is two embrace two conclusions. The first is that the service in question slips through the cracks of the substantive titles of the Communications Act (II, III, and VI), and is thus immune from the industry-specific regulations contained in those titles. The second is that the FCC has broad discretion to regulate or deregulate the service as it sees fit….").

[46] *See* Yochai Benkler, *From Consumers to Users: Shifting the Deep Structures of Regulation Towards Sustainable Commons and User Access,* 52 FED. COMMS. L.J. 561 (2000); Benkler, *supra* note 8; Zittrain, *supra* note 8; Susan Crawford, *The Internet and the Project of Communications Law*, 55 UCLA L. REV. 359 (2007); Brett M. Frischmann*, An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005); Van Schewick, *supra* note 8.

[47] *See* Frischmann, *supra* note 46.

[48] *See* Crawford, *supra* note 46.

communications networks the FCC historically regulated.[49] She worries that expansion of FCC authority over Internet-based communications is a form of regulatory "capture" by incumbent operators, who seek to force the new technology to compete on their old, tilted playing field.[50] A key conclusion of this approach is that the infrastructure must be open to uncontrolled innovation.[51] Those who build networks should not be given total control over the activity on those networks, because their own incentives are too narrow to encompass the full welfare calculus of the ecosystem built around their platform.[52]

Under the "layered model" of communications systems, networks are divided into conceptual stacks of functional layers.[53] Physical connections, such as wires, switches, and wireless links make up the bottom layer. Software-based systems to route information and to deliver applications exist at a higher level, with content sitting on top of them. Data networks such as the Internet are designed to separate these layers through modular design and standards-based interfaces.[54] This allows one physical network to carry many different applications. It also means that third parties, including service providers, content providers, and even users, can interact at the higher levels of the network without involving the lower layers.[55]

Infrastructure scholars generally favor separation of the Internet's application and content layers from the regulated physical layer of communications networks.[56] The only way to keep incumbent operators

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[49] *See id. See also* David Isenberg, The Rise of the Stupid Network, *at* http://www.rageboy.com/stupidnet.html.

[50] *See* Crawford, *supra* note 5, at 925 (2006) ("The delegation by Congress of broad power over communications to an independent, unaccountable 'expert' agency is, in this age of convergence, leading to a situation in which the capture of 'new technology' rulemakings by 'old technology' companies an interests is very likely.").

[51] *See* Frischmann, *supra* note 46.

[52] *See id.*

[53] Kevin Werbach, *A Layered Model for Internet Policy,* 1 J. TELECOMM. & HIGH-TECH L. 37 (2002); Werbach, Breaking the Ice, *supra* note 28; Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815 (2004); Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L.J. 587 (2004).

[54] *See* Joseph Farrell & Phil Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85, 89 (2003).

[55] *See* Werbach, Layered Model, *supra* note 53.

[56] *See* Crawford, The Ambulance, *supra* note 46; Crawford, Transporting, *supra* note 6.

and incumbent regulators from corrupting the Internet, on this theory, is to quarantine it. These scholars tend to be skeptical of the ability of regulators such as the FCC to manage the issues that arise at the interfaces between networks and applications. They prefer the more drastic solution of barring network operators from competing at the higher levels of the system.[57]

The FCC mandated separation in its *Computer II* and *Computer III* decisions.[58] It barred AT&T and the successor Bell Operating Companies from offering integrated enhanced services. The Commission moved away from this tack after the passage of the 1996 Act. It recognized that network operators could gain efficiencies from delivering information services that integrated with their network platforms.[59] Allowing integrated information services was also a way to incentivize telephone companies to invest in the significant network upgrades required to support broadband Internet access. Because cable operators, the major broadband competition for telephone companies, were never subject to the *Computer Inquiry* restrictions, eliminating them was seen as leveling the competitive playing field. The Commission believed that new competition would provide sufficient discipline to prevent abuses by network operators.[60]

As an alternative to mandatory separation, open Internet proponents coalesced around the concept of network neutrality.[61] The basic concept of network neutrality is that network operators should not disadvantage unaffiliated providers of applications or content. Barbara Van Schewick has explained in detail how this approach reflects the "end-to-end" architecture of the original Internet.[62] Other network neutrality

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[57] TK structural separation. Note European experience. Can be physical or functional.

[58] *See* Second Computer Inquiry, Final Decision, 77 F.C.C.2d 384, 47 Rad. Reg.2d (P & F) 669 (1980); Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 F.C.C.2d 958 (1986).

[59] *See* Computer III, *supra* note 58.

[60] *See* Lemley & Lessig, *supra* note 38; Werbach, Only Connect, *supra* note 40.

[61] *See generally* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003); Tim Wu, *The Broadband Debate, A User's Guide*, 3 J. TELECOMM. & HIGH TECH. L. 69 (2004); Barbara van Schewick, *Toward an Economic Framework for Network Neutrality Regulation*, 5 J. TELECOMM. & HIGH-TECH. L. 329 (2007); Brett Frischmann & Barbara van Schewick, *Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo*, 47 JURIMETRICS 383 (2007).

[62] *See* Van Schewick, *supra* note 8; Jerome Saltzer et al., *End-to-End Arguments in System Design*, 2 ACM TRANSACTIONS ON COMPUTER SYS. 277 (1984).

champions such as Tim Wu and Lawrence Lessig situated the approach within the history of communications policy.[63] They argued that network neutrality represented an extension of common carriage, the long-established doctrine that telephone companies and certain other businesses had to be a neutral service platform for all customers.[64]

On this view, government rules expressly prevented network operators from discriminating against users of their networks from the nineteenth-century precursors of the Communications Act until *Brand X*. Tim Wu has made the case that *Carterfone*, the 1968 FCC decision barring AT&T from controlling what devices connected to the telephone network, reflects the same policy of regulating network operators to promote competition and innovation at higher layers.[65] To network neutrality advocates, therefore, the Internet represents the fullest expression of policy goals articulated in the Communications Act, as well as celebrated FCC decisions.[66]

A problem with network neutrality is that it lacks purchase within the statutory apparatus.[67] As a high-level matter, a requirement that Verizon Wireless provide non-discriminatory interfaces for mobile phones parallels a requirement that AT&T provide non-discriminatory interfaces for landline phones. However, the Internet is not just a device that hangs off the end of the network. It *is* the network. Internet-based services directly overlap with and sometimes compete with regulated communications offerings. Most seriously from a legal standpoint, this means that the network platform owners can themselves become Internet-based providers.

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[63] Ex parte letter from Timothy Wu and Lawrence Lessig at 12-15, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, CS No. 02-52, (Aug. 22, 2003), *available at* http://-gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514683884.

[64] *See* Werbach, Only Connect, *supra* note 40.

[65] Tim Wu, *Wireless Carterfone*, I INT'L J. COMM. 389 (2007).

[66] Wu & Lessig, *supra* note 61. Phil Weiser offers a related set of arguments for applying traditional intellectual property and antitrust theory to the Internet. *See* Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534 (2003).

[67] There are other objections to network neutrality rules, including concerns that they stifle investment in networks and prevent efficient congestion management. *See* C. Scott Hemphill, *Network Neutrality and the False Promise of Zero-Price Regulation*, 25 YALE J. REG. 135 (2008); Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1 (2005) (rejecting network neutrality in favor of network diversity); Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847 (2006). My purpose here is not to engage the well-developed debate over the desirability of network neutrality, but to consider how any such rules could be implemented if the FCC chose to.

Comcast, when offering its cable modem service, is an information service provider according to the FCC.[68] Regulating Comcast's broadband service is therefore tantamount to regulating the *Carterfone*-like devices attached to the regulated telephone network, rather than that network. Under current policies, the only way to fit network neutrality within the Communications Act, therefore, is to impose obligations on information services.

C. The Internet Policy Statement and Beyond

The open access movement eventually succeeded in convincing regulators of their concerns. Without taking a hard look at the jurisdictional questions, the FCC agreed to enforce network neutrality, on a case-by-case basis. The Commission rejected calls to adopt prospective rules requiring broadband network operators to offer non-discriminatory transport to application and content providers.[69] It sided with cable and telephone companies who argued that network neutrality rules were unnecessary and could dampen broadband investment.[70] However, it did express a willingness to police abuses when it saw them.

As part of its *Wireline Broadband Order* classifying DSL as an integrated information service, the FCC issued a non-binding policy statement.[71] This document explicitly disclaimed having any legal force, but it represented a strong public statement by the Commission. At its core, the Policy Statement describes three user entitlements:[72]

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[68] *See* Comcast Order, *supra* note 2.

[69] *See* Werbach, Only Connect, *supra* note 40. Then-Chairman Michael Powell initially addressed the issue in a speech rather than a formal proceeding. Michael Powell, Preserving Internet Freedom: Guiding Principles for the Industry, Remarks at the Silicon Flatirons Symposium on the Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age (Feb. 8, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

[70] *See* Powell, *supra* note 69.

[71] *See In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14986, 14987-88 (Policy Statement) (2005).

[72] I prefer the term "user" to consumer. *See* Benkler, from Consumers to Users, *supra* note 46. There is a fourth statement, "consumers are entitled to competition among network providers, application and service providers, and content providers," which is entirely hortatory. Promoting competition is part of the FCC's mission, as understood today, but there is no conceivable recourse for "violation" of this statement, as it refers to the general state of certain markets. If a company eliminated or precluded competition through anti-competitive practices, it could be subject to recourse under either FCC rules or antitrust law. Such a case would never be brought under the aspirational declaration of the Policy Statement.

> "[C]onsumers are entitled to access the lawful Internet content of their choice."[73]
>
> "[C]onsumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement."[74]
>
> "[C]onsumers are entitled to connect their choice of legal devices that do not harm the network."[75]

The three policies are subject to a blanket caveat, included in a footnote, that "The principles we adopt are subject to reasonable network management."[76] This footnote becomes the critical test. All broadband access providers impose a number of limitations on applications and devices. The question is whether those are consistent with "reasonable network management."

The Commission asserted, without substantial analysis, that it had the authority to take action to support the goals articulated in the Policy Statement.[77] Such initiatives would be part of the FCC's "ongoing policymaking activities", whatever that meant.[78] The Policy Statement was not an order, so it could not be enforced directly.[79] Instead, the FCC described it as a list of principles that it believed were consistent with its statutory mission. It suggested that it would take further action when needed.

The first such example involved Madison River, a rural telephone company that blocked a competing VOIP service from its broadband network.[80] Madison River agreed to a consent decree after the FCC

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[73] *See* Internet Policy Statement, *supra* note 71.

[74] *Id.*

[75] *Id.*

[76] *Id.* at n. 15.

[77] Broadband Industry Practices, Notice of Inquiry, 22 FCC Rcd. 7894, 7896 (2007) ("The Commission, under Title I of the Communications Act, has the ability to adopt and enforce the net neutrality principles it announced in the Internet Policy Statement.")

[78] Internet Policy Statement, *supra* note 71, at para. 5.

[79] *See* Chairman Kevin J. Martin Comments on Commission Policy Statement, FCC News Release, August 5, 2005, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A2.pdf ("While policy statements do not establish rules nor are they enforceable documents, today's statement does reflect core beliefs that each member of this Commission holds regarding how broadband Internet access should function.").

[80] *See* FCC Chairman Michael K. Powell Commends Swift Action to Protect Internet Voice Services, FCC News Release, March 3, 2005, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257175A1.pdf. The Madison River action predated the Policy Statement, but followed Chairman

launched an investigation of its practice. While the case showed the FCC was willing to act in cases of discrimination, its impact was limited. Madison River is a traditional regulated telephone company. It was completely blocking a service for no apparent reason other than anti-competitive motives. It was relatively easy for the FCC to justify its intervention. The first real test of the FCC's will to promote Internet openness came later, and involved Comcast's network management techniques.

D. The Comcast P2P Order

Comcast's network management techniques for its cable modem broadband access service singled our peer-to-peer (P2P) applications and surreptitiously degraded their performance. Confronted with a concrete example of what looked like broadband discrimination, the FCC had two choices. It could fit new converged Internet services into the existing statutory boxes of the Communications Act. Or, it could create a new box, if it found that doing so was necessary to carry out its explicit mandates. It did neither. The agency tried to find the Internet within the emanations of its existing statutory authority.

In Fall 2007, testing revealed that Comcast, the nation's second largest broadband access provider, had implemented network management technology that deliberately slowed peer-to-peer (P2P) file transfer traffic.[81] Here, it seemed, was a paradigmatic case of a network operator foreclosing innovation and competition by discriminating against certain users of its infrastructure. P2P services could be used to deliver video programming, which competed with Comcast's cable television programming. In the post-*Brand X* world, it seemed, Comcast

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Powell's announcement of similar principles in his 2004 speech. *See* Powell, *supra* note 69

[81] Peter Svensson, *Comcast Blocks Some Internet Traffic*, ASSOC. PRESS, Oct. 19, 2007 (Oct. 19, 2007), *available at* http://www.msnbc.msn.com/id/21376597/; Seth Schoen, *EFF Tests Agree with AP: Comcast is Forging Packets to Interfere with User Traffic*, ELEC. FRONTIER FOUND. DEEPLINKS BLOG, Oct. 19, 2007, *at* http://www.eff.org/deeplinks/2007/10/eff-tests-agree-ap-comcast-forging-packets-tointerfere; *F.C.C. to Look at Complaints Comcast Interferes with Net*, ASSOC. PRESS, Jan. 9, 2008, *available at* http://www.nytimes.com/2008/01/09/business/media/09fcc.html. Comcast claimed it implemented the network management because P2P applications used up so much capacity. *See* Comcast Order, *supra* note 2; Letter from Kathryn A. Zachem, Comcast Corp. to FCC, July 10, 2008, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520033822.

had the incentive and the opportunity to violate network neutrality, as scholars had previously warned.[82]

Several public interest groups filed complaints against Comcast at the FCC.[83] After initially denying it was throttling P2P traffic, Comcast eventually acknowledged that its network management approach was arbitrary and over-inclusive.[84] It promised to implement a new, non-discriminatory system. It also reached agreement with Bittorrent, the company started to commercialize the primary video P2P technology, on standards to address bandwidth concerns.[85]

By the time the FCC took up the complaint and the parallel petition for declaratory ruling, therefore, the question therefore was not what would happen, but what the role of the government would be. In August 2008, the FCC rendered its decision.[86] It found that Comcast had violated the principles embodied in the Policy Statement. It ordered Comcast to make a detailed declaration of the network management practices it had engaged in, and to cease and desist from throttling P2P services specifically. Comcast had four months to implement a new, non-application-aware, network management technology.[87] Because Comcast did not have notice that the FCC might enforce the Policy Statement in this way, the FCC declined to impose any fees on the company.

Unfortunately, the FCC's reach exceeded its grasp. To sanction Comcast for unreasonable and discriminatory network management techniques, the FCC engaged in an ad hoc process and built an unsustainable legal foundation. The Comcast order was just the tip of the iceberg.

Section 230(b) of the Communications Act, as amended, begins:

> It is the policy of the United States—
>
> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

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[82] *See* Wu, *supra* note 61 (describing the potential for network neutrality violations).

[83] *See* Formal Complaint of Free Press and Public Knowledge against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, File No. EB-08-IH-1518 (Nov. 1, 2007).

[84] *See* Jim Puzzanghera, *Comcast Relents on Web Tech*, L.A. TIMES, March 28, 2008, at C1; Comcast Order, *supra* note 2.

[85] *See* Vishesh Kumar, *Comcast, Bittorrent to Work Together on Network Traffic,* WALL ST. J., March 27, 2008.

[86] *See* Comcast Order, *supra* note 2.

[87] *See id.* Effectivel, therefore the FCC required Comcast to meet the deadline it had already set for itself.

> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
>
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;[88]

In the *Comcast P2P Order*, the FCC based its actions on the statutory language of Section 230.[89] Although the decision cited six other provisions of the Communications Act in support of ancillary authority over broadband network management,[90] all of these were subsidiary to Section 230.[91] The Commission obviously understood that its jurisdictional claim was suspect, so it took the "kitchen sink" approach of listing every possible statutory hook. These other provisions reinforce the view that an active FCC Internet policy is consistent with established themes in the Communications Act. None of them, however, provide the unifying directive of Congressional intent without Section 230.

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[88] 47 USC 230(b). There are two other sub-provisions of section 230(b), which are specifically related to blocking and filtering of children's access to "inappropriate" material online, and to online stalking and other criminal acts. 47 USC 230(b)(4)-(5).

[89] *See* Comcast Order, *supra* note 2, at para. 13.

[90] The other provisions were Section 1 (directing the Commission Commission "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"), 47 U.S.C. 151; Section 201 of the Act (requiring that "[a]ll charges, practices, classifications, and regulations for and in connection with [common carrier] service, shall be just and reasonable"), 47 U.S.C. 201; Section 706 of the Telecommunications Act of 1996 (ordering the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"), 47 U.S.C. 157; Section 256 (directing the FCC "to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications services"), 47 U.S.C. 256; Section 257 (directing the FCC to eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services"), 47 U.S.C. 257; and Section 601(4) (directing the FCC to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public"), 47 U.S.C. 601(4).

[91] The Section 230 discussion came first and was the longest section of the FCC's jurisdictional analysis. The Commission stated that Congress "inscribed these policies [addressing the Internet in the 1996 Act] into section 230…." *Id.* at para. 15.

The Commission noted that, in the Policy Statement, it had justified its actions on its "responsibility for overseeing and enforcing the 'national Internet policy' Congress had established" in Section 230(b).[92] The Policy Statement, according to the Commission, functioned to "clarified the contours" of the statutory federal policy.[93] In response to Comcast's claim that ancillary authority must be ancillary to something, the FCC stated directly that section 230(b) was the foundation for its jurisdictional authority in the proceeding:

> [T]he "something" Comcast is looking for is right in the Act itself – it is the national Internet policy enshrined in section 230(b) of the Act. When Congress drafted a national Internet policy in 1996, it did not do so on an empty tablet. Instead, Congress inscribed these policies into Section 230 of the Communications Act – the very same Act that established this Commission as the federal agency entrusted with "regulating interstate and foreign commerce in communication by wire."[94]

According to the Commission, therefore, the "national Internet policy" of section 230(b) gave the agency a policy directive and the authority to adopt such rules necessary to effectuate it.

The FCC's analysis rests on the contention that section 230(b) authorizes FCC oversight of the broadband access marketplace. In the *Comcast P2P Order*, the Commission made this claim by referencing its earlier decision that Vonage, as a VOIP provider, should not be classified as a regulated telecommunications carrier.[95] There, the Commission stated, "Through codifying its Internet policy in the Commission's organic statute, Congress charged the Commission with the ongoing responsibility to advance that policy consistent with our other statutory obligations."[96] The FCC viewed the non-discrimination decision it issued against Comcast as an exercise of this "ongoing responsibility."

Comcast argued that, instead, section 230(b) was intended to limit regulation. It pointed to the language of section 230(b)(2) that the

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[92] *Id.* at para. 13.

[93] *Id.*

[94] *Id.* at para. 15 (footnotes omitted).

[95] *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22426, para. 35 (2004) (*Vonage Order*) ("While we acknowledge that the title of section 230 refers to 'offensive material,' the general policy statements regarding the Internet and interactive computer services contained in the section are not similarly confined to offensive material.").

[96] *See id.* at para. 35. The Commission quoted this language in a footnote in the *Comcast Order*. *See* Comcast Order, *supra* note 2, at n.69.

Internet should remain "unfettered by Federal or State regulation."[97] The FCC responded that section 230(b)(2) could not reasonably be read as a prohibition on *any* FCC regulation of broadband access providers, and noted that it had previously rejected such an interpretation.[98] To the FCC, the "last few words" Comcast cited were a distinct policy goal, which should not trump the main directive to promote Internet development.[99]

In short, the FCC painted a picture of a well-defined Congressional policy mandate, which the agency was faithfully effectuating. The argument would be convincing based on the evidence cited in the *Comcast P2P Order*. Unfortunately for the FCC, it is inconsistent with both prior FCC practice and the legislative history of the statutory provision.

III. FAILINGS OF THE FCC'S CURRENT APPROACH

The FCC's current approach to Internet regulation, however well-intentioned, is fatally flawed. The Commission's jurisdictional theory in the *Comcast Order* is simply untenable. Its substantive vision is inconsistent with precedent. And the Comcast proceeding itself was procedurally suspect.

A. The Real Section 230

The central problem with the FCC's argument in the *Comcast Order* is that it involves an inaccurate reading of Section 230(b). While on its face the statutory provisions are consistent with the FCC's narrative, the legislative history tells a very different story. Section 230 actually *limits* FCC authority over the Internet, although not as completely as deregulation proponents would have it.

Section 230 was adopted as part of the Telecommunications Act of 1996.[100] It is the only provision in that massive overhaul of the

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[97] 47 USC 230(b)(2).

[98] *See* Comcast Order, *supra* note 2, at paras. 25-26. The Commission also claimed that Comcast had waived its right to contest FCC jurisdiction in the case, based on an earlier proceeding involving its acquisition of certain cable systems from Adelphia Communications. *See id.* at para. 27.

[99] *See id.* at para. 24.

[100] *See supra* note 16.

Communications Act that makes direct reference to the Internet.[101] That supports the FCC's claim that it represents a "national Internet policy." However, the vague and inconsistent language of Section 230(b) belies the FCC's claim that the provision was intended to carry such weight. Congress expressed its desire for affirmative steps to "promote", "preserve," and "encourage" Internet development, and at the same time an Internet "unfettered" by regulation.[102] The first three subsections, which are the ones the FCC cites in the *Comcast Order*, offer no specific directives, in contrast to the detailed provisions in the rest of the Telecommunications Act.

The legislative history of Section 230 clears up the confusion. Section 230 began as a freestanding bill, the Internet Freedom and Family Empowerment Act, introduced in 2005 by Representatives Christopher Cox and Ron Wyden.[103] The Cox-Wyden bill was subsequently accepted as an amendment to the House version of the 1996 Telecommunications Act.[104] The House-Senate conference committee adopted the House language virtually intact in the final version of the legislation.[105]

At the time, the Congressional debate about Internet regulation and its relationship to the FCC involved government regulation of online content. Senator James Exon of Nebraska had introduced the controversial Communications Decency Act (CDA), which would have barred indecent speech on the Internet.[106] Under the CDA, the FCC would have been responsible for policing online indecency in much the same manner it polices indecency on broadcast television and radio.[107] The legislation was extremely controversial.[108] Experts warned that it would quash free expression in the new medium of the Internet.[109] However, CDA tapped into politically powerful fears about the Internet

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[101] Other legislation added provisions to the Communications Act dealing with topics such as restrictions on children's access to material on the Web, and a moratorium on Internet taxes.

[102] 47 USC 230(b).

[103] Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong., 1st Sess. (1995)).

[104] *See* 141 CONG. REC. H8478-79 (daily ed. Aug. 4, 1995).

[105] TK conference committee.

[106] Communications Decency Act of 1996, Pub. L. No. 104-104, sec. 502, 223(d)(1)(B), (h)(2), 110 Stat. 133, 134-135 (to be codified at 47 U.S.C. 223(d)(1)(B), (h)(2)).

[107] TK CDA specifics.

[108] *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 55-56 (1996).

[109] *See id.*

becoming a haven for pornography and illicit materials.[110] The CDA was incorporated into both the Senate and House versions of the Telecommunications Act.[111]

Civil libertarians were not the only ones concerned about the CDA. Many Internet businesses saw a major economic threat. Early court decisions, notably *Stratton Oakmont v. Prodigy Services Co.*, found online service providers such as Prodigy responsible for libelous postings by their subscribers.[112] With the boundaries of intermediary liability online unclear, and such liability potentially quite extensive, Internet access and service providers worried they would be forced into the role of private online censors, or held responsible for content beyond their control.[113] Even worse, the language of *Stratton Oakmont* and its ilk suggested that online service providers who took steps to exclude any inappropriate or illegal content would be more likely to face liability for questionable material they did not block. As publishers, they would be held liable for what actually made it onto their sites, much like newspapers.[114]

The Cox-Wyden legislation was introduced in response to these fears about the CDA. It represented an alternative approach to the widespread concern about pornography and other material online that was inappropriate for children. Where the CDA proposed government regulation of Internet speech, the Internet Freedom and Family Empowerment Act endorsed non-governmental mechanisms, and prohibited government regulation.[115] The bulk of its sections offered a specific alternative to the CDA's private censorship: a safe harbor for online service providers for content over which they had no control, and

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[110] *See id.*

[111] *See id.*

[112] Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710 (N.Y. Sup. Ct. 1995).

[113] *See* Cannon, *supra* note 108; Crawford, Shortness of Vision, *supra* note 5, at TAN 32.

[114] *See id.*

[115] *See* Steven Levy, *No Place for Kids? A Parents' Guide to Sex on the Net*, NEWSWEEK, July 3, 1995 ("Conservative Republican Chris Cox of California has teamed with liberal Democrat Ron Wyden of Oregon to develop the grandiosely entitled Internet Freedom and Family Empowerment Act. Basically, the bill would forbid the federal government from creating any regulatory agency to govern the Internet, relying instead on a variety of means (not yet determined) to protect children.")

protection for affirmative steps to remove unauthorized or illegal material.[116]

In other words, the "national Internet policy" of Section 230(b) was essentially a lead-in to the substantive provisions of Section 230(c)-(d). Comcast made this argument before the FCC it is recent adjudication, but the Commission rejected the interpretation.[117] The Commission asserted that the framing of section 230(b) as the "policy of the United States" implies that it has broader application than the specific provisions Congress adopted, to be filled in by the Commission under its general grant of authority.[118] This reading conflicts with the legislative history.

When the Cox-Wyden amendment was added to the Telecommunications Act, it was for the purpose of addressing inappropriate online content for children, and preventing ISP liability. The Amendment was titled "Online Family Empowerment."[119] As codified, section 230 is titled "Protection for private blocking and screening of offensive material."[120] These titles belie the FCC's claim that section 230 was intended as a broader "national Internet policy."

The House-Senate Conference Committee report similarly describes the purpose of the provision: "Section 104 of the House amendment protects from civil liability those providers and users of interactive computer services for actions to restrict or to enable restriction of access to objectionable online material."[121] Representative Cox, one of the provision's authors, has emphasized this aspect when describing the purpose of the bill.[122] The Cox-Wyden legislation was designed to

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[116] *See* Cannon, *supra* note 108.

[117] *See* Comcast Order, *supra* note 2, at n.69. Comcast argued that Congress had chosen a specific remedy, a safe harbor for good actors in sections 230(c)-(d), as a means of implementing the goals in Section 230(b). This argument, implying that the safe harbor was the sole means of implementing the aspirational portions of Section 230, goes farther than necessary. There is a significant space between claiming that Congress decided only to adopt a safe harbor, and claiming that Congress directed the FCC to create a "national Internet policy" in any way it saw fit under the policy goals of Section 230(b).

[118] See id.

[119] TK amendment title.

[120] 47 USC 230

[121] TK conference committee report.

[122] "Third, the [Internet Gambling Prohibition Act of 2000] would unfairly make ... interactive service providers ... responsible for policing the behavior of their subscribers. This is the principle that we rejected when then Representative Wyden and I brought the Internet Freedom and Family Empowerment Act to the floor so that we could stop the approach that the Senate had adopted with the Communications Decency Act, later rejected by the Supreme Court." (Rep. Cox) 146 Cong Rec H 6067 (2000). See also SEC Chairman Cox Speaks on Electronic

protect the Internet by protecting service providers potentially subject to liability, not by advancing the broader vision of the open access advocates.

If Section 230 were intended as a broad invitation to create a national Internet policy, there would be at least some contemporaneous evidence consistent with this interpretation. In fact, a more likely reading is that, to the extent Congress intended to send a broad message to the FCC in Section 230, it was to limit the Commission's authority. Specifically, Section 230 sought to preclude retail price and content regulation of the Internet. As originally introduced, the Cox-Wyden amendment included the following provision:

> FCC Regulation of the Internet and Other Interactive Computer Services Prohibited -- Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to content or any other regulation of the Internet or other interactive computer services.[123]

This was not an insignificant element of the bill. Representative Cox later described the goal of the legislation that became Section 230 as keeping the FCC from "regulating prices of computer services offered over the Internet".[124] Cox and Wyden later teamed up to introduce the Internet Tax Freedom Act, which established a moratorium on new Internet-specific taxes.[125] Cox, who subsequently became Chairman of the Securities and Exchange Commission, has elsewhere expressed fears about the FCC turning into a "Federal Computer Commission," by engaging in direct regulation of Internet-based services.[126]

The Senate passed a telecommunications bill including the CDA, and the House passed a bill including the Cox-Wyden language, meaning that it fell to a House-Senate conference committee to reconcile the conflict. Although the two amendments represented opposed policy positions,

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Shareholder Forum Rules, US Fed News, Nov. 28, 2007 (describing the bill as designed to create safe harbors for Internet service providers.)

[123] TK cite to original amendment

[124] Press Release, *Rep. Cox, Sen. Wyden to Unveil Highly-Touted Bill to Keep the Internet Free From Taxes*, March 12, 1997 ("Rep. Cox has been a long time supporter of the Internet. His Internet Freedom and Family Empowerment Act approved by the U.S. House of Representatives in the summer of 1995, called on the Federal Communications Commission to stay ally (sic) from regulating prices of computer services offered over the Internet.").

[125] Internet Tax Freedom Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-719 (1998).

[126] *See* Congressmen Decry the "Federal Computer Commission," *TECH L.J.* (March 31, 1998), *a*t http://www.techlawjournal.com/telecom/80331fcc.htm*;* Werbach, Federal Computer Commission, *supra* note 13.

they were not facially inconsistent with one another.[127] The conference committee compromised and left both in the final bill.

The most significant change to the Cox-Wyden language was the removal of the provision expressly precluding FCC economic and content regulation of the Internet. The Conference Committee report is silent on the rationale for this deletion, only stating that "The conference agreement adopts the House provision with minor modifications."[128]

The removal of the provision suggests that Congress did not intend to exclude the FCC from Internet regulation. However, that does not imply that Congress had the opposite desire. The designation of the deletion as a "minor modification[]" implies that the limited, deregulatory focus of the provision remained intact. The rest of the Conference Committee report on the new Section 230 reiterates the focus on precluding liability for users and providers who restrict access to objectionable online material.[129]

There appear to be no contemporaneous statements suggesting that Section 230(b), when introduced and adopted by Congress, was intended to "charge[] the Commission with… ongoing responsibility" to ensure Internet openness.[130] There is substantial evidence that, to the contrary, Congress was seeking to moderate the restrictive consequences of existing court decisions and its own actions elsewhere in the 1996 Act.

Viewed in context, the Section 230 "fix" was a way to avoid imposition of common carrier rules on Internet-based service providers.[131] The reason online service providers faced the risk of liability for content they transmitted was that they were not common carriers. A common carrier such as a telephone company is immune from liability for the content it transmits, because it is precluded from exerting any control over that content.[132] Common carriers are subject to many other intrusive regulations. Internet-based service providers did not wish to

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[127] Contemporaneous observers noted the fact that the CDA and Cox-Wyden provisions did not overlap. Some commentators concluded that the Cox-Wyden bill was a mere symbolic challenge to the CDA, allowing House members to claim opposition without actually sinking the indecency restrictions. *See* Cannon, *supra* note 108. This interpretation is even further from the FCC's view in the *Comcast Order* that Section 230 was designed as an affirmative national Internet policy with substantive teeth. *See supra* text at note 92.

[128] TK conference committee report.

[129] *See id.*; Stratton Oakmont, *supra* note 112.

[130] *See* Comcast Order, *supra* note 2, *quoting* Vonage Order, *supra* note 95.

[131] Congress also may have intended to stop the FCC from imposing broadcast-like content controls on the Internet, other than the ones mandated under the CDA.

[132] TK Common carrier rules

avail themselves of the common carrier safe harbor because of the burden that came with it. Congress adopted Section 230 to ensure that the reverse was not true: The benefit of service provider immunity did not imply the liability of common carrier regulation. That is different than saying online service providers were exempt from *all* potential FCC regulation.[133]

The CDA provisions of the 1996 Act were challenged on First Amendment grounds immediately upon adoption. The Supreme Court unanimously found that legislation facially unconstitutional.[134] The CDA language (Section 223) was therefore stricken from the statute. The Cox-Wyden language of Section 230, however, remained in effect. A naïve reader of the Communications Act today would therefore see, as the FCC did, language supporting Internet promotion with no counter-balancing restrictions. The legislative history, however, shows the true picture. Section 230 tells the FCC not to put the new wine of the Internet into the old bottles of common carrier or broadcast regulation.

B. Delegation Issues

Removing the Section 230 foundation from the FCC's Internet jurisdictional theory creates more serious problems. An administrative agency such as the FCC cannot act without a legislative delegation from Congress.[135] The Supreme Court in two 1935 cases invalidated federal statutes for not providing an "intelligible principle" to agencies, thus violating the Constitutional mandate that all legislative power remain vested in Congress.[136] This non-delegation doctrine was not invoked to overturn a statute for more than sixty years, and was considered a relic. However, the Supreme Court has recently exercised greater scrutiny over agency delegations.[137] A prime example, *AT&T Corp. v. Iowa Utilities Board*, involved the FCC. [138] There, as here, the Commission claimed

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[133] Common carriers are the most extensively regulated class under the Communications Act. There are several other categories with lesser obligations.

[134] See ACLU v. Reno, 521 U.S. 844 (1997).

[135] *See* Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 478-88 (1989) (tracing the evolution of the non-delegation doctrine).

[136] *See A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935); *Pan. Ref. Co. v. Ryan,* 293 U.S. 388 (1935).

[137] *See* Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass'ns*, 87 CORNELL L. REV. 452 (2002); *See also* Industrial Union Department v. American Petroleum Institute 448 U.S. 607 (1980).

[138] *See* Iowa Utilities Board, *supra* note 169.

that Congress had invited it to regulate in a broad new area with little discretion on its policy choices.

In *Iowa Utilities Board*, the Court invalidated portions of the Telecommunications Act of 1996 for not providing any "limiting standard, rationally related to the goals" of the Act.[139] The Act required incumbent local exchange carriers to unbundle network elements that were "necessary" for competitors, but left it to the Commission to interpret that term.[140] The Commission simply defined as "necessary" all those elements that new entrants had sought in its rulemaking process. The Supreme Court held that Congress had failed to make the hard policy choices involved in choosing the appropriate network elements to unbundle.[141] It could not simply pass that decision on to the Commission, nor could the Commission then effectively pass it on to a set of private actors with a strong self-interest in the result.[142]

Two years later, in *Whitman v. American Trucking Associations*, the Supreme Court limited the scope of this holding.[143] It reversed the District of Columbia Circuit for concluding that the Clean Air Act involved an impermissible delegation to the Environmental Protection Agency (EPA).[144] The Court found that statutory language directing the EPA to set certain standards at a level of safety that was "requisite to protect the public health" offered sufficient guidance to the administrative agency.[145] The Court concluded that even such a broad command represented sufficient exercise by Congress of its legislative responsibilities.[146]

The FCC's approach in the *Comcast Order* fails the *Iowa Utilities Board* test, even under the more expansive standard of *American Trucking*. The 1996 Act defines information services; it does not provide any guidance all for regulating them. Until now, this has not been a problem. The Title I information services classification was important solely because it meant certain rules *did not* apply.[147] There was no need

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[139] *Id.*at 388.

[140] *Id.*

[141] *Id.*; Bressman, *supra* note 135

[142] *Id.*

[143] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

[144] *Id.*

[145] Clean Air Act, 42 U.S.C. 7409(b)(1).

[146] The decision also rejected the notion, advanced by some scholars and the D.C. Circuit, that an administrative agency could cure a faulty delegation through its own development of limiting standards. *See* Bressman, *supra* note 137.

[147] The information services category continued the FCC's enhanced services classification, which served both to establish an unregulated

to consider what rules for information services were important, because there were no rules. All that changed when the FCC decided to require information service providers such as Comcast's broadband access operation to adhere to the mandates of the Policy Statement.

To the FCC, the "national Internet policy" of section 230 provided the limiting principle. According to the story the FCC told in the Comcast decision, Congress made the decision to favor an open, unfettered Internet, properly limiting the FCC's discretion.[148] As described above, however, this interpretation rests on a faulty reading of the statute and its legislative history.[149] Congress expressed a policy preference for further development of the Internet, and for an Internet unfettered by regulation. It did not delegate general rulemaking authority over the Internet in Section 230.

The Policy Statement itself cannot serve as the limiting principle. Under *American Trucking*, an agency cannot cure an improper delegation by itself developing the necessary standards.[150] Even if the FCC could do so, the Policy Statement would not qualify as a sufficient limit on agency discretion. The Policy Statement is *sui generis*; it was issued with no record and no detailed analysis, simply as a statement of the Commission's views. Neither it nor the Comcast decision was issued through a rulemaking proceeding.[151] An adjudication of an individual case cannot itself provide the limiting standard for future agency action.[152]

If Section 230 is not the Congressional limiting principle on FCC regulation of information services, under the current FCC theory, that leaves only the general public interest standard of the Communications Act.[153] That language could not be sufficient to save the Comcast order from a non-delegation challenge. *Iowa Utilities Board* involved rules adopted under the same statute. If requiring unbundling when "necessary" provides no "limiting standard, rationally related to the goals" of the statute, the Internet case is even more extreme, because Congress offered no constraints at all, other than the definition of

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zone and to ensure that regulated network operators could not interfere with it. *See* Steve Bickerstaff, *Shackles on the Giant: How the Federal Government Created Microsoft, Personal Computers, and the Internet*, 78 TEX. L. REV. 1 (1999).

[148] *See* Comcast Order, *supra* note 2.

[149] *See supra*.

[150] American Trucking, *supra* note 143.

[151] *See* Bressman, *supra* note 137.

[152] *Id.*

[153] 47 USC 303(r).

information services.[154] A different source for FCC authority must be identified.

C. Other Problems with the Commission's Approach

1. Whatever happened to unregulation?

A further chink in the FCC's armor is its claim to be carrying out a consistent program of implementing the statutory scheme. On the contrary, the *Comcast Order* represents a significant departure from the FCC's longstanding reticence to impose binding obligations on Internet-based providers.

Section 230 was adopted twelve years before the *Comcast Order*. During that time, the Commission repeatedly rejected calls to adopt rules governing Internet-based services. It rejected a 1996 petition to classify VOIP services under the rules governing telecommunications carriers.[155] It issued an extensive report to Congress in 1998 declining to impose interstate access charges on VOIP providers at that time, even those whose services arguably fell within the statutory standard for such charges.[156] It declined to adopt rules governing the Internet backbone market, even when the competitiveness of that market was questioned.[157] It resisted calls in 1999 to impose "open access" conditions on cable broadband providers.[158] It allowed competitive local exchange carriers to collect reciprocal compensation for carrying traffic to dial-up Internet service providers (ISPs), lest those ISPs fall within traditional FCC

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[154] Iowa Utilities Board, *supra* note 169, at 388.

[155] *See* The Provision of Interstate and International Interexchange Telecommunications Service Via the "Internet" by Non-Tariffed Uncertified Entities, America's Carriers Telecommunication Association, Petition for Declaratory Ruling, Special Relief, and Institution of a Rulemaking, RM 8775 (Mar. 4, 1996), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Other/actapet.html; Werbach, Federal Computer Commission, *supra* note 13.

[156] *See* Stevens Report, *supra* note 19.

[157] Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, 11 COMMLAW CONSPECTUS 45 (2003); Werbach, Only Connect, *supra* note 40.

[158] *See* Werbach, Only Connect, *supra* note 40; Lemley & Lessig, *supra* note 38.

regulation.[159] It even published a staff working paper that identified an FCC policy toward "unregulation" of the Internet.[160]

The cable open access debate is particularly instructive, as it involved the same claims about anti-competitive threats to the open Internet as the Comcast P2P proceeding.[161] The Commission considered whether to mandate competitive access to the cable modem platform in several proceedings, repeatedly declining to adopt a classification that would impose such a mandate.[162] In ultimately deciding that cable broadband services were information services and not telecommunications services, the Commission cited section 230(b).[163] It stated that its "primary policy goal" was to "encourage the ubiquitous availability of broadband to all Americans," based on the mandates of Section 706(a), which promotes universal accessibility of advanced communications services.[164] The Commission used section 230(b)(2) as further support for deregulatory measures in support of that aim.[165]

This framing of the statutory scheme standard in sharp contrast to the Commission's description of the Congressional "national Internet policy" six years later. In fact, prior to the *Internet Policy Statement* in 2005, the FCC used the phrase "national Internet policy" only twice: to support federal preemption of state VOIP regulation[166] and to describe its "unregulation" approach in connection with the court challenge to the cable modem classification.[167]

These inconsistencies do not invalidate the Comcast decision, but they suggest that the Commission needs to further articulate its position. The FCC is entitled to revise its interpretation of the statute to give

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[159] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689 (1999).

[160] *See* Jason Oxman, *The FCC and the Unregulation of the Internet* (Fed. Comms. Comm'n Office of Plans and Pol., Working Paper No. 31, 1999), *available at* http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf.

[161] *See* Lemley & Lessig, *supra* note 38; Francois Bar et al., *Access and Innovation Policy for the Third-Generation Internet*, 24 TELECOMM. POL'Y 489, 490 (2000).

[162] *See* Wireline Broadband Order, *supra* note 26, at para 2 & n.6-10.

[163] *See i*d. at para. 4.

[164] *See id.*

[165] *Id.*

[166] *See* Vonage Order, *supra* note 95, at para. 34.

[167] See FCC Court Brief Underscores Consumer Benefits from National Internet Policy of Unregulation; Urges Narrow Judicial Resolution, 1999 FCC LEXIS 3926.

greater emphasis to the pro-competitive language in Section 230(b). Nothing in the *Comcast Order* is inconsistent with the FCC's prior classification decisions, or with a general skepticism toward excessive regulation of the Internet. Nothing in the earlier "unregulation" decisions suggested that the FCC would never impose regulations on broadband providers. In fact, once the Commission classified both cable modem and telephone-based digital subscriber line (DSL) offerings as information services, it and the courts repeatedly that new rules under Title I might be needed to achieve policy objectives that could no longer be met through other Titles.[168]

The problem is that the *Comcast Order* rested on ambiguous statutory authority. The Commission's refusal to acknowledge that ambiguity calls into question the validity of the underlying statutory delegation. Sections 230(b) is internally inconsistent. It sings the praises of an open, competitive Internet, which might not emerge through market forces alone, as well as those of minimal regulation. The relationship of Section 230(b) to Section 706(a) and other provisions of the statute is also unclear. As Justice Scalia concluded, the 1996 Act is "in many important respects a model of ambiguity or indeed even self-contradiction."[169] As the Supreme Court held in that case, the statutory ambiguity makes it incumbent on the FCC to make the hard choices necessary to constrain discretion.

2. The substance of the national Internet policy

Section 230 was intended to limit, rather than expand, FCC regulatory authority. The Commission was undoubtedly correct that Congress did not intend to preclude all FCC oversight of broadband access.[170] However, that does not mean that Congress endorsed any regulation the FCC saw fit to impose. Section 230 was designed to foreclose FCC regulation of the Internet under either the traditional content-based standards of broadcasting or the traditional price regulation of telecommunications. To be faithful to the statute, the FCC would have to define the scope of regulation that would be consistent with those restrictions.

The Commission's definition of its statutory mandate, however, also begs for justification. In the Policy Statement, the Commission defined the "essence" of the national Internet policy as to "encourage broadband

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[168] Brand X, 545 U.S at 976 ("Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications.").

[169] AT&T Corp. v. Iowa Utils. Bd., 525 U.S.C. 366 (1999).

[170] *See supra*; *See* Comcast Order, *supra* note 2, at paras. 25-26.

deployment and preserve and promote the open and interconnected nature of the public Internet."[171] This gloss involves two subtle shifts from the express language of section 230(b). First, the Commission interpreted the mandate to "promote the continued development of the Internet" as one to "encourage broadband deployment." The emphasis on broadband deployment derives from section 706(a) of the Act, which charges the FCC with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability" to all Americans.[172] The Commission cited this provision in both the Policy Statement and the *Comcast Order*.

As a general matter, broadband deployment is certainly a means to "promote the continued development of the Internet." In the Comcast case, however, the connection is not so clear. Comcast argued that P2P file-sharing was overwhelming the capacity of its broadband network. To Comcast, therefore, the FCC's restrictions on its network management practices are an impediment to deployment of its broadband service. Even if one believes that Comcast degraded P2P file transfers to prevent competition with its own video offerings, the threat of revenue cannibalization might cause the company to scale back its broadband investment.

The nexus between an open or neutral Internet and the deployment mandate of section 706(a) is one of the "hard questions" that either Congress or the agency must answer, if the FCC's actions are to represent a valid delegation.[173] The FCC could make a convincing argument that measures to preserve an open and interconnected Internet would best promote broadband deployment, and the statutory scheme more generally. The problem is that the *Internet Policy Statement* and the *Comcast Order* contain no such analysis. Because the FCC has not connected the dots, it has not limited its freedom of action.[174]

3. Process: The problem of ad-hoc decision-making

Any application of the Policy Statement to decide actual cases raises serious administrative law questions. The Commission's assertion that it "will incorporate the above principles into its ongoing policymaking activities,"[175] supported by a footnote stating that, "We are not adopting rules in this policy statement"[176] only confuses matters further. If the

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[171] *See* Internet Policy Statement, *supra* note 71, at para. 4. (emphasis omitted), *cited in See* Comcast Order, *supra* note 2, at para 13.

[172] 47 USC 706(a).

[173] *See* Bressman, *supra* note 137.

[174] *See* Iowa Utilities Board, *supra* note 169; Bressman, *supra* note 137.

[175] *See* Internet Policy Statement, *supra* note 71.

[176] *See id.*

Policy Statement's principles are not rules, how can the FCC adopt, according to an FCC source quoted in a news report, "an item that finds Comcast's broadband network management practices to be in violation of the FCC's policy principles?"[177] Principles are not binding, unless they are embodied in legislative rules. FCC Chairman Martin, in an interview with the *New York Times*, made the even stronger statement that companies such as Comcast bear the burden of proof in such a situation: "When they show they are blocking access to some sort of content, they have the burden to show that what they are doing is reasonable."[178]

By sanctioning Comcast for violation of the Policy Statement, the FCC has built a castle on air. The Administrative Procedure Act (APA) provides for procedural protections whenever an agency engages in either rulemaking or adjudication.[179] Since the Policy Statement, by its own terms, does not adopt rules, the clear implication is that those rules must come through "ongoing policymaking activities." However, the FCC's "ongoing policymaking activities" in the Comcast case are justified on the basis of the Policy Statement! The Commission cannot turn non-rules into rules simply by issuing an order separately.[180]

Under *SEC v. Chenery*, administrative agencies have discretion to resolve disputes either through case-by-case adjudication or through comprehensive rulemaking.[181] The FCC will defend its actions by claiming that it is merely adjudicating a complaint filed over a matter within its jurisdiction.[182] There is some merit to this contention. While the FCC traditionally makes policy almost exclusively through rulemaking, other agencies use adjudication more frequently, or even exclusively in the case of the National Labor Relations Board.[183]

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[177] Chloe Albanesius, *FCC: Comcast Broke Rules, But Will Not Face Fines*, PC MAG., July 11, 2008.

[178] Saul Hansell, *F.C.C. Chief Would Bar Comcast From Imposing Web Restrictions*, N.Y. TIMES, July 12, 2008.

[179] 5 U.S.C. 553.

[180] *See* Philip J. Weiser, *The Future of Internet Regulation* (working paper, Feb. 2, 2009 ("The FCC's determination that Comcast violated its Internet Policy Statement is also vulnerable on the legal ground that an agency cannot enforce a policy statement that did not emerge from notice-and-comment rulemaking or explicitly warn parties that it would be enforced.").

[181] 332 U.S. 194, 203 (1947) ("[t]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

[182] *See* Comcast Order, *supra* note 2. at 13,044.

[183] *See* N.L.R.B. v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 819 (1990) (Scalia, J., dissenting). Moreover, there is an argument that case-by-case adjudication is a better mechanism for novel situations where the agency has no track record for understanding the relevant issues. *See* Weiser, Future of

However, an administrative adjudication must have some legal basis. If an agency could unilaterally declare a policy and then hold any company accountable to it, so long as someone filed a complaint, it would be tantamount to exercising rulemaking authority.[184] An adjudication to enforce statutory obligations requires some indication that those are, in fact, legal obligations. The Policy Statement was adopted with no record, as a standalone document that expressly disclaimed any legal force.[185]

In the Comcast case, the FCC considered the complaint in parallel with a petition for declaratory ruling and a notice of inquiry on the same set of topics, only choosing to announce at the end that it was treating the matter as an adjudication.[186] That alleged adjudication involved no on-the-record hearings or testimony. The FCC held two public forums on the general topic of broadband network management, one of which Comcast representative attended.[187] The Commission itself

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Internet Regulation, *supra* note 180; M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1406 (2004).

[184] *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like -- Should Federal Agencies Use Them To Bind the Public?,* 41 DUKE L.J. 1311 (1992); Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974) ("The agency cannot apply or rely on [a policy statement] as law because a general statement of policy only announces what the agency seeks to establish as policy.").

[185] *See* Weiser, Future of Internet Regulation, *supra* note 180.

[186] *See id.* The caption of the Free Press petition, which references seven separate rulemaking dockets, belies the claim that the Comcast proceeding was best seen as an adjudication of a private dispute between two parties. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Review — Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities; Broadband Industry Practices*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, WC Docket No. 07-52, Petition for Declaratory Ruling of Free Press, et al (Nov. 1, 2007).

[187] *See FCC Announces Public En Banc Hearing in Cambridge, Massachusetts on Broadband Network Management Practices* (Feb. 12, 2008), FCC Press Release, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280194A1.pdf; *FCC Announces Second Public En Banc Hearing on Broadband Network Management Practices at Stanford University, Palo Alto, California,* FCC Press Release, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-80895A1.pdf. *See also* Weiser, Future of Internet Regulation, *supra* note 180 ("The FCC's proceeding lacked most—if not all—of the characteristics associated with traditional fact-finding.").

acknowledged that it could not fine Comcast for its actions, because the company had insufficient notice that the obligations of the Policy Statement were to be enforced.[188] Given the courts' record of frequently reversing FCC decisions, the Comcast decision will likely be viewed as an attempt to shortcut the administrative process.

Even if the Comcast order survives a judicial challenge, there are problems with the FCC's approach. Case-by-case resolution requires a time-consuming, after-the-fact assessment of the challenged practice. The only guidance the FCC provides in the Policy Statement is the language that "reasonable" network management is acceptable.[189] The Commission will have to develop a jurisprudence to give meaning to that term through its resolution of complaints.[190] In the Comcast case, it stated that the techniques Comcast employed were not considered reasonable by networking engineers.[191] Its primary basis for this conclusion was the testimony of a few hand-picked experts in the FCC's public hearings on the topic. Contrary to the FCC's assertion, the challenged practices do not violate the standards of the Internet Engineering Task Force, although they are generally disfavored by engineers.[192] A more serious effort to engage these issues would require a process involving a representative technical and industry group.[193]

There is little in the Comcast Order to provide guidance for future cases. For example, Comcast's technique used a form of Deep Packet Inspection (DPI), which means reading the contents of individual data packets as they pass across the network.[194] DPI technologies are controversial, because of the level of control they potentially give the network operator.[195] These mechanisms can be used to target advertising based on user behaviors, which is rapidly becoming a controversial practice.[196] There are worries about privacy violations if network operators can see the entire contents of messages they carry. On the

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[188] *See* Comcast Order, *supra* note 2.

[189] *See* Internet Policy Statement, *supra* note 71.

[190] *See* Weiser, Future of Internet Regulation, *supra* note 180 ("The FCC's decision in the Comcast matter represents the beginning of what is likely to be a challenging effort to define 'reasonable network management.'")

[191] *See* Comcast Order, *supra* note 2.

[192] *See id.* at n.212. *See* Paul Ohm, *The Rise and Fall of Pervasive ISP Surveillance,* 2009 UNIV. OF ILL. L. REV. ___ at n. 115 (forthcoming 2009) (discussing the IETF's comments on the "RST packet" mechanism that Comcast used).

[193] *See* Weiser, Future of Internet Regulation, *supra* note 180.

[194] *See id.*

[195] *See* Werbach, Video Peer-to-Peer, *supra* note 20.

[196] *See* Ohm, *supra* note 192.

other hand, DPI can be a legitimate mechanism for managing network traffic.[197] It is not, in all cases, an "unreasonable" technique. The FCC decision suggested, however, that it might be.[198] Because the FCC chose an ad hoc, case-by-case, adjudicative approach to the network neutrality problem, it remains unclear whether the Commission will impose fines and other sanctions on DPI more broadly.

There is room for vigorous debate about whether certain network management practices represent unacceptable discrimination, or necessary and neutral traffic engineering. As an expert regulatory agency, the FCC is qualified to engage in this analysis. However, it could only do so by developing a full record and considering the issues squarely. The narrow and haphazard record in the Comcast case is insufficient. Only through a rulemaking procedure that allows it to gather all the necessary information can the Commission be certain of discharging its duties properly. And such a proceeding (or proceedings) needs to start with a solid jurisdictional foundation.

IV. FINDING A HOME FOR THE INTERNET

Unless it intends to reverse its post-*Brand X* course of dumping all broadband services into the Title I bucket, the FCC must take seriously the implications of its choice. The FCC should declare regulation of broadband Internet access necessary as ancillary to its obligations under Sections 251 and 256 of the Communications Act. The Commission could use this authority for ongoing efforts to promote open access and standards-based interconnection.

A careful reading of the Communications Act demonstrates that these two core obligations of telecommunications service providers will not be met if broadband access providers can avoid regulation. Title I is not Title 0. A consistent implementation of the information services classification must give some concrete meaning to the regulatory obligations of such services.

The FCC's mistake was to anchor Internet law in the part of the Communications Act that mentions the Internet. Section 230 may be a Congressional delegation to develop policy, but it was a delegation for the

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[197] *See* Werbach, Breaking the Ice, *supra* note 28, at 92; Cisco Systems, Deploying Premium Services Using Cisco Service Control Technology, *available at* http://www.democraticmedia.org/PDFs/CiscoPremiumServices.pdf; Sailesh Kumar, et al, Advanced Algorithms for Fast and Scalable Deep Packet Inspection, Proceedings of the 2006 ACM/IEEE Symposium on Architecture for Networking and Communications Systems (Dec 3-5, 2006).

[198] *See* Comcast Order, *supra* note 2, at n.214.

limited purpose of preventing intermediary liability. Regulators must honestly confront the reality that Congress did not create a national Internet policy in 1996.[199] A new policy regime to promote open access and interconnection for Internet infrastructure requires a different foundation. Fortunately, such a foundation exists. If the Internet is consuming legacy communications and media industries, that means Internet policy is the new telecommunications policy. The central provisions of the Communications Act must morph to apply to Internet-based systems.

A. Ancillary Jurisdiction

The concept of ancillary jurisdiction under the Communications Act was established in *United States v. Southwestern Cable Co*, a 1968 decision of the Supreme Court.[200] In *Southwestern Cable*, the FCC sought to regulate cable television service, which was in its earliest stages of commercial development. Cable posed a conundrum under the Communications Act. It was delivered over wires, like telephone service, but provided one-way delivery of video content to many subscribers, like broadcasting. It fit neither the common carrier definitions of Title II of the Act, nor the broadcast definitions of Title III, despite obviously having attributes of both. And even though it was then a small industry, cable had the potential to significantly alter the market for video programming, which the FCC had regulated under its public interest standard since the dawn of television.[201]

The FCC needed a hook to assert jurisdiction over cable.[202] To reach its goal, it used a two-step process. First, the Commission found that

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[199] The term, "Internet," appears twice out of more than 75,000 words in the Telecommunications Act. *See* H. Russell Frisby, Jr. & David A. Irwin, *The First Great Telecom Debate of the 21st Century*, 15 COMMLAW CONSPECTUS 373, 377 (2007).

[200] 392 U.S. 157 (1968). Ancillary jurisdiction is not limited to the FCC. The traditional version of the concept applies to federal agencies being allowed to adjudicate state law claims that are inextricably related to federal claims. *See* Commodity Future Trading Comm'n v. Schor, 478 U.S. 833, 851-53 (1986); Penina Michlin, *Note: The Broadcast Flag and the Scope of the FCC's Ancillary Jurisdiction: Protecting the Digital Future*, 20 BERKELEY TECH. L.J. 907 (2005).

[201] The Commission's assessment was accurate. Today, cable along with direct broadcast satellite service, represents over 86 percent of the video market. *See* Federal Communications Comission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report, 21 F.C.C.R. 2503, 2620 (Feb. 10, 2006).

[202] The FCC was right to be concerned that cable would have a significant impact, but the specific content of its regulations are more open to challenge. In effect, the FCC sought to regulate cable to protect incumbent broadcasters.

cable was within its primary statutory grant of authority under Section 152(a) of the Act.[203] This provision allows the FCC to regulate "all interstate and foreign communication by wire or radio…." Second, the FCC invoked Section 303(r) of the Act, which allows the Commission to issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law," as "public convenience, interest, or necessity requires."[204] It also referenced section 4(i), that "the Commission may perform any and all acts, make such rules and regulations, and issue such orders not inconsistent with [the Communications Act], as may be necessary in the execution of its functions."[205]

As affirmed by the Supreme Court in *Southwestern Cable*, these provisions give the FCC authority to take steps "reasonably ancillary to the effective performance of the Commission's various responsibilities…."[206] Regulation of cable was deemed reasonably ancillary to the statutorily defined regulation of broadcasting, because an unregulated cable industry could prevent effective achievement of those statutory mandates.[207]

Ancillary authority has limits. In two successor cases in the 1970s, *Midwest Video I* and *Midwest Video II*,[208] the Supreme Court clarified the boundaries of the authority carved out in *Southwestern Cable*. *Midwest Video I* upheld FCC rules requiring cable operators to originate their own programming.[209] *Midwest Video II*, however, rejected FCC requirements that cable providers offer access to unaffiliated content providers and non-commercial users.[210] The court in *Midwest Video II* found these requirements tantamount to common carriage obligations.[211] Section 153(h) of the Act expressly stated that "a person engaged in…

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[203] 47 USC 152(a).

[204] 47 USC 303(r).

[205] 47 U.S.C. § 154(i) (2000).

[206] 392 U.S. 157, 178. Phil Weiser describes ancillary jurisdiction as "a cousin to the interstitial authority of the federal courts to develop the basic principles embodied in common law-like statutes such as the Sherman Antitrust Act or the Copyright Act." *See* Weiser, Next Generation, *supra* note 8, at TAN 47.

[207] Congress later added Title VI, explicitly regulating cable and supplanting the FCC's earlier rules.

[208] *See* United States v. Midwest Video Corp., 406 U.S. 649 (1972) (Midwest Video I); FCC v. Midwest Video Corp., 440 U.S. 689 (1979) (Midwest Video II).

[209] *See* Midwest Video I, *supra* note 208. The case produced a splintered opinion. Concurring, Chief Justice Burger stated that the order "strains the outer limits" of FCC jurisdiction. *Id* at 676 (Burger, C.J., concurring).

[210] *See* Midwest Video II, *supra* note 208.

[211] *See id.*

broadcasting shall not… be deemed a common carrier."[212] While the FCC rules in question might further statutory goals of the Communications Act, they required cable operators to do something the FCC could not legally require of broadcasters. Therefore, the court held, those rules could not possibly be "reasonably ancillary" to FCC regulation of broadcasting.[213]

As defined in *Southwestern Cable* and refined in *Midwest Video*, ancillary authority means the expansion of the FCC's jurisdiction must be *necessary* to meet statutory obligations.[214] In the case of cable television, the FCC believed the statutory scheme for regulating wireless broadcasters would collapse if analogous wired systems were wholly unregulated.[215] In other words, what mattered was what the statute said about the traditional regulated service, not what if anything it said about the new service.[216] Cable could be regulated because it was a service within the FCC's general grant of jurisdiction that was likely to have significant impacts on services subject to specific FCC regulatory obligations. When the FCC attempted to decouple the regulation of cable from the regulation of broadcasting, the Court overturned it.[217]

In its *Computer I* decision in 1971, the FCC declined to regulate data processing services, but left open the possibility of doing so under ancillary jurisdiction.[218] The Commission ultimately chose to maintain the unregulated status of what became enhanced or information services, but it noted that it could have taken a different tack of competitive

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[212] 47 USC 153(h).

[213] *See* Midwest Video II, *supra* note 208.

[214] The distinction between *Southwestern Cable* and *Midwest Video I* was that the first allowed the FCC to act to protect the existence of the regulated industry (broadcasting), and the second allowed it to promulgate rules to effectuate the established statutory objectives of broadcast regulation. *See* Crawford, Shortness of Vision, *supra* note 5.

[215] Whether the Commission was right is another story. For example, the FCC regulates indecent content on broadcast television, but not on cable, even though the two platforms compete. Though this may not be a level playing field, it has not made the FCC's content rules untenable.

[216] In *Midwest Video*, the fatal flaw in the challenged FCC order was that it expressly contradicted the mandates of the statute for the legacy service, by imposing common carrier-like restrictions on broadcasters. *See* Midwest Video II, *supra* note 208.

[217] *See id.*

[218] See Computer I Tentative Decision, 28 F.C.C. 2d at 268 ("Since we are not proposing, at this time, to regulate data processing, as such, a discussion of the extent of our jurisdiction with respect thereto is neither relevant nor necessary….").

dynamics in those markets were different.[219] However, *Computer I* did promulgate rules restricting regulated common carriers from entering the unregulated data processing market.[220] The Second Circuit upheld these provisions in *GTE v. FCC*, even though the Communications Act gave the FCC no authority over such services. [221]

In recent years, the FCC has asserted ancillary authority in several cases, including issues such as closed captioning requirements for broadcasters, regulation of instant messaging, and a universal service fund.[222] The courts have scrutinized each claim according to the *Southwestern Cable* standards. As Phil Weiser notes, "the FCC's conception of this authority is hardly a model of clarity or consistency."[223] The forty-year-old cable television decisions remain the benchmarks for understanding the contours of ancillary jurisdiction.[224]

The FCC's latest foray into ancillary jurisdiction involved the so-called broadcast flag. In 2003, the FCC mandated that manufacturers of television receivers, or other devices capable of receiving digital broadcast TV signals, include broadcast flag capability in their devices.[225] The broadcast flag was designed to prevent unauthorized copying of digital programming. Broadcasters and content producers argued that, without strong protections against copying, digital content would not be made available.[226] The FCC was eager to promote the switch to digital

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[219] 28 F.C.C.2d at 268.

[220] Computer I Tentative Decision, 28 F.C.C. 2d. AT&T was prohibited from doing so under a 1956 consent decree, but other smaller incumbent carriers such as GTE could offer data processing through separate affiliates. *Id.* at 302, ¶ 35.

[221] GTE Serv. Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973).

[222] *See* Implementation of Video Description of Video Programming, 15 F.C.C.R. 15,230, para. 67 (2000), *rev'd*, Motion Pictures Ass'n of Am. v. FCC, 309 F.3d 796 (D.C. Cir. 2002) (video descriptions); Applications for Consent to the Transfer of Licenses and Section 214 Authorizations by Time Warner Inc. and American Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee, 16 F.C.C.R. 6547, para. 148 (2001) [hereinafter AOL-Time Warner Merger Order] (instant messaging); Rural Tel. Coalition v. FCC, 838 F.2d 1307 (D.C. Cir. 1988) (universal service).

[223] *See* Weiser, Next Generation, *supra* note 5.

[224] *See id*.

[225] Digital Broadcast Content Protection, MB Docket No. 02-230, Report and Order and Further Notice of Proposed Rule, FCC No. 03-273 (rel. Nov. 4, 2003) (Broadcast Flag Order).

[226] *See* Werbach, Federal Computer Commission, *supra* note 13; John Borland, *FCC Nears Vote on TV "Broadcast Flag"*, CNET NEWS.COM, Oct. 28, 2003, at *http://news.com.com/FCC+nears+vote+on+TV+'broadcast+flag'/2100-1028_3-5097927.html*. While there is always the possibility of copying the analog signal, this degrades over time, unlike the pristine digital version.

television. It concluded that the a digital right management system was important to ensure sufficient digital programming to entice consumers to purchase the new digital sets.[227] The jurisdictional problem was that the broadcast flag applied to *hardware*. It regulated television sets, not the television broadcasters covered under Title III of the Act.[228]

The FCC tried and ultimately failed to defend the broadcast flag as an exercise of ancillary jurisdiction. The Commission's argument was that FCC's statutory authority includes not only communications, but also all incidental "instrumentalities, facilities, apparatus, and services" used for the "receipt, forwarding and delivery of such transmissions."[229] The District of Columbia Circuit Court of Appeals disagreed.[230] In *American Library Association v. FCC*, it concluded that, because the broadcast flag operated *after* a digital broadcast transmission arrived at a television set, it was not covered under the statutory provision.

American Library Association struck down the broadcast flag, but it did not narrow the scope of the FCC's ancillary jurisdiction. As the court noted, "The Commission's general jurisdictional grant under Title I plainly encompasses the regulation of apparatus that can receive television broadcast content, but only while those apparatus are engaged in the process of receiving a television broadcast."[231] It is tempting to characterize the broadcast flag as the FCC over-reaching towards the Internet.[232] However, the case is more properly seen as a straightforward application of the *Midwest Video II* doctrine[233] that ancillary jurisdiction cannot produce a result inconsistent with express statutory language.

B. Internet Communications as Ancillary to Interconnection

1. Internet Communications Services

The *Wireline Broadband Order* concerned providers of integrated telecommunications and information services. Broadband access services

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[227] *See* Werbach, Federal Computer Commission, *supra* note 13.

[228] The FCC's order applied to all "Covered Demodulator Products," which were essentially all devices able to display a digital television broadcast signal on a screen. 47 CFR 73.9002(b)., 73.9000(g).

[229] 47 USC 153(33).

[230] *See* Am. Library Ass'n v. FCC, 406 F.3d 689 (D.C. Cir. 2005).

[231] *Id.* at 4.

[232] *See* Susan Crawford, Shortness of Vision, *supra* note 5.

[233] The video description case similarly involved a proposed FCC rule that contravened express limits set out in the statute. *Motion Picture Assoc. of Am. v. FCC,* 309 F.3d 796 (D.C. Cir. 2002).

such as DSL and cable modem clearly involve both a pure transportation pipe and a suite of data processing functionality. The trouble is that their providers do not offer the two components separately. The FCC's decision was to treat the bundles as information services.[234] This conclusion effectively placed "pure" information services, which are, according to the statutory definition, capabilities offered "via telecommunications,"[235] into the same category as "integrated" information services, which include those very telecommunications capabilities.

When a user accesses Google through a dial-up Internet service provider, Google is an information service, riding on the phone company's telecommunications service. When that same user connects to Google over a broadband connection, however, the situation changes. Google is an information service provider, but so is the telephone, cable, or other company that provides the underlying connection.

In the *Comcast Order,* the FCC did not define the class of information service providers that it thought it could regulate to promote an open Internet. It proposed a rule specific to broadband network operators, and evaluated whether it had sufficient jurisdictional authority to adopt it. Under the Commission's case-by-case adjudicatory approach, the scope as well as the contents of the requirement could presumably be considered each time.

A better approach would be to define a new category as a subset of information services. There is plainly no need for the FCC to adopt rules for all information services. The overwhelming majority of services that involve data processing capabilities across telecommunications networks are vastly different from the network operators the FCC regulates. There is no policy reason to develop rules under the Telecommunications Act for Google's search engine, or Amazon.com's online bookstore.[236] The FCC approach of classifying enhanced or information services primarily to wall them off from regulation remains a good one.

Two specific kinds of information services should be within FCC jurisdiction, as Internet Communications Services. One includes those information services so identical to telecommunications services as to make the distinction purely an invitation for arbitrage. AT&T's "fake VOIP" backbone service was an example. Even though it involved some

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[234] Interestingly, this was the opposite of its original decision in *Computer I*. There, it held that a service of a common carrier that included both communications and data processing would be treated as regulated communications. That "contamination" approach generated significant difficulties in application. *See* Cannon, *supra* note 26.

[235] 47 U.S.C. 153(20).

[236] That is not to say that no regulation would be appropriate. Antitrust rules may apply, for example.

mechanical protocol conversion, it was effectively a telecommunications service.[237]

Having a class of information services that straddle the boundary in this way would eliminate uncertainty about where a service fell. Manipulating offerings to fall on the information services side of the divide would not itself eliminate regulatory obligations. This category would not apply to all information services that are similar to traditional regulated services. There are many VOIP offerings, for example, that differ in significant ways from circuit-switched telephone service, even if they compete with it.[238] Applying the same obligations to those services could put a damper on competition and innovation.[239] Internet communications services would consider only those that were indistinguishable from regulated services or clearly designed to evade regulatory obligations.[240]

The second category of Internet Communications Services would be broadband access platforms. Services that integrate telecommunications and information services in order to provide end-users with access to the Internet are hybrids. They can remain in the information services bucket, so long as they are carved out as a special case over which the FCC can exercise ancillary jurisdiction. This narrow approach would avoid the need to impose the full panoply of common carrier obligations or cable TV rules on broadband access providers. As discussed above, that would be fully consistent with the real Congressional intent behind Section 230 of the 1996 Act.[241] At the same time, such an approach would acknowledge that the FCC's path of declaring all broadband access networks as information services created a significant hole in the regulatory scheme.

Broadband access is not a "pure" information service. It is telecommunications transport integrated with data processing functionality. The major companies that offer it are regulated telephone, cable, and wireless providers. Even if one accepts the FCC's conclusion that the broadband access bundle should be treated for regulatory purposes as an information service, it is a different kind of information service than Amazon.com or Wikipedia offers. Especially for a carrier such as Verizon or AT&T, the information service classification means a net reduction in regulatory obligations, since they would otherwise be Title II common carriers. Treating them as information service providers

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[237] *See supra* note 35.

[238] *See* Crawford, *supra* note 5.

[239] *See id*.

[240] *See GTE v. FCC,* 474 F.2d at 733 (rejecting ancillary jurisdiction when it was clear that a class of providers were not structured to avoid regulation).

[241] *See supra*.

subject to limited Title I obligations would still subject them to far fewer rules than the alternative.

The debate today over regulation of information services ignores the requirements established in *Southwestern Cable* and *Midwest Video*. The FCC's analysis in the *Comcast Order* focused on the nature of broadband Internet access service and online applications. It did not consider regulated services that might be affected.[242] Comcast critics asserted that the broadband operator's network management techniques were adopted to protect its cable video revenues against competition from Internet-based P2P delivery.[243] The FCC, however, did not use this argument as a basis for its decision. It found Comcast's network management practices improper regardless of their motivation, because they were not necessary to achieve its legitimate technical requirements. The FCC's goal in asserting ancillary authority was to protect the integrity of the unregulated Internet, based on the language it found in Section 230 and elsewhere.[244]

This is not the analysis the Supreme Court prescribed. Under the cable cases, the characteristics of the new service are relevant only to determine that it fits under the broad grant of authority in Section 152(a). Once that prong is satisfied, the next question is what the effects will be on existing regulated services. If the new service could prevent achievement of statutory goals associated with the established service, the third prong is to evaluate the proposed regulation for consistency with the FCC's existing rules. By using the impact on unregulated services as the basis for new regulation of incumbents, the FCC had it exactly backwards.

The fact that language about the Internet appears in the Act, unlike cable service at the time of *Southwestern Cable*, is not material. Section 230, as described above, is not a concrete regulatory scheme equivalent to the extensive set of Title III broadcast rules at issue in *Southwestern Cable*, nor it is even a command to achieve the policy objectives the FCC identified in the *Comcast Order*.[245] The logic of ancillary authority is that there must be some primary authority at risk. Moreover, as developed in *Midwest Video II*, the ancillary authority must track the contours of those primary mandates.

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[242] The FCC did in passing note that because Comcast's information service interconnects with the public switched telephone network, it affects the market for telecommunications services, as required under Section 256. *See* Comcast Order, *supra* note 2.

[243] *See See* Comcast Order, *supra* note 2, at para. 5; other critics making this argument TK.

[244] *See* Comcast Order, *supra* note 2.

[245] *See supra*.

There are no actual mandates within Section 230. On the FCC's reading, the primary content of a statutory command would be developed under ancillary authority, which makes no sense. Such a reading would give general policy pronouncements in a regulatory statute effectively the same status as specific mandates. The decision of whether to impose obligations, or simply to express an objective, is properly the domain of Congress, not the administrative agency.

An analysis faithful to Supreme Court precedent would proceed differently. There is a basis for bringing broadband access services within the Communications Act, but with a different foundation than the one the Commission used in the *Comcast Order*. Internet-based services clearly satisfy the first prong of *Southwestern Cable*. They are "communications by wire or radio" that cross state lines.[246]

The second prong is met as well. In *Southwestern Cable*, the problem was that a new unregulated service (cable) could mimic and therefore competitively undermine a regulated service (broadcasting). FCC exercise of ancillary authority was deemed necessary to preserve the statutory public interest mandates on broadcasters. The analogous issue today is whether new unregulated broadband Internet services would have the same effect.[247] The answer is unquestionably yes.

The rise of broadband Internet services and content threaten FCC statutory obligations in two ways. Unregulated services can mimic and compete with regulated telecommunications services. Simultaneously, those regulated services can either escape from regulation or harm competition in the markets higher up. Either outcome would belie Congressional objectives. The FCC cannot carry out its statutory duties for telecommunications service providers if information services remain a contentless regulatory grey area.[248] For example, if Verizon or Cablevision refused to allow independent application and content

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[246] See Southwestern Cable, *supra* note 200.

[247] The situation today is akin to the one the FCC faced in the early days of the television industry. The Communications Act granted the FCC the power to regulate broadcasters. It clearly covered technical rules for spectrum licensing, but did not expressly address business arrangements. In *NBC v. US*, the Supreme Court upheld the FCC's "chain broadcasting" rules on the grounds that, "Congress was acting in a field of regulation which was both new and dynamic," and, "[i]n the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers." National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[248] *Cf.* GTE v. FCC, 474 F.2d. at 731 ("[E]ven absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service.").

providers to reach customers through their pipes, or discriminated against unaffiliated providers on their platform, it would ultimately make the substantive provisions of Title II of the Act meaningless.

The FCC should not try to stop the "digital broadband migration," to borrow a phrase from former FCC Chairman Michael Powell.[249] On the contrary, it should cheer the substitution of closed network silos with a converged, layered, interconnected universal data network.[250] The perception that regulatory concern with the Internet will somehow contaminate it is a residue of the CDA debate, and the early work of "cyber-exceptionalists" such as John Perry Barlow, David Johnson, and David Post.[251] It is no longer 1996. We can now see that future telecommunications and broadcast networks will all be based on Internet-like data networking technologies. Yet we can also see that classic policy concerns of ensuring affordability, ubiquity, reliability, interoperability, innovation, investment, and consumer protection will remain important. The challenge for the FCC today is not how to keep the Internet out, but how to bring it in.[252]

2. GTE v. FCC

The court decision most directly applicable to the ancillary jurisdiction analysis for Internet communications services is *GTE v. FCC*, in which the Second Circuit in 1973 upheld the FCC's *Computer I* rules.[253] Though nearly forty years old, the case provides a good blueprint for FCC authority. The situation today is analogous to the one the Commission confronted in the late 1960s, when computers first began to have a significant relationship with the telephone network. The two sets of rules challenged in *GTE* map directly to the two main kinds of Internet-based information services today.

The *Computer I* rules governed the behavior of common carriers when acting as providers of data processing, even though data processing providers were not regulated under the Communications Act.[254] The Court of Appeals had no difficulty upholding this action:

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[249] Michael Powell, The Great Digital Broadband Migration (2000), *available at* http://www.fcc.gov/Speeches/Powell/2000/spmkp003.html.

[250] *See* Werbach, Layered Model, *supra* note 53.

[251] *See* John Perry Barlow, A Declaration of the Independence of Cyberspace, Feb. 8, 1996, *at* http://homes.eff.org/barlow/Declaration-Final.html; David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

[252] *See* Weiser, Future of Internet Regulation, *supra* note 180.

[253] GTE Serv. Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973).

[254] Computer I Tentative Decision, 28 F.C.C. 2d.

> The burgeoning data processing activities of the common carriers pose, in the view of the Commission, a threat to efficient public communications services at reasonable prices and hence regulation is justified under its broad rule-making authority. [255]

In 1971, there was no "information service" category in the statute. Had there been, the FCC's *Computer I* rules would have constituted regulation of telecommunications carriers who were acting as information services providers – the exact parallel to today's broadband access providers. The FCC cannot have less authority to regulate something specified in the statute than a non-category.

Even the portion of *GTE* that found the FCC exceeded its authority supports the exercise of ancillary jurisdiction over Internet communications services today. The court invalidated the *Computer I* rules that sought to regulate the behavior of the structurally separate data processing affiliates that the FCC required common carriers to establish.[256] The FCC was concerned that these new affiliates would have an unfair advantage if they could use the brands of, or purchase services from, their regulated parents. The problem was that the affiliates were pure data processing companies, and the FCC had itself declared that it would not regulate data processing at the time.[257] Its justification for the challenged rules was based on antitrust theory, not the requirements of the Communications Act. As the court noted, the data processing affiliates were not means to escape regulation, but corporate vehicles that the FCC itself required.[258] The Commission could not then turn around and treat them as creatures of the regulated carrier.

The circumstances today are quite different. What in 1971 was a tiny, formative data processing industry is today a vast information services marketplace. The *GTE* court based its action on the FCC's prior decision to avoid exercise of ancillary jurisdiction over data processing.[259] However, the FCC expressly stated at that time that, "[i]f there should develop significant changes in the structure of the data processing industry, or, if abuses emerge which require the exercise of corrective

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[255] GTE v. FCC, 474 F.2d 724.

[256] 474 F.2d. at 733.

[257] "[The FCC's] concern here therefore is not for the communications market which Congress has entrusted to its care, but for data processing which is beyond its charge and which the Commission itself has announced it declines to regulate" 474 F.2d. at 733

[258] *See id.*

[259] *See id.*

action by the Commission," it would re-evaluate the regulatory status of the market.[260]

If the FCC today finds that the broadband access market, despite involving information services, requires actions to enforce the mandates of the Communications Act, it can use that finding as a basis for oversight of Internet communications services. Unlike the invalidated rules in *GTE*, these FCC policies would derive from the impact on the Commission's ability to carry out its statutory duties, not on general antitrust concerns about the performance of the information services market.

Whenever an administrative agency draws a new dividing line between regulated and unregulated services, it creates two possibilities: unregulated companies may become regulated for the first time, and regulated companies may escape regulation. The *GTE* court allowed the FCC to act in the latter case, but not in the former. Imposing rules on data processing affiliates would have expanded the base of regulated entities. Such a move can be justified, as it was in *Southwestern Cable*, but it stands to reason that the bar should be high absent express Congressional mandates. With broadband access, the Commission faces the same dichotomy. It can properly distinguish rules regulating pure information services for the first time from those maintaining limited oversight over integrated providers.

3. Limits on FCC authority

As Justice Scalia noted in his dissent in *Brand X*, ancillary jurisdiction without sufficient constraints renders the statute meaningless:

> This is a wonderful illustration of how an experienced agency can (with some assistance from credulous courts) turn statutory constraints into bureaucratic discretions. ... Under its undefined and sparingly used "ancillary" powers, the Commission might conclude that it can order cable companies to "unbundle" the telecommunications component of cable-modem service. And presto, Title II will then apply to them, because they will finally be "offering" telecommunications service![261]

The majority in *Brand X* found the FCC had sufficiently justified its appeal to ancillary authority. However, Justice Scalia's criticism does have some bite. Consistent with *Midwest Video II*, the Commission must constrain its auctions so the outcome is not flatly contrary to the statute.

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[260] 28 F.C.C.2d at 268.

[261] Brand X, 545 U.S. at 1014 (Scalia, J., dissenting).

The ultimate decisions remain with Congress, and should not be usurped by a bureaucratic agency.[262]

Unlike the broadcast/common carriage distinction, nothing in the Telecommunications Act expressly forbids imposition of any regulation on information service providers. The Act lists obligations for providers of telecommunications service, such as the requirement to interconnect.[263] It distinguishes telecommunications from information services,[264] but offers no particular requirements for those information services. The assumption has been that information services were designed as an inherently unregulated zone. Information services are often described as "Title I" services, as if any regulation must come under that section of the Act.[265]

However, Congress issued no such pronouncement in the statutory text. The term "information services" is defined in Section 153 (part of Title I), but so are "telecommunications services", "common carrier," broadcasting," and all the other major statutory categories. Title II includes rules primarily applicable to telecommunications carriers, but it is not exclusive. The fact that Congress chose to establish a new category for information services, as opposed to calling them "unregulated" or "non-telecommunications" services, supports the notion that some regulatory obligations would be consistent with the Congressional mandate.

The question is then what should govern the FCC rules adopted under ancillary authority.[266] The FCC in the *Comcast Order* pointed to a hodgepodge of provisions of the Communications Act, which offer no clear limits on the contours of a Title I regime.[267] Phil Weiser argues for an antitrust-like regime, on the grounds that it is better-suited to the challenges of broadband access than the prophylactic regime of Title II.[268] The FCC need not go so far afield. A better option is right there within the Act.

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[262] The specific scenario Justice Scalia painted, however, would conflict with the Court's holding in *Midwest Video II*. Just as the FCC could not "change the facts" to regulate cable companies as common carriers in that case, it could not do so here. Common carrier regulation is still limited to common carriers under the statutory scheme.

[263] 47 USC 251.

[264] *See supra*.

[265] *See* Nuechterlein & Weiser, *supra* note 14, at 213.

[266] Weiser, Next Generation, *supra* note 5, at 56 ("[A] Title I-based regime begins from the premise that no regulation applies and that the FCC can develop any reasonable regulations that are ancillary to its statutory mandate.").

[267] *See* Comcast Order, *supra* note 2.

[268] Weiser, Next Generation, *supra* note 5, at 66.

C. The Interconnection Mandates of Sections 251 and 256

1. The statutory scheme

Considering the structure of the Communications Act as a whole reveals a coherent framework, which can encompass Internet communications services. Two core mandates of the statute would be in jeopardy if Internet communications services were not subject to ancillary jurisdiction. FCC rules for Internet-based services would be ancillary to these two provisions.

The statute is still called the Communications Act, but portions of it were dramatically changed in the 1996 overhaul. In particular, Congress added a new set of rules for the interconnected environment of competing providers that it envisioned would replace the traditional environment of regulated common carriers. These rules modified and expanded Title II of the original Act. Though the title of the relevant section of the Act is still "Common Carriers," only the first of three Parts describes common carriage requirements.[269] Section 201, for example, requires common carriers (and only common carriers) to furnish service on reasonable request and charge "just and reasonable" rates.[270] The rest of Title II, though, has broader applicability, and can therefore serve as a basis for rules governing Internet-based communications.

The general regulatory pronouncements governing telecommunications networks are in Part II of Subchapter II of the Communications Act as codified, "Development of Competitive Markets." The substantive provisions that apply generally, not just to incumbents, are Section 251 (requiring interconnection),[271] and Section 256 (requiring coordination for interconnectivity).[272] The common theme of open interconnection runs through all of them. Providers of telecommunications services must interconnect, they must do so through open standards, and they must share infrastructure. There is, therefore, a clear Congressional vision to promote open, interconnected networks.[273]

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[269] The definition of a common carrier is circular: it is "any person engaged as a common carrier for hire, in interstate or foreign communication…." 47 U.S.C. 153(10).

[270] 47 U.S.C. 201.

[271] 47 U.S.C. 251.

[272] 47 U.S.C. 256. There is also Section 259 (requiring sharing of infrastructure with "qualifying carriers." But this is for a limits set of situations.

[273] *See MPAA v. FCC,* 309 F.3d at 804 ("Both the terms of § 1 and the case law amplifying it focus on the FCC's power to promote the accessibility and universality of transmission…."). *MPAA v. FCC* was the case that rejected the FCC's claim of ancillary jurisdiction to issue rules for television video

Moreover, while these requirements specifically apply to telecommunications carriers, they are not limited in application to telecommunications services. Verizon is still a telecommunications carrier even though it sometimes provides information services. So is Comcast, which is now one of the nation's largest telephone companies.[274] Section 251 mandates interconnection of "facilities and equipment,"[275] which in a digital environment can be used to provide many different kinds of services. Section 256 declares a goal to promote unfettered transmission for "users and information providers,"[276] which depend on the transport capability embedded in Internet communications services.

By limiting the scope of Sections 251 and 256 to telecommunications carriers, Congress limited regulation of pure information services markets, such as instant messaging and social networks.[277] There is nothing to suggest that Congress intended to limit openness of network ecosystems built on telecommunications infrastructure. On the contrary, the Act manifests an express desire to promote those goals.[278]

The most recent Congressional action concerning broadband networks reinforces this interpretation. The American Recovery and Reinvestment Act, the massive economic stimulus package adopted in early 2009, includes significant funding for broadband deployment.[279] The grants are to be administered by the Department of Agriculture and the National Telecommunications and Information Administration

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descriptions. Even that skeptical court recognized that there is a place for ancillary authority in the area considered here.

[274] TK Comcast phone service cite.

[275] 47 U.S.C. 251(a)(1).

[276] 47 U.S.C. 256(a)(2).

[277] *See* Werbach, Only Connect, *supra* note 40 (discussing Internet backbone and application interconnection). The FCC was able to impose interconnection obligations on AOL's instant messaging service in connection with its merger with Time Warner. *See* AOL-Time Warner Merger Order, *supra* note 218. There, however, the FCC had specific statutory authority to review and impose conditions on mergers involving change of control over spectrum licenses. The Commission only had to show that instant messaging fell within its general Section 152 authority, and that the conditions were related to the merger. *See id.* at para. 148. Rules covering instant messaging in other contexts would be more difficult to justify.

[278] In the 1996 Act, Congress also directed the FCC to forbear from enforcing any provision of the statute that it determines is not necessary, if doing so would serve the public interest. 47 U.S.C. 160(a). This authorization to shrink the Commission's authority mirrors the flexibility embodied in ancillary jurisdiction to interpret statutory mandates more broadly.

[279] American Recovery and Reinvestment Act, H.R. 1, Section 6001.

(NTIA) of the Department of Commerce, but they are tied to FCC open access and interoperability mandates:

> [The NTIA Administrator], in coordination with the [FCC], publish the non-discrimination and network interconnection obligations that shall be contractual conditions of grants awarded under this section, including, at a minimum, adherence to the principles contained in the Commission's broadband policy statement (FCC 05-15, adopted August 5, 2005).[280]

Rather than chastise the FCC for adopting the Policy Statement and the Comcast Order, Congress incorporated the Commission's policies as its own.

Because the public debate around the Telecommunications Act of 1996 focused on the potential emergence of competition for local telephone and cable television services, as well as the removal of regulatory obligations on the successors to the AT&T monopoly, provisions geared to those specific transitional situations garnered a disproportionate share of attention and statutory text. Now that those processes have largely been completed, what remains are the core common carrier obligations and the broader requirements such as Sections 251 and 256.

A conception of FCC jurisdiction over the Internet grounded in Sections 251 and 256 would address Justice Scalia's desire to check the agency's ability to manipulate the scope of its authority.[281] This approach would not, for example, support FCC imposition of rules regulating online content or social policies such as 911 emergency services and access for law enforcement.[282] Nor would it allow the FCC to impose obligations such as the broadcast flag or other digital rights management technologies.[283] None of these would have sufficient nexus with the goal of promoting open interconnection.[284]

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[280] *Id.* at Section 6001(j).

[281] *See supra* TAN 261.

[282] *See* Crawford, The Ambulance, *supra* note 5.

[283] *See* Werbach, Federal Computer Commission, *supra* note 13; Crawford, Shortness of Vision, *supra* note 5.

[284] The FCC might be able to address digital rights management as a standardization exercise. *See* Daniel Benoliel, *Cyberspace Technological Standardization: An Institutional Theory Retrospective*, 18 BERKELEY TECH. L.J. 1259 (2003); Daniel Benoliel, *Technological Standards, Inc.: Rethinking Cyberspace Regulatory Epistemology*, 92 CALIF. L. REV. 1069 (2004); Molly S. Van Houweling, *Communications' Copyright Policy*, 4 J. TELECOMM. & HIGH TECH. L:. 97 (2005).

2. Section 251: interconnection

Section 251(a)(1) requires telecommunications carriers to interconnect "directly or indirectly" with other carriers.[285] This broad mandate, the first substantive provision Congress added to the Communications Act in 1996, demonstrates a recognition of the centrality of interconnection to competition in telecommunications.[286] Without effective interconnection, network effects crowd out smaller players.[287] Interconnection becomes even more important with the rise of packet data networks such as the Internet, built on the assumption that traffic may flow between multiple networks dynamically to reach its destination.[288] Requiring a broadband access provider such as Comcast to offer effective interconnection with other networks, and with application providers, is the contemporary analogue of interconnection between telephone companies.

Though Section 251(a)(1) covers telecommunications carriers only, this is not an impediment to ancillary jurisdiction over Internet communications services. First, the reference in the statute to "indirectly" interconnecting indicates a broader understanding of interconnection than links purely between classic telecommunications carriers.[289] Second, the point of ancillary jurisdiction is that the statute admits of new obligations to address new situations. The precise interconnection obligations that Section 251 places on telecommunications carriers should not be mechanically extended to information services, lest the statutory language become meaningless.

However, interconnection-like open access requirements on broadband access services, of the kind the FCC proposed in the Policy Statement, would be a distinct and appropriate means to achieve the statutory goal. It was only after the emergence of the broadband Internet, and the FCC's decision to treat broadband access as an indivisible information service, that telecommunications carriers such as AT&T and Verizon were viewed as interconnecting as information service providers. Just as the FCC in the 1960s saw the growth of unregulated cable television service potentially making its rules promoting local broadcast content irrelevant, the FCC today could argue that unregulated broadband access networks would make its rules promoting interconnection irrelevant.

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[285] 47 U.S.C. 251.

[286] *See* Werbach, Only Connect, *supra* note 40.

[287] *See* Id; Werbach, Centripetal Network, *supra* note 7.

[288] *See* Werbach, Only Connect, *supra* note 40.

[289] 47 U.S.C. 251(a)(1).

Section 251(a)(2) directly connects interconnection obligations with standards under Section 256.[290] The second half of Section 251(a) provides a clear mandate for the FCC to address broadband access. It states that, in addition to interconnecting, telecommunications carriers must "not [] install network features, functions, or capabilities" that do not meet open interconnection standards set by the FCC.[291] Comcast's proprietary, hidden, discriminatory traffic management techniques could be considered "capabilities" in violation of this provision. The Commission need only conclude that adopting such a rule for Internet communications services is necessary to effectuate the statutory scheme for telecommunications carriers.[292]

3. Section 256: standards

Section 256 concerns the FCC's involvement in network management and standards development activities. It expresses a desire "to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications services."[293] Specifically, it directs the Commission to establish procedures "for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications service,"[294] and authorizes it to continue its practice of participating in telecommunications standards processes.[295]

As with Section 251, this provision is limited on its face to telecommunications networks. Section 256 goes even farther, limiting its interoperability mandate to "public telecommunications networks used to provide telecommunications service,"[296] and expressly stating that the provision does not change the scope of pre-existing FCC authority.[297] Congress clearly intended to limit the FCC's participation in formal standards bodies to those, such as the International Telecommunications Union, concerned with traditional telecommunications networks. Section 256 cannot reasonably be read to give the FCC the same authority to set standards and coordinate network planning for

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[290] *Id.*

[291] 47 U.S.C. 251(a)(2).

[292] *See* Kevin Werbach, Higher Standards (forthcoing 2009).

[293] 47 U.S.C. § 256(a).

[294] 47 U.S.C. 256(b)(1).

[295] 47 U.S.C. 256(b)(2).

[296] 47 U.S.C. 256(d). In fact, Section 256 uses the term "telecommunications" seventeen times.

[297] 47 U.S.C. 256(c).

information services as it does for telecommunications services. The FCC could not, for example, define the DOCSIS standards for cable modems.[298]

On the other hand, Section 256 states as one of its purposes, "to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks."[299] This statement recognizes that information services travel via telecommunications networks. Interconnection standards for those networks can shape the information services markets they support. Section 256(c) states that Congress did not intend to reduce the FCC's pre-existing authority.[300] That would be the case if a broadband access provider could use its legal classification to avoid oversight of its behavior entirely.

The FCC concluded in the *Wireline Broadband Order* that it could continue to oversee broadband reliability and interoperability, even though broadband access was now classed as an information service.[301] The *Comcast Order* extended that holding, further noting that, "[e]ven assuming that Comcast's cable plant-based Internet access network is not, when viewed in isolation, a 'public telecommunications network,' it clearly interconnects with such networks."[302]

In a world where traditional public telecommunications networks and newer Internet data transmission networks are pervasively interconnected,[303] it makes no sense to preclude the FCC's interoperability efforts from affecting information services. The limiting language in Section 256 prevents the FCC from defining standards for private networks, or information services networks that do not interconnect with the public telephone network. It should not be read to preclude addressing Internet communications services.

4. Delegation

Tying ancillary authority over the Internet to Sections 251 and 256 also cures the delegation problem with the FCC's current approach.[304] These provisions represent the legislative direction and the "intelligible principles" to cabin the authority of the regulatory agency. Unlike the FCC's view, in which the rules for information services arise either from

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[298] TK DOCSIS.

[299] 47 U.S.C. 256(a)(2).

[300] 47 U.S.C. 256(c).

[301] *See* Wireline Broadband Order, *supra* note 26, at para. 120.

[302] *See* Comcast Order, *supra* note 2.

[303] *See* Werbach, Only Connect, *supra* note 40.

[304] *See supra* Part III(B).

an inaccurate reading of Section 230 or an abstract generalization of the "national Internet policy" that Congress intended in the 1996 Act, this interpretation limits the FCC's discretion according to the Congressional language of two specific statutory provisions.

As an expert agency, the FCC is entitled to judicial deference for its interpretation of its governing statute under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[305] In finding Congressional intent to promote standards-based interconnection for the Internet as well as the traditional telephone network, the FCC would be engaging in such an activity.[306] The Supreme Court clarified, in *United States v. Mead Corp.*, that such deference is only appropriate when Congress first delegates legislative authority to the agency.[307] Congress has granted the FCC such authority through the interconnection mandates of the Telecommunications Act of 1996.

This analysis also demonstrates why *Brown & Williamson Tobacco Corp. v. FDA* supports exercise of FCC jurisdiction.[308] In *Brown & Williamson*, the Supreme Court rejected the Food and Drug Administration's claim that it could regulate cigarettes, because the Court found "Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco."[309] The Court refused to grant the agency *Chevron* deference where. "based on the overall regulatory scheme and the subsequent tobacco legislation" Congressional intent to bar the FDA from taking such steps could be inferred.[310]

In this present case, however, Congress considered and eliminated statutory language from the Telecommunication Act of 1996 that would have barred FCC rulemaking authority over the Internet.[311] The section of the Cox-Wyden bill dropped in the Conference Committee would have had such an effect. Had Congress wished to limit FCC Internet rulemaking, it would have left that provision in the statute. Any analogy

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[305] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 866 (1984).

[306] *See* Weiser, Next Generation, *supra* note 5.

[307] United States v. Mead Corp., 533 U.S. 218, 237 (2001) (precluding *Chevron* deference "where statutory circumstances indicate no intent to delegate general authority to make rules with force of law,"). *See* Weiser, Next Generation, *supra* note 5.

[308] 529 U.S. 120 (2000). *Cf.* Susan Crawford, Shortness of Vision, *supra* note 5 (invoking *Brown & Williamson* to argue against FCC ancillary jurisdiction over the Internet).

[309] Brown & Williamson, 529 U.S. at 160.

[310] *Id.*

[311] *See supra* TAN 128.

to *Brown & Williamson* therefore rests on the overly credulous interpretation of Section 230 attacked in Part III.[312]

D. Finding Reason in the Communications Act

1. Critiques of Title I authority

Some commentators criticize the ancillary jurisdiction doctrine. They argue that it should never have been adopted, or at a minimum, should be limited to situations directly analogous to *Southwestern Cable*.[313] Thomas Merrill and Kathryn Watts assert that section 4(i) is purely a housekeeping provision, granting the FCC authority only on matters of internal procedure.[314] Jim Speta acknowledges some validity for ancillary jurisdiction, but argues that it cannot be stretched to apply to the Internet.[315] Susan Crawford expresses concern that Title I authority over Internet-based services such as VOIP will be used to impose unnecessary regulatory impediments on new competitive entrants.[316]

These critics neglect the impact of the 1996 Telecommunications Act. It is true that the original Communications Act prior to the 1996 overhaul granted the FCC legislative rulemaking authority over only three classes of companies: interstate common carriers, spectrum licensees, and cable television providers.[317] However, that changed when Congress revamped the statute. The 1996 legislation added several new categories, including telecommunications and information services. It was only in 1996 that information services were expressly mentioned in the statute; the predecessor category of enhanced services was purely an FCC interpretive creation. And the 1996 Act layered rules on

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[312] *See, e.g.*, Crawford, Shortness of Vision, *supra* note 5, at TAN 209 ("Congress in Section 230 has precluded the FCC from asserting rulemaking authority over the Internet.").

[313] *See* Susan Crawford, *Shortness of Vision*, *supra* note 5; Speta, *supra* note 5; Rob Frieden, *Neither Fish Nor Fowl: New Strategies For Selective Regulation of Information Services*, 6 J. ON TELECOMM. & HIGH TECH. L. 373 (2008).

[314] Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 517-19 (2002).

[315] *See* Speta, *supra* note 5, at 24 ("If the section 4(i) grant of authority included legislative rulemaking, then the specific inclusion of these other substantive grants would be redundant."). Speta favors interconnection obligations for Internet-based providers. His concern is that such mandates must be specified in a new Congressional delegation, rather than imposed by the FCC under its existing authority.

[316] *See* Crawford, *supra* note 5.

[317] *See* Speta, *supra* note 5.

telecommunications providers, such as the Section 251 interconnection mandate, on top of the more intensive but less broadly applicable rules for common carriers. "Telecommunications carrier" is expressly broader than "common carrier" under the 1996 Act.[318]

The post-1996 Communications Act should be viewed through the lens of the present, not the past. Congress may have intended a narrow scope of FCC rulemaking authority in 1934, as Merrill and Watts argue, but that interpretation need not remain fixed indefinitely.[319] When the Supreme Court in *Southwestern Cable* endorsed an interpretation of FCC authority contrary to the Merrill and Watts thesis, Congress had ample opportunity to reverse the outcome. Instead, in the 1984 and 1992 Cable Acts, it added detailed regulations for cable while leaving in place the questionable "housekeeping" language of section 4(i).[320] In the 1996 Act, it did the same, while rewriting significant portions of the original statute.[321] Furthermore, Congress chose in 1996 to create a new category, information services, without specifying any substantive mandates for that category. Had it intended information services as a regulatory null set, there was no need for a separate bucket.[322] Congress, despite not expressly contemplating the Internet, saw the need to define a distinct class for data processing services that ride on the network. The narrow theories of ancillary authority would consign that class to surplassage.

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[318] *See* 47 U.S.C. 153(44) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services…").

[319] Merrill and watts, *supra* note 314.

[320] Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C.) (1984); Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[321] Telecommunications Act of 1996, *supra* note 16.

[322] The history of Congressional action and inaction around network neutrality is consistent with this theory. Prior to the *Comcast Order*, several bills were introduced but not adopted that would have expressly directed the Commission to enforce the Policy Statement. *See Markey Offers Network Neutrality Alternative To Barton Bill,* NATIONAL JOURNAL'S CONGRESSDAILY, May 2, 2006. Since that action, and the election of a President who endorses network neutrality, the momentum for such legislation has stopped. *See* David Hatch, *Boucher Opts For Talks, Not Legislation, On Net Neutrality,* CONGRESS DAILY, Feb. 26, 2009.

If Congress, by not passing legislation to delegate authority over broadband access to the FCC, intended to withhold such authority, the response to the *Comcast Order* should have been moves to roll back the Commission's decision. Instead, the pattern is consistent with the idea that Congress was concerned the FCC would not act to address broadband discrimination because it was unsure of the limits of its authority. This further distinguishes the FCC from the FDA scenario of *Brown & Williamson*, *see supra* TAN 308.

When considering the scope of the FCC's ancillary authority today, the current statutory blueprint is the baseline. In 1968 the Supreme Court could only consider what FCC actions were necessary to achieve its statutory mandates for common carriers and broadcasters. Today, the FCC can act as necessary to carry out its functions regarding not just these categories, but also cable providers, telecommunications service providers, and information service providers. A view that Internet-based services are beyond the reach of the Commission's authority would undermine the modern statutory scheme. The FCC's ancillary jurisdiction is not unlimited, as the broadcast flag case demonstrated, but neither is it so narrow as to be non-existent.[323]

Speta argues that assertion of ancillary authority over Internet-based services "runs square into the central theme of the Telecommunications Act of 1996 … which was the introduction of competition into all telecommunications markets."[324] If Internet-based services such as VOIP compete with regulated telecommunications services, he notes, the preferred solution under the 1996 Act is deregulation rather than new regulation.[325] While this argument may have some purchase in the VOIP regulation cases that Crawford is concerned with, it is inapposite to the broadband access scenario.[326] The danger is not competition, but regulatory arbitrage. If telecommunications carriers can escape from interconnection obligations by offering broadband service, section 251 becomes meaningless. Competition does not change this outcome.

At bottom, the critiques of FCC authority rest on the flawed assumption that such authority must flow from Section 230. The caselaw on delegation and ancillary authority indicates that Congress must affirmatively transfer some legislative authority to an agency before that agency can act.[327] The view adopted by the FCC in the *Comcast Order* and other decisions is that Congress did so when it told the FCC, in Section 230(b)(1), "to promote the continued development of the Internet…."[328] Opponents of that view emphasize that what Congress giveth in Section 230(b)(1), Congress taketh away in Section 230(b)(2), which demands and Internet "unfettered by Federal or State

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[323] *See supra* note 225.

[324] *See* Speta, *supra* note 5, at 26.

[325] *Id.*

[326] *See* Crawford, *supra* note 5.

[327] *See* Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation,* 104 COLUM. L. REV. 2097, 2100 (2004).

[328] 47 U.S.C. 230(b)(1).

regulation."[329] There is ultimately no way to square these two statements, which makes them ideal for selective quotation. [330]

Grounding exercise of ancillary jurisdiction over the Internet in the substantive interconnection provisions of Title II avoids these problems. The Congressional directive is clear. Regulation of Internet communications services gains continuity with the long history of FCC rules to promote open interconnection.[331]

2. The disaggregated alternative

The FCC retains the option to go back to the old regime of separating regulated platforms from unregulated devices and content, although such a course would be unwise. In theory, the Commission could reverse its *Wireline Broadband Order*, reimposing the *Computer III* non-structural safeguards on the telecommunications component of broadband services offered by common carriers. The *Brand X* decision upheld the FCC's exercise of discretion in doing so as not arbitrary and capricious. The courts have not yet passed on whether, as a matter of law, integrated broadband offerings could be separated into their telecommunications and information services components.

While re-separating the components of broadband access is legally permissible, it would represent an inferior alternative to the ancillary jurisdiction approach. Legally separating broadband access from its underlying telecommunications platform would simply reopen the vexing issues that led the Commission down its current path. Drawing lines between telecommunications and information services, in a world where both use digital packet data networks, is next to impossible. Even a few years ago, AT&T was able to transform its backbone traffic into packets to arbitrage around access charge requirements for telecommunications services. Network operators such as Verizon and AT&T are moving toward all-IP networks for business and technical reasons. If FCC rules distinguished between regulated and unregulated components of a broadband pipe, they would be impossible to enforce.

The *Computer III* rules are problematic for other reasons. They were cumbersome to apply and burdened legitimate service innovation,

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[329] 47 U.S.C. 230(b)(2).

[330] An interpretation that Congress intended for the FCC to "promote" the Internet entirely by keeping it "unfettered by… regulation" would be inconsistent with the history of Section 230 and its relationship with the Communications Decency Act. *See supra* Part III. Moreover, in the current broadband environment, it is impossible to demarcate where the regulated telephone and cable networks end and the unfettered Internet begins. The Internet is a network of networks run by network operators. Regulation of the largest of those network operators is regulation of the Internet.

[331] *See* Werbach, Only Connect, *supra* note 40.

because the required detailed filings and approvals for any new offerings.[332] The Commission could attempt to reopen the proceeding and develop a less cumbersome set of rules. However, it is difficult to see how the challenges involved would be any easier today. The Commission could instead require structural or functional separation among the offerings of broadband access providers. Several telecommunications policy scholars now advocate this approach, although so far there has been little political support for it in the U.S.[333]

3. Institutional competence

Ultimately, the question of the best regime comes down to institutional competence.[334] Those concerned about regulatory capture and the public choice problems that administrative agencies face will prefer an interpretation that strictly limits agency discretion to go beyond explicit Congressional mandates.[335] Those who believe the courts applying general-purpose doctrines can effectively address the economic challenges of interconnected networks will emphasize antitrust mechanisms.[336] And those who see continued viability of the expert agency model will prefer giving the FCC more room to maneuver.[337]

In practice, there may only be one option. Congress makes substantive changes to the Communications Act only rarely. Cable was not added to the statute until 1984, sixteen years after the Supreme Court ratified the Commission's ancillary authority, and it was not until 1996 that the first substantial overhaul of the telecommunications provisions of the Act was adopted.

When Congress does get involved, the powerful competing interests tend to create a lobbying food fight, the results of which are

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[332] *See* Werbach, Federal Computer Commission, *supra* note 13.

[333] *See supra* note 57.

[334] *See* Weiser, Next Generation, *supra* note 5, at TAN 49.

[335] *See* Crawford, *supra* note 5; Lessig, Reboot the FCC, *supra* note 4.

[336] *See* PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM (1997); Thomas Hazlett, *FCC Should Leave Net Neutrality to Antitrust Courts*, FINANCIAL TIMES (September 30, 2008), *available at* http://www.ft.com/cms/s/0/bac78ca48ee8-11dd-946c-0000779fd18c.html.

[337] There is also room for hybrid models. Phil Weiser, for example, proposes that that the FCC could superintend mechanisms that use post-hoc antitrust-like standards, or that involve self-regulatory organizations. *See* Weiser, Future of Internet Regulation, *supra* note 180; Philip J. Weiser, *The Next Frontier for Network Neutrality*, 60 ADMIN. L. REV. 273 (2008); Weiser, Next Generation, *supra* note 5.

unpredictable and often problematic.[338] There have been rumblings for several years about a "fix" for the problems with the 1996 Act, and numerous bills introduced, but so far the critical mass has been absent to overcome this political burden. It seems dangerous to rely on Congress to amend the FCC's authority on a regular basis to impose specific mandates for cutting-edge Internet-based services.

Nor are the courts likely to take on a major role. In 1983, antitrust was the sword that broke up the mighty AT&T monopoly.[339] A quarter-century later, the Supreme Court has largely shut the door on antitrust litigation as a means to ensure openness of broadband Internet platforms.[340] In two recent cases, the Court rejected antitrust claims against incumbent local exchange carriers. *Verizon Communications v. Trinko* in 2004 held that the FCC's comprehensive regulatory scheme precluded assertion of an antitrust claim on a refusal to deal theory.[341] *Pacific Bell v. LinkLine*, issued in February 2009, extended that holding for a price squeeze claim by a broadband access competitor.[342] The Court further concluded that AT&T had no duties toward competitors under antitrust law, because "as the FCC has recognized…the market for high-speed Internet service is now quite competitive…."[343] Rightly or wrongly, the Court views the FCC as the proper forum for competitive issues arising out of the broadband access market.[344]

The FCC must take seriously its responsibility for oversight of the broadband market. And those who are concerned about the future of that market must take seriously the legal foundations for FCC involvement. A desired outcome is useless without a path to achieve that outcome.

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[338] Cf. William Safire, *Stop the Giveaway*, N.Y. TIMES, Jan. 4, 1996, at A21 (complaining about the impact of lobbying over the 1996 Telecommunications Act).

[339] *See* United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[340] *See* Philip J. Weiser, *The Relationship between Antitrust and Regulation in a Deregulatory Era*, 50 ANTITRUST BULL. 549 (2005);

[341] Verizon Comms. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

[342] *See* LinkLine*, supra* note 43.

[343] *Id*. at n.2.

[344] The Federal Trade Commission, another potential avenue for antitrust-like regulation of the Internet access market, is also poorly positioned to engage the competitive aspects of broadband networks, as opposed to their consumer protections implications. *See* Jon Leibowitz, Comm'r, FCC, *Concurring Statement Regarding the Staff Report: "Broadband Connectivity Competition Policy"* 1 (2007), *available at* http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf.

V. CONCLUSION

Twentieth-century regulation is holding back the twenty-first century information ecosystem. For the first time, a universal platform – the Internet – connects every kind of communications network.[345] Moreover, it is by design an open network, allowing any user to reach any point, using any compatible device, running any software and delivering any content the user chooses.[346] Innovation has flourished, from the Blackberry to Facebook, iTunes to Google, Wikipedia to Tivo, with the promise of even more extraordinary things to come.[347] The problem is that all those services and devices require one thing: a network pipe to reach their customers. And those pipes, be they wired or wireless, broadband or narrowband, copper or fiber, belong to network operators who operate in a very different environment. Without restraints, those network providers could destroy or pervert the activities on top of their networks.

The regulatory structure for communications has not kept up with the times. The FCC has pushed broadband access networks, and therefore the Internet, into the netherworld of information services, without stopping to consider what that classification means. The agency can salvage its role as the guardian of the public interest in communications, but only if it re-examines that mission for a new century. Promoting competition and innovation in telecommunications today is tantamount to promoting competition and innovation on the Internet. The FCC must assert its authority under the Communications Act to address this objective.

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[345] *See* Werbach, Centripetal Network, *supra* note 287.

[346] *See id*.; Van Schewick, *supra* note 8; Lemley & Lessig, *supra* note 38.

[347] *See supra* note 8.