

Off the Hook

Kevin Werbach

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OFF THE HOOK

Kevin Werbach†

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 gray 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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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 nearly a century to safeguard the public interest. Yet today, as telecommunications and media converge into the Internet, networks are becoming a vast legal gray area. It is unclear, for example, whether the Federal Communications Commission (FCC) can apply its rules mandating open interconnection and nondiscrimination to the platforms supporting the iPhone ecosystem. And the same analysis applies to any device or service connected

¹ See Sara Silver, *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 roughly twenty million iPhones and downloaded over 500 million applications. See Posting of Philip Elmer-DeWitt to Fortune Apple 2.0 Blog, <http://apple20.blogs.fortune.cnn.com/2009/03/05/apples-app-store-25000-apps-and-counting/> (Mar. 5, 2009, 1:51 PM).

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 Internet policy”³ in section 230 of the Communications Act of 1934.⁴ 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.⁵ This is an unfashionable position. 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.⁶ Commentators have been content with the notion that Internet-based services are somehow subject to “ancillary jurisdiction” under

² See *infra* Part I.D; see also *In re* Formal Complaint of Free Press and Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13,028, 13,028 (2008) (mem. opinion & order) [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 . . .”).

³ Comcast Order, *supra* note 2, at 13,034, para. 13.

⁴ Communications Act of 1934, § 230(b), 47 U.S.C. § 230(b) (2006).

⁵ This authority 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 in which the Commission was historically active. See Lawrence Lessig, *Reboot the FCC: We'll Stifle the Skypes and YouTubes of the Future if We Don't Demolish the Regulators that Oversee Our Digital Pipelines*, NEWSWEEK.COM, Dec. 23, 2008, <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 TEX. L. REV. 863, 864–87 (2004).

⁶ See, e.g., JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE* 428–29 (2005) (urging the FCC to practice “regulatory humility” in the face of changes in the marketplace and technology); Susan P. Crawford, *Shortness of Vision: Regulatory Ambition in the Digital Age*, 74 FORDHAM L. REV. 695, 695–96 (2005).

the vague and procedural Title I of the Communications Act.⁷ 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.⁸ It should not be subject 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 choke points 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.⁹

Such problems will only worsen. As new platforms such as social networks and smart mobile devices become ubiquitous, 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 broad-

⁷ Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 976 (2005); Crawford, *supra* note 6, at 728–36; James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 22 (2003); Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41, 65–84 (2003); see 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, 880 (2006) [hereinafter Crawford, *Ambulance*].

⁸ See *In re IP-Enabled Servs.*, 19 F.C.C.R. 4863, 4864–68 (Feb. 12, 2004) (notice of proposed rulemaking) (“[T]he changes wrought by the rise of [Internet-Protocol]-enabled communications promise to be revolutionary.”); Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 874 (2009); 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, 211–12 (1999) (“The communications world is changing, and packet-switched networks are taking over.”); Weiser, *supra* note 7, at 41 (“[T]he advent of digital, packet-switched broadband networks that carry all forms of communication will restructure traditional telecommunications markets . . .”).

⁹ See Kevin Werbach, *The Centripetal Network: How the Internet Holds Itself Together, and the Forces Tearing It Apart*, 42 U.C. DAVIS L. REV. 343, 346–47 (2008) (applying network-science research to explain the fragility of the Internet); see also Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001) (expressing concern that gatekeepers will damage the Internet’s innovation-promoting “end-to-end” architecture); Julius Genachowski, Chairman, Fed. Comm’n’s Comm’n, *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity* (Sept. 21, 2009), available at <http://www.openinternet.gov/read-speech.html> (advocating policies to promote and protect the open Internet).

casters were at the beginning of the twentieth century: the emerging infrastructure of communication and community for a changing society. Neither Congress nor the courts are likely to address all of 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 Yochai Benkler, Lawrence Lessig, Barbara van Schewick, and Jonathan Zittrain, 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.¹⁰ Nevertheless, 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.

The arrival of the new presidential administration gives new importance to these questions. President Barack Obama ran on a platform promising to “ensure that these critical communications pathways [of the Internet] remain accessible to all Americans.”¹¹ He and Julius Genachowski, the new Chairman of the FCC, support non-discrimination rules for broadband.¹² Already, the economic stimulus package enacted by Congress in February 2009 includes seven billion dollars of funding for broadband infrastructure,¹³ subject to open-access requirements to be developed in concert with the FCC.¹⁴ The FCC proposed Open Internet rules in October 2009¹⁵ and will soon

¹⁰ See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 29–34 (2006); LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 34–41 (2001); BARBARA VAN SCHEWICK, *ARCHITECTURE AND INNOVATION: THE ROLE OF THE END-TO-END ARGUMENTS IN THE ORIGINAL INTERNET* (forthcoming 2010) (manuscript at 119–55); Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1975, 1975–78 (2006).

¹¹ Barack Obama, *Connecting and Empowering All Americans Through Technology and Innovation*, http://www.barackobama.com/pdf/issues/technology/Fact_Sheet_Innovation_and_Technology.pdf (last visited Jan. 20, 2010).

¹² See *id.* (“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.”); see also Posting of Ryan Singel to Wired Epicenter Blog, *Obama Nominates Net Neutrality Backer for FCC Chief*, <http://blog.wired.com/business/2009/03/obama-nominates.html> (Mar. 3, 2009, 4:58 PM) (describing FCC Chairman-designate Julius Genachowski, who was subsequently confirmed).

¹³ See Sue Kirchhoff, *How Will the \$789B Package Affect You?*, USA TODAY, Feb. 13, 2009, at 3B. Grants for health care, education, energy, and the environment are also tied to network-based services. See *id.*

¹⁴ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(j), 123 Stat. 115, 515.

¹⁵ See *In re Preserving the Open Internet and Broadband Industry Practices*, 24 F.C.C.R. 13,064 (Oct. 22, 2009) (notice of proposed rulemaking). The Open Internet proceeding is still in the notice and comment phase. In other words, the FCC has taken no binding action on this topic since President Obama took office. The FCC’s jurisdictional theory in the Open Internet Notice of Proposed Rulemaking did not significantly deviate

issue a National Broadband Plan.¹⁶ Classic communications-policy issues of interconnection, universal access, competition, pricing, and discrimination are bound to generate new debates in light of technological change. 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 I 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 II attacks the FCC’s reasoning. It shows how the FCC decision misread the Telecommunications Act of 1996 and suffered from procedural flaws, undermining the entire project. Part III 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 be effectuated only through application to Internet services.

I

THE PHANTOM NATIONAL INTERNET POLICY

The FCC is an independent regulatory agency established during the New Deal to oversee telephone and radio services.¹⁷ Today, its jurisdiction covers a broad collection of major industries, including broadcasting, telephone service, mobile phones, satellite communications, and cable television.¹⁸ The FCC oversees universal-service funding mechanisms, content regulation, and other mechanisms with significant impacts in shaping mass culture.¹⁹ The agency’s authorizing statute, the Communications Act of 1934,²⁰ was substantially overhauled by the Telecommunications Act of 1996.²¹

from the one described herein. *See id.* at 13,099. Pending litigation in response to the *Comcast Order*, as described *infra* at Part I.D, may well change the legal context of the proceeding. For these reasons, this article takes the *Comcast Order* as the last definite FCC position on the scope of Internet regulation.

¹⁶ See Press Release, Fed. Commc’ns Comm’n, FCC Launches Development of National Broadband Plan (April 8, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-289900A1.pdf.

¹⁷ See Kevin Werbach, *The Federal Computer Commission*, 84 N.C. L. REV 1, 3, 14 (2005).

¹⁸ See PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW 209–11, 220–21 (2d ed. 1999); NUCHTERLEIN & WEISER, *supra* note 6, at 146.

¹⁹ See, e.g., 18 U.S.C. § 1464 (2006) (proscribing indecent or obscene content in broadcasting); 47 U.S.C. § 254 (2006) (regarding universal service).

²⁰ Communications Act of 1934, ch. 652, 48 Stat. 1064, 1064 (codified as amended at 47 U.S.C. § 151).

²¹ Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56, 137 (codified at 47 U.S.C. § 203).

Like any administrative agency, the FCC is technically a creature of Congress.²² It can interpret congressional mandates but may 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,”²³ 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.²⁴ It also delivers services that mimic and compete with those of the regulated providers, including voice-over Internet protocol (VoIP) phone service²⁵ and video programming.²⁶ And yet the Internet is somehow part of the entire regulated communications world while standing outside of it.

The Telecommunications Act of 1996 distinguishes between “telecommunications” and “information services.”²⁷ “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.”²⁸ In other words, telecommunications involve an unaltered communications pipe, analogous to traditional voice telephone service.²⁹ “Information service” means “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”³⁰ In other words, information service involves some computer processing that acts upon

²² See Crawford, *supra* note 6, at 728–36.

²³ 47 U.S.C. § 152(a).

²⁴ See *In re* Fed.-State Joint Bd. on Universal Serv., Report to Cong., 13 F.C.C.R. 11,501, 11,531–32 (1998), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf [hereinafter Stevens Report].

²⁵ See *id.* at 11,541–45; *In re* IP-Enabled Servs. and E911 Requirements for IP-Enabled Serv. Providers, 20 F.C.C.R. 10,245, 10,290 (May 19, 2005) (first report & order & notice of proposed rulemaking).

²⁶ See Kevin Werbach, *The Implications of Video Peer-to-Peer on Network Usage*, in *PEER TO PEER VIDEO: THE ECONOMICS, POLICY, AND CULTURE OF TODAY’S NEW MASS MEDIUM* 95, 98 (Eli M. Noam & Lorenzo Maria Pupillo eds., 2008).

²⁷ See Weinberg, *supra* note 8, at 222.

²⁸ 47 U.S.C. § 153(43).

²⁹ See Weinberg, *supra* note 8, at 222. 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 the kind of information put into and taken out of the network. Voice goes in, voice comes out.

³⁰ 47 U.S.C. § 153(20).

the content transmitted across the network. Internet-based services are generally understood to be information services.³¹

The telecommunications/information services distinction, added in the Telecommunications Act of 1996, codified an earlier FCC-developed division between basic and enhanced services.³² In its *Computer Inquiry* 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.³³ For most of that time, telephone service was provided primarily by AT&T and other heavily regulated monopolies.³⁴ 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.³⁵

The Commission created a distinction between basic services, which were traditional, regulated transmission offerings, and enhanced services, a new invention.³⁶ The basic/enhanced framework was a simple two-layer model: basic service underneath and enhanced services on top. The Commission considered providers of enhanced services users of the network and therefore not subject to regulation.³⁷ These providers purchased capacity and features from AT&T under the same tariffs as businesses.³⁸ The Commission limited the ability of AT&T and its successor companies to offer enhanced services, so they

³¹ See Rob Frieden, *The FCC's Name Game: How Shifting Regulatory Classifications Affect Competition*, 19 BERKELEY TECH. L.J. 1275, 1286–87 (2004); Jason Oxman, *The FCC and the Unregulation of the Internet* 11 n.27 (Fed. Comm'n's Comm'n Office of Plans & Policy, Working Paper No. 31, 1999), available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf.

³² See *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14,853, 14,871, para. 29 (Aug. 5, 2005) (report & order & notice of proposed rulemaking) [hereinafter *Wireline Broadband Order*] (“[T]he 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, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 FED. COMM. L.J. 167, 191–92 (2003) (explaining that the terms “telecommunications” and “information services” formalize the distinction between basic and enhanced services).

³³ See Cannon, *supra* note 32, at 173; see also *In re Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Servs.*, 10 F.C.C.R. 8360, 8362–69 (Feb. 7, 1995) (notice of proposed rulemaking) (recounting the history of the *Computer Inquiries*); *In re* Regulatory & Policy Problems Presented by the Interdependence of Computer & Comm'n Servs. & Facilities, 7 F.C.C.2d 11, 13–16 (1966) (notice of inquiry).

³⁴ See NUCHESTERLEIN & WEISER, *supra* note 6, at 55.

³⁵ See Cannon, *supra* note 32, at 168–69.

³⁶ See Kevin Werbach, *Breaking the Ice: Rethinking Telecommunications Law for the Digital Age*, 4 J. ON TELECOMM. & HIGH TECH. L. 59, 84 (2005).

³⁷ See Cannon, *supra* note 32, at 188.

³⁸ 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 COMM'LAW CONSPICUOUS 49, 56 (2001).

would not snuff out new services that depended on their underlying transmission capabilities.³⁹ The basic/enhanced distinction became a sort of shorthand for regulated versus unregulated services.⁴⁰ This concept largely survived in the 1996 Act.

Generally speaking, the regulatory commands of Title II of the Act apply to providers of telecommunications services.⁴¹ The Act defines information services, but it does not impose particular mandates on them. The FCC has interpreted the statutory provisions of the Act as a mandate to continue its prior practice of treating information-service providers as unregulated users of the network.⁴² In the initial years after the passage of the 1996 Act, the telecommunications/information services distinction came up primarily in connection with new entrants. 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 services.⁴³ In a 1998 report to Congress⁴⁴ and a 2004 declaratory ruling,⁴⁵ the FCC outlined its approach to VoIP services. The Commission generally avoided treating as telecommunications any offering that did not exactly mimic classic telephone service.⁴⁶

The issue before the Commission in these early decisions was whether an information-service provider could be found to engage in telecommunications; the issue was not whether telecommunications-service providers could be classified as offering information services. Although the possibility existed that incumbent operators could switch to Internet-protocol-based transmission, the FCC did not consider this possibility a serious threat to the regulatory structure.⁴⁷ When AT&T tried to avoid regulated “access charges” by routing some of its voice backbone traffic through an Internet protocol (IP) link, the FCC rebuked the company.⁴⁸

³⁹ See Cannon, *supra* note 32, at 184.

⁴⁰ See Cannon, *supra* note 38, at 50.

⁴¹ See NUECHTERLEIN & WEISER, *supra* note 6, at 217.

⁴² See sources cited *supra* note 32.

⁴³ Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n, 290 F. Supp. 2d 993, 999 (D. Minn. 2003); Sunny Lu, Cello Partnership v. FCC & Vonage Holdings Corp. v. Minnesota Public Utilities Commission: *VoIP’s Shifting Legal and Political Landscape*, 20 BERKELEY TECH. L.J. 859, 860 (2005).

⁴⁴ See Stevens Report, *supra* note 24, at 11,541–45.

⁴⁵ *In re* Petition for Declaratory Ruling that Pulver.com’s Free World Dialup Is Neither Telecomms. Nor a Telecomms. Serv., 19 F.C.C.R. 3307, 3312–24 (2004) (mem. opinion & order).

⁴⁶ See *id.* at 3312–14. However, the Commission did impose some “social polic[y]” obligations, such as 911 emergency service and law-enforcement access on VoIP providers. Crawford, *Ambulance*, *supra* note 7, at 874.

⁴⁷ See Cannon, *supra* note 38, at 53–56.

⁴⁸ See *In re* Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Servs. Are Exempt from Access Charges, 19 F.C.C.R. 7457, 7465–68 (2004) (order) [hereinafter Petition for Declaratory Ruling]. This was AT&T the postdivestiture, long-distance

And then, something funny happened: the biggest providers of regulated telecommunications services became the biggest providers of unregulated broadband access.⁴⁹ The major network operators largely missed the initial wave of the Internet, ceding to stand-alone Internet-service providers (ISPs) such as AOL and Earthlink the leading position in the dial-up Internet-access market.⁵⁰ Dial-up Internet traffic passes through the telephone network like voice or fax calls. High-speed broadband connections, on the other hand, involve end-to-end data transmission. The cable industry was the first to deploy broadband aggressively.⁵¹ Cable was not subject to the common-carriage requirements of Title II. The cable industry developed its cable-modem networks as closed systems, rejecting calls to offer access to independent ISPs.⁵² 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.⁵³

Faced with a choice between expanding or reducing the scope of open-access mandates, the Republican-led FCC during the Bush Administration chose to cut back on regulation. The Commission determined that broadband offerings of both cable and DSL providers, as well as other similar services, were indivisible information services.⁵⁴ 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 offer to their customers.⁵⁵ From that point on, network operators providing broadband access were information-service providers.

carrier, not the local incumbent carrier that purchased the former carrier and subsequently took its name.

⁴⁹ See Susan P. Crawford, *The Internet and the Project of Communications Law*, 55 UCLA L. REV. 359, 401 (2007) ("In general, Internet access infrastructure is dominated in the west by AT&T and in the east by Verizon, with cable companies Comcast and Time Warner operating nationally.").

⁵⁰ This was partly due to the pre-1996 Act's restrictions on the Bell Operating Companies' carrying traffic across local-exchange boundaries, which were still in effect.

⁵¹ See Lemley & Lessig, *supra* note 9, at 928–29; see also Kevin Werbach, *The Architecture of Internet 2.0*, RELEASE 1.0, Feb. 19, 1999, available at <http://downloads.oreilly.com/radar/r1/02-99.pdf> (noting that cable companies were starting to provide commercial high-speed access).

⁵² See Lemley & Lessig, *supra* note 9, at 927; Werbach, *supra* note 51, at 4–5 (explaining that cable operators enter into exclusive arrangements with affiliated service providers so that customers in those areas "cannot use independent ISPs").

⁵³ See Lemley & Lessig, *supra* note 9, at 927–28.

⁵⁴ See Wireline Broadband Order, *supra* note 32, at 14,909–11; *In re Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities*, 17 F.C.C.R. 4798, 4839 (Mar. 14, 2002) (declaratory ruling & notice of proposed rulemaking) (determining that cable-modem service is properly classified as an information service); Kevin Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233, 1268 (2008).

⁵⁵ See Wireline Broadband Order, *supra* note 32, at 14,858.

The Supreme Court ratified the FCC's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.⁵⁶ Subsequently, in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*,⁵⁷ the Court rejected the use of antitrust claims to gain unbundled access to the telecommunications component of those broadband-information services and acknowledged the Commission's finding of robust competition between cable-modem and DSL services.

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 to Internet-based services are therefore generally labeled "Title I" mandates.⁵⁸ The concept of Title I regulation, however, is quite vague today.⁵⁹ The FCC and the courts have asserted that the FCC could establish some rules for information services. The boundaries for such action must be determined.⁶⁰

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 open Internet as a goal of communications policy. "Infrastructure-oriented" communications-policy scholars, including Benkler, Susan Crawford, Brett Frischmann, van Schewick, and Zittrain, articulated rationales for the unique potential of the Internet.⁶¹ These academics generally reject Chicago-School economic arguments for treating network operators like any other business. Instead of the old, vague notions that

⁵⁶ 545 U.S. 967, 1002–03 (2005).

⁵⁷ No. 07-512, slip op. at 1–5 (Feb. 25, 2009).

⁵⁸ See NUCHECTERLEIN & WEISER, *supra* note 6, at 213–16. In *Brand X*, the Supreme Court recognized the FCC's power to regulate information-service providers under Title I. See *Brand X*, 545 U.S. at 976.

⁵⁹ NUCHECTERLEIN & WEISER, *supra* note 6, at 218 ("To say that a given communications technology . . . should be regulated under Title I is to 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 . . .").

⁶⁰ See *id.* at 218–21.

⁶¹ See BENKLER, *supra* note 10, at 168–79; VAN SCHEWICK, *supra* note 10, at 1–2; Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 579 (2000) [hereinafter Benkler, *Consumers to Users*]; Crawford, *supra* note 49, at 390; Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 1004–22 (2005); Zittrain, *supra* note 10, at 1987–94.

certain industries were “‘affected with the public interest’”⁶² 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.⁶³ Drawing on newer literatures in common-pool resources and complexity theory, the approach seeks to legitimize infrastructure within the framework of neoclassical economics while also drawing on communitarian and related theories of political economy.⁶⁴

Crawford, for example, argues that the Internet represents a new kind of complex system, radically different from the static communications networks that the FCC historically regulated.⁶⁵ 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.⁶⁶ A key conclusion of this approach is that the infrastructure must be open to uncontrolled innovation.⁶⁷ 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.⁶⁸

Under the “layered model” of communications systems, networks are divided into conceptual stacks of functional layers.⁶⁹ Physical connections, such as wires, switches, and wireless links, make up the bottom layer.⁷⁰ Software-based systems to route information and to deliver applications exist at a higher level, with content sitting on top of them.⁷¹ Data networks such as the Internet are designed to separate these layers through modular design and standards-based inter-

⁶² Frischmann, *supra* note 61, at 963 (quoting RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 279–318 (1998)).

⁶³ *See id.* at 1004–22.

⁶⁴ *See* Crawford, *supra* note 49, at 390–94.

⁶⁵ *See id.* at 388–91; *see also* David Isenberg, *Rise of the Stupid Network*, <http://www.rageboy.com/stupidnet.html> (last visited Jan. 20, 2010).

⁶⁶ *See* Crawford, *Ambulance*, *supra* note 7, at 925 (“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 and interests is very likely.”).

⁶⁷ *See* Frischmann, *supra* note 61, at 1022.

⁶⁸ *See id.* at 929–31 (arguing that focusing exclusively on supply-side issues yields an incomplete analysis because it fails to account for the social benefits of open access).

⁶⁹ Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 816 (2004); Werbach, *supra* note 36, at 71–74; Kevin Werbach, *A Layered Model for Internet Policy*, 1 J. ON TELECOMM. & HIGH-TECH L. 37, 57–64 (2002) [hereinafter Werbach, *Layered Model*]; 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, 592–93 (2004).

⁷⁰ *See* Werbach, *Layered Model*, *supra* note 69, at 60.

⁷¹ *See id.* at 61–64.

faces.⁷² This design 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.⁷³

Infrastructure scholars generally favor separation of the Internet's application and content layers from the regulated physical layer of communications networks.⁷⁴ The only way to keep incumbent operators and incumbent regulators from corrupting the Internet, on this theory, is to quarantine it.⁷⁵ 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.⁷⁶ These scholars prefer the more drastic solution of barring network operators from competing at the higher levels of the system.⁷⁷

The FCC mandated separation in its *Computer II* and *Computer III* decisions.⁷⁸ In its *Computer II* decision, the FCC barred AT&T and the successor Bell Operating Companies from offering integrated enhanced services.⁷⁹ The Commission moved away from this tack after the passage of the 1996 Act. The FCC recognized that network operators could gain efficiencies from delivering information services that integrated with their network platforms.⁸⁰ 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.⁸¹ 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.⁸² The Commission believed that new competition would provide sufficient discipline to prevent abuses by network operators.⁸³

⁷² See Joseph Farrell & Philip J. 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, 95–96 (2003).

⁷³ See Werbach, *supra* note 36, at 66–67.

⁷⁴ See Crawford, *supra* note 8, at 927.

⁷⁵ See *id.* at 928.

⁷⁶ See *id.* at 927.

⁷⁷ See Crawford, *Ambulance*, *supra* note 7, at 923–38.

⁷⁸ See *In re* Amendment of Section 64.702 of the Comm'n's Rules & Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 474–75 (1980) (final decision) [hereinafter *Computer II*]; *In re* Amendment of Sections 64.702 of the Comm'n's Rules & Regulations (Third Computer Inquiry), 104 F.C.C.2d 958 (1986) (report & order) [hereinafter *Computer III*].

⁷⁹ See *Computer II*, *supra* note 78, at 388–89.

⁸⁰ See *Computer III*, *supra* note 78, at 1002–03.

⁸¹ See Wireline Broadband Order, *supra* note 32, at 14,865.

⁸² See *id.* at 14,856, para. 2.

⁸³ See Lemley & Lessig, *supra* note 9, at 951–52; Werbach, *supra* note 54, at 1255.

As an alternative to mandatory separation, open-Internet proponents coalesced around the concept of network neutrality.⁸⁴ The basic concept of network neutrality is that network operators should not disadvantage unaffiliated providers of applications or content.⁸⁵ Van Schewick has explained in detail how this approach reflects the “end-to-end” architecture of the original Internet.⁸⁶ Other network-neutrality champions such as Tim Wu and Lessig situated the approach within the history of communications policy.⁸⁷ They argue that network neutrality represents an extension of common carriage, the long-established doctrine that telephone companies and certain other businesses must be a neutral-service platform for all customers.⁸⁸

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*. 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.⁸⁹ To network-neutrality advocates, therefore, the Internet represents the fullest expression of policy goals articulated in the Communications Act and celebrated FCC decisions.⁹⁰

A problem with network neutrality is that it lacks purchase within the statutory apparatus.⁹¹ As a high-level matter, a requirement that

⁸⁴ See Brett M. Frischmann & Barbara van Schewick, *Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo*, 47 JURIMETRICS J. 383, 384–89 (2007); Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. ON TELECOMM. & HIGH TECH. L. 329, 331–34 (2007); Tim Wu, *The Broadband Debate, A User's Guide*, 3 J. ON TELECOMM. & HIGH TECH. L. 69, 88–90 (2004); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 142–44 (2003) [hereinafter Wu, *Network Neutrality*].

⁸⁵ See van Schewick, *supra* note 84, at 333; Wu, *Network Neutrality*, *supra* note 84, at 142–43.

⁸⁶ See VAN SCHEWICK, *supra* note 10, at 491–95, 564–65. For a description of the “end-to-end” design of the original Internet, see J.H. Saltzer et al., *End-to-End Arguments in System Design*, 2 ACM TRANSACTIONS ON COMPUTER SYS. 277 (1984).

⁸⁷ See Ex parte letter from Tim Wu, Assoc. Professor, Univ. of Va. Sch. of Law, & Lawrence Lessig, Professor of Law, Stanford Law Sch., to Marlene H. Dortch, Sec'y, Fed. Comm'n's Comm'n (Aug. 22, 2003), available at <http://fjallfoss.fcc.gov/ecfs2/document/view?id=6514683885>.

⁸⁸ See *id.* at 12.

⁸⁹ Tim Wu, *Wireless Carterfone*, 1 INT'L J. COMM. 389, 396–97 (2007).

⁹⁰ Letter from Tim Wu & Lawrence Lessig to Marlene H. Dortch, *supra* note 87, at 10–12. 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, 550–52 (2003).

⁹¹ See *infra* Part II. 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. ON REG. 135, 148–51 (2008); Christopher S. Yoo, *Beyond Network Neutrality*, 19

Verizon Wireless provide nondiscriminatory interfaces for mobile phones parallels a requirement that AT&T provide nondiscriminatory 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 arrangement means that the network-platform owners can themselves become Internet-based providers.

According to the FCC, Comcast, when offering its cable-modem service, is an information-service provider.⁹² Regulating Comcast's broadband service is therefore tantamount to regulating the *Carterfone*-like devices attached to the regulated telephone network, rather than regulating the network itself. 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 its 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 nondiscriminatory transport to application and content providers.⁹³ The FCC sided with cable and telephone companies who argued that network-neutrality rules were unnecessary and could dampen broadband investment.⁹⁴ Nevertheless, the FCC expressed 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 also issued a nonbinding policy statement.⁹⁵ Although this document explicitly disclaimed having any legal force, it represented a strong public statement by the Commis-

HARV. J.L. & TECH. 1, 76–77 (2005) (rejecting network neutrality in favor of network diversity); Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1874–1900, 1896–97, 1907–08 (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.

⁹² See Comcast Order, *supra* note 2, at 13,049.

⁹³ See Werbach, *supra* note 54, at 1268–69. Then-Chairman Michael Powell initially addressed the issue in a speech rather than a formal proceeding. See Michael K. Powell, Chairman, Fed. Comm'ns Comm'n, Preserving Internet Freedom: Guiding Principles for the Industry 4 (Feb. 8, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

⁹⁴ See Powell, *supra* note 93.

⁹⁵ See *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14,986, 14,987–88 (2005) [hereinafter Internet Policy Statement].

sion. At its core, the Policy Statement describes three user⁹⁶ entitlements:

- [1] C]onsumers are entitled to access the lawful Internet content of their choice. . . . [2] C]onsumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement. . . . [3] C]onsumers are entitled to connect their choice of legal devices that do not harm the network.⁹⁷

These three policies are subject to a blanket caveat, included in a footnote, that “[t]he principles we adopt are subject to reasonable network management.”⁹⁸ This footnote becomes the critical test. Because all broadband-access providers impose a number of limitations on applications and devices, the question is whether these limitations 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.⁹⁹ Such initiatives would be part of the FCC’s “ongoing policymaking activities,” whatever that meant.¹⁰⁰ Because the Policy Statement was not an order, the FCC could not enforce it directly.¹⁰¹ Instead, the FCC described it as a list of principles that the Commission believed were consistent with its statutory mission, and the Commission suggested that it would take further action when needed.¹⁰²

The first “ongoing policymaking activity” under the Policy Statement involved Madison River, a rural telephone company that blocked a competing VoIP service from its broadband network.¹⁰³

⁹⁶ I prefer the term “user” to consumer. See Benkler, *Consumers to Users*, *supra* note 61, at 562.

⁹⁷ Internet Policy Statement, *supra* note 95, at 14,988.

⁹⁸ *Id.* at 14,988 n.15. There is a fourth statement, “consumers are entitled to competition among network providers, application and service providers, and content providers,” which is entirely hortatory. *Id.* at 14,988. 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 anticompetitive 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.

⁹⁹ *In re* Broadband Indus. Practices, 22 F.C.C.R. 7894, 7896 (2007) (notice of inquiry) (“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.”).

¹⁰⁰ Internet Policy Statement, *supra* note 95, at 14,988.

¹⁰¹ See Press Release, Fed. Commc’ns Comm’n, Chairman Kevin J. Martin Comments on Commission Policy Statement (Aug. 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.”).

¹⁰² See *id.*

¹⁰³ See Press Release, Fed. Commc’ns Comm’n, FCC Chairman Michael K. Powell Commends Swift Action to Protect Internet Voice Services (Mar. 3, 2005), available at <http://>

Madison River agreed to a consent decree after the FCC launched an investigation of its practice. Although the case showed that the FCC was willing to act in situations of discrimination, it had a limited impact. Madison River is a traditional, regulated telephone company that was completely blocking a service for no apparent reason other than anticompetitive 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 out peer-to-peer (P2P) applications and surreptitiously degraded their performance.¹⁰⁴ Confronted with a concrete example of what looked like broadband discrimination, the FCC had two choices: The Commission could fit new converged Internet services into the existing statutory boxes of the Communications Act. Or the agency 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 the fall of 2007, testing revealed that Comcast, the nation's second largest broadband-access provider, had implemented network-management technology that deliberately slowed peer-to-peer file-transfer traffic.¹⁰⁵ 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 deliver video programming, which competed with Comcast's cable-television programming. In the post-*Brand X* world, it seemed, Comcast had the incentive and the opportunity to violate network neutrality, as scholars had previously warned.¹⁰⁶

hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257175A1.pdf. The Madison River action predated the Policy Statement but followed Chairman Powell's announcement of similar principles in his 2004 speech. See Powell, *supra* note 93, at 5–6.

¹⁰⁴ See Comcast Order, *supra* note 2, at 13,031–32.

¹⁰⁵ *F.C.C. to Look at Complaints Comcast Interferes with Net*, N.Y. TIMES, Jan. 9, 2008, at C4; Peter Svensson, *Comcast Blocks Some Internet Traffic: Tests Confirm Data Discrimination by Number 2 U.S. Service Provider*, MSNBC.COM, Oct. 19, 2007, <http://www.msnbc.msn.com/id/21376597/>; Posting of Seth Schoen to Deeplinks Blog, <http://www.eff.org/deeplinks/2007/10/eff-tests-agree-ap-comcast-forging-packets-to-interfere> (Oct. 19, 2007). Comcast denied that its practices were significantly restricting P2P traffic. See Comcast Order, *supra* note 2, at 13,050–51; Letter from Kathryn A. Zachem, Vice President, Regulatory Affairs, Comcast Corp., to Marlene H. Dortch, Sec'y, Fed. Comm'ns Comm'n (July 10, 2008), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520033822.

¹⁰⁶ See generally Wu, *Network Neutrality*, *supra* note 84 (describing the potential for network-neutrality violations).

Several public-interest groups filed complaints against Comcast with the FCC.¹⁰⁷ After initially denying that it was throttling P2P traffic, Comcast eventually acknowledged that its network-management approach was arbitrary and overinclusive.¹⁰⁸ It promised to implement a new, nondiscriminatory system. It also reached an agreement with BitTorrent, the company that started to commercialize the primary video-P2P technology, on standards to address bandwidth concerns.¹⁰⁹

By the time the FCC took up the complaint and the parallel petition for declaratory ruling, therefore, the question was not what would happen, but what role the government would play. In August 2008, the FCC rendered its decision.¹¹⁰ It found that Comcast had violated the principles embodied in the Policy Statement. The FCC ordered Comcast to make a detailed declaration of the network-management practices in which it had engaged and to cease and desist from throttling P2P services specifically. Comcast had thirty days to stop its practices and disclose a plan for implementing new, non-application-aware, network-management technology.¹¹¹ In light of Comcast's not having notice that the FCC might enforce the Policy Statement in this way, the FCC declined to impose any fees on the company.

The matter did not end there. Comcast complied with the FCC's mandates¹¹² but also sued to have the Order invalidated on jurisdictional and procedural grounds.¹¹³ The United States Court of Appeals for the District of Columbia Circuit heard oral arguments on the case in January 2010.¹¹⁴

¹⁰⁷ See Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, File No. EB-08-IH-1518 (Nov. 1, 2007).

¹⁰⁸ See Comcast Order, *supra* note 2, at 13,051; Jim Puzzanghera, *Comcast Relents on Web Tech: It Allegedly Blocked BitTorrent Software for Watching Video Online*, L.A. TIMES, Mar. 28, 2008, at C1.

¹⁰⁹ See Vishesh Kumar, *Comcast, BitTorrent to Work Together on Network Traffic*, WALL ST. J., Mar. 27, 2008, at B7. BitTorrent itself (the company) was not a party to the FCC proceeding, perhaps because of its agreement with Comcast. Comcast was therefore not formally prohibited from continuing its controversial broadband network management practices prior to the FCC action. However, Comcast's public commitment to change its practices, coupled with an agreement with the most visible provider of the BitTorrent technology, made it clear that Comcast did not intend to do so.

¹¹⁰ See Comcast Order, *supra* note 2, at 13,059-61.

¹¹¹ See *id.* Effectively, therefore, the FCC required Comcast to meet the deadline that the company had already set for itself.

¹¹² See Letter from Kathryn A. Zachem, Vice President, Regulatory Affairs, Comcast Corp., to Marlene H. Dortch, Sec'y, Fed. Comm'ns Comm'n (Sept. 19, 2008), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6520169715>.

¹¹³ Steven Musil, *Comcast Appeals FCC Traffic-Blocking Ruling*, CNET NEWS, Sept. 4, 2008, http://news.cnet.com/8301-13578_3-10033376-38.html.

¹¹⁴ See Fawn Johnson, *Court Skeptical of FCC's Net-Neutrality Push*, WALL ST. J., Jan. 9, 2010, at B5; Marguerite Reardon, *Judges Question FCC Authority in Comcast Case*, CNET NEWS, Jan. 8, 2010, http://news.cnet.com/8301-30686_3-10430647-266.html.

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;

(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.¹¹⁵

In the *Comcast P2P Order*, the FCC based its actions on the statutory language of section 230.¹¹⁶ Although the decision cited six other provisions of the Communications Act in support of ancillary authority over broadband-network management,¹¹⁷ all of these provisions were subsidiary to section 230.¹¹⁸ 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 the pro-

¹¹⁵ 47 U.S.C. § 230(b) (2006). There are two other subprovisions of section 230(b), which are specifically related to blocking and filtering children's access to “inappropriate” material online and to online stalking and other criminal acts. 47 U.S.C. § 230(b)(4)–(5).

¹¹⁶ See *Comcast Order*, *supra* note 2, at 13,035, para. 15.

¹¹⁷ The other provisions were section 151 (directing the Commission “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nationwide, 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”), *id.* § 201(b); section 706 of the Telecommunications Act of 1996 (ordering the FCC to “encourage the provision of new technologies and services to the public”), *id.* § 157(a); 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 service”), *id.* § 256(a)(1); 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”), *id.* § 257(a); and section 521(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”), *id.* § 521(4).

¹¹⁸ 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.” *Comcast Order*, *supra* note 2, at 13,035, para. 15.

visions, however, provide the unifying directive of congressional intent without section 230.

The Commission noted that, in the Policy Statement, it had justified its actions on the basis of its “responsibility for overseeing and enforcing the ‘national Internet policy’ Congress had established in section 230(b).”¹¹⁹ The Policy Statement, according to the Commission, “clarified the contours” of the statutory federal policy.¹²⁰ 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.”¹²¹

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.¹²² 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.”¹²³ The FCC viewed the nondiscrimination decision it issued against Comcast as an exercise of this “ongoing responsibility.”¹²⁴

Comcast argued that, instead, Congress intended section 230(b) to limit regulation.¹²⁵ It pointed to the language of section 230(b) (2)

¹¹⁹ *Id.* at 13,034, para. 13.

¹²⁰ *Id.*

¹²¹ *Id.* at 13,035, para. 15 (footnotes omitted).

¹²² *See In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm’n*, 19 F.C.C.R. 22,404, 22,426, para. 35 (2004) (mem. opinion & order) [hereinafter *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.”).

¹²³ Comcast Order, *supra* note 2, at 13,036 n.69.

¹²⁴ *Id.*

¹²⁵ *Id.* at 13,042.

that the Internet should remain “unfettered by Federal or State regulation.”¹²⁶ 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.¹²⁷ 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.¹²⁸

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, this position is inconsistent with both prior FCC practice and the legislative history of the statutory provision. Based on the oral argument, the Court of Appeals appears likely to overturn the Order, upsetting the FCC’s entire framework of Internet regulation.¹²⁹

II

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). Though on their 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 1996.¹³⁰ It is the only provision in that massive overhaul of the Communications Act that directly references the Internet,¹³¹ a fact

¹²⁶ 47 U.S.C. § 230(b)(2) (2006).

¹²⁷ See *Comcast Order*, *supra* note 2, at 13,042–43, 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 Comcast’s acquisition of certain cable systems from Adelphia Communications. See *id.* at 13,043–44, para. 27.

¹²⁸ *Id.* at 13,042, para. 24.

¹²⁹ See Johnson, *supra* note 114; Reardon, *supra* note 114.

¹³⁰ See *supra* note 21 and accompanying text.

¹³¹ Other legislation added provisions to the Communications Act dealing with topics such as restrictions on children’s access to material on the Web, 47 U.S.C. § 231, and a moratorium on Internet taxes, Internet Tax Freedom Act, *id.* § 151.

that supports the FCC's claim that it represents a "national Internet policy."¹³² 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.¹³³ 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 (IFFEA), introduced in 1995 by Representatives Christopher Cox and Ron Wyden.¹³⁴ The IFFEA was subsequently accepted as an amendment to the House version of the 1996 Telecommunications Act.¹³⁵ The House-Senate conference committee adopted the House language virtually intact in the final version of the legislation.¹³⁶

At the time, the congressional debate about Internet regulation and its relationship to the FCC involved government limitation of on-line content.¹³⁷ Senator James Exon of Nebraska had introduced the controversial Communications Decency Act (CDA), which would have barred indecent speech on the Internet.¹³⁸ Under the CDA, online indecency would have been restricted in much the same manner as indecency on broadcast television and radio are today.¹³⁹ The legislation was extremely controversial.¹⁴⁰ Experts warned that it would quash free expression in the new medium of the Internet;¹⁴¹ however, the CDA tapped into politically powerful fears about the Internet becoming a haven for pornography and illicit materials.¹⁴² The CDA was incorporated into both the Senate and House versions of the Telecommunications Act.¹⁴³

¹³² See Wireline Broadband Order, *supra* note 32, at 14,987.

¹³³ 47 U.S.C. § 230(b)(1)-(3).

¹³⁴ Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995).

¹³⁵ See 141 CONG. REC. H8478-79 (daily ed. Aug. 4, 1995).

¹³⁶ See H.R. REP. NO. 104-458, at 81-84, 86-88 (1996) (Conf. Rep.).

¹³⁷ See generally Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 65-67 (1996) (discussing congressional debates over regulating online content).

¹³⁸ See Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 133, 134-35 (to be codified at 47 U.S.C. § 223(d)(1)(B), (h)(2)).

¹³⁹ See Cannon, *supra* note 137, at 57.

¹⁴⁰ See *id.* at 65-67.

¹⁴¹ See *id.* at 70.

¹⁴² See *id.* at 64.

¹⁴³ See *id.* at 68-69.

Civil libertarians were not the only ones concerned about the CDA. Many Internet businesses saw it as a major economic threat.¹⁴⁴ An early court decision, *Stratton Oakmont, Inc. v. Prodigy Services Co.*, found online-service providers such as Prodigy responsible for libelous postings by their subscribers.¹⁴⁵ 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.¹⁴⁶ Even worse, the language of *Stratton* 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.¹⁴⁷

The IFFEA was introduced in response to these fears about the CDA.¹⁴⁸ It represented an alternative approach to dealing with the widespread concern about pornography and other online material that was inappropriate for children. Where the CDA proposed government regulation of Internet speech, the IFFEA endorsed nongovernmental mechanisms and prohibited government regulation.¹⁴⁹ The IFFEA 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 limited liability for ISPs, even when they take affirmative steps to remove unauthorized or illegal material.¹⁵⁰ That safe harbor now appears in later provisions of section 230 of the Communications Act.¹⁵¹

In other words, the “national Internet policy” of section 230(b) was essentially a lead-in to the substantive provisions of section 230(c) and (d). Comcast made this argument before the FCC in its recent adjudication, but the Commission rejected the interpretation.¹⁵² The

¹⁴⁴ See *id.* at 90.

¹⁴⁵ *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 4, 1995).

¹⁴⁶ See Cannon, *supra* note 137, at 59, 62–63.

¹⁴⁷ See *id.* at 61–62.

¹⁴⁸ See *id.* at 67–69.

¹⁴⁹ See Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995); 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.”).

¹⁵⁰ See Cannon, *supra* note 137, at 68.

¹⁵¹ 47 U.S.C. § 230(c) (2006).

¹⁵² See Comcast Order, *supra* note 2, at 13,036 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 further than necessary. There is a significant difference between claiming that Congress

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.¹⁵³ This reading conflicts with the legislative history.

Congress added the Cox–Wyden amendment to the Telecommunications Act to address inappropriate online content and to prevent ISP liability. The amendment was titled “Online Family Empowerment.”¹⁵⁴ As codified, section 230 is titled “Protection for private blocking and screening of offensive material.”¹⁵⁵ 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.”¹⁵⁶ Representative Cox, one of the provision’s authors, has emphasized this aspect when describing the purpose of the bill.¹⁵⁷ The purpose of the Cox–Wyden legislation was to 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

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).

¹⁵³ *Id.*

¹⁵⁴ 141 CONG. REC. H8468 (daily ed. Aug. 4, 1995).

¹⁵⁵ 47 U.S.C. § 230 (2006).

¹⁵⁶ S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.).

¹⁵⁷ *See* 146 CONG. REC. H6067 (daily ed. July 17, 2000) (statement of Rep. Cox) (“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.”); *see also* Christopher Cox, Chairman, U.S. Sec. & Exch. Comm’n, Electronic Shareholder Forum Rules; Codification of Interpretation of Rule 14(a)(8)(i)(8) (Nov. 28, 2007), *available at* <http://www.sec.gov/news/speech/2007/spch112807cc.htm> (explaining that the bill “enhanced free speech on the Internet by making it unnecessary for internet service providers to unduly restrict customers’ actions for fear of being found legally liable for their conduct”).

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 economic or content regulation of the Internet or other interactive computer services.”¹⁵⁸ 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.”¹⁵⁹ Representatives Cox and Wyden later teamed up to introduce the Internet Tax Freedom Act, which established a moratorium on new Internet-specific taxes.¹⁶⁰ Representative 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.¹⁶¹

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.¹⁶² Although the two amendments represented opposing policy positions, they were not facially inconsistent with one another.¹⁶³ 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 economic and content regulation of the Internet by the FCC. The conference committee report is silent on the rationale for this deletion, stating only that

¹⁵⁸ See Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. § 230(d) (1995).

¹⁵⁹ Press Release, Rep. Cox, Sen. Wyden to Unveil Highly-Touted Bill to Keep the Internet Free from Taxes (Mar. 12, 1997) (on file with author) (“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 [away] from regulating prices of computer services offered over the Internet.” (emphasis omitted)).

¹⁶⁰ See Internet Tax Freedom Act, Pub. L. No. 105-277, 112 Stat. 2681-719 (1998).

¹⁶¹ *Congressmen Decry the “Federal Computer Commission”*, TECH L.J., Mar. 31, 1998, <http://www.techlawjournal.com/telecom/80331fcc.htm>; see Werbach, *supra* note 17, at 8–9.

¹⁶² See Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH 163, 174 (2006).

¹⁶³ See Barbara Esbin & Adam Marcus, “The Law Is Whatever the Nobles Do”: *Undue Process at the FCC*, 17 COMM.LAW CONSPECTUS 535, 592 (2009). In fact, 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 137, at 67–69. 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 accompanying note 119.

“[t]he conference agreement adopts the House provision with minor modifications.”¹⁶⁴

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 intention. Classifying 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.¹⁶⁵

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.¹⁶⁶ To the contrary, the legislative history and text of the 1996 Act strongly suggest that Congress was seeking to moderate the restrictive consequences of existing court decisions and its own actions.¹⁶⁷

Viewed in context, the section 230 “fix” was a way to avoid imposition of common-carrier rules on Internet-based service providers.¹⁶⁸ 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.¹⁶⁹ Common carriers, however, are subject to many other intrusive regulations.¹⁷⁰ Internet-based service providers did not wish to 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 unregulated status as an information-service provider did not imply greater liability for content on their networks. That is different from saying that online-service providers were exempt from *all* potential FCC regulation.

¹⁶⁴ H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.); *see id.* at 81–84, 86–88.

¹⁶⁵ *See id.* at 81–84, 86–88.

¹⁶⁶ *See* Comcast Order, *supra* note 2, at 13,036 n.69 (quoting Vonage Order, *supra* note 122, at 22,426).

¹⁶⁷ *See, e.g.*, Telecommunications Act of 1996, Pub. L. No. 104-104, § 601, 110 Stat. 56, 143 (codified at 47 U.S.C. § 203 (2006)) (regarding the applicability of consent decrees).

¹⁶⁸ 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.

¹⁶⁹ *See* HUBER ET AL., *supra* note 18, at 13–14.

¹⁷⁰ Indeed, common carriers are the most extensively regulated class under the Communications Act. There are several other categories subject to less onerous restrictions. *See, e.g.*, 47 U.S.C. § 153(26) (2006) (“Local exchange carrier”); *id.* § 153(44) (“Telecommunications carrier”); *id.* § 153(46) (“Telecommunications service”); *id.* § 153(47) (“Telephone exchange service”).

The CDA provisions of the 1996 Act were challenged on First Amendment grounds immediately upon adoption. The Supreme Court found the legislation facially unconstitutional.¹⁷¹ Accordingly, the Court struck from the statute the CDA language (section 223). 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 described, 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.¹⁷² In two 1935 cases, the Supreme Court invalidated federal statutes for not providing intelligible principles to agencies, thus violating the constitutional mandate that all legislative power remain vested in Congress.¹⁷³ This nondelegation doctrine was not invoked to overturn a statute for more than sixty years and was considered a relic;¹⁷⁴ however, the Supreme Court has recently exercised greater scrutiny over agency delegations. A prime example, *AT&T Corp. v. Iowa Utilities Board*,¹⁷⁵ involved the FCC. There, as here, the Commission claimed that Congress had invited it to regulate in a broad, new area with little discretion over 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.¹⁷⁶ The Act required incumbent local-exchange carriers to unbundle network elements that were “necessary” for competitors but left it to the Commission to interpret

¹⁷¹ See *Reno v. ACLU*, 521 U.S. 844, 861–63, 882–83 (1997) (severing the unconstitutional CDA language from 47 U.S.C. § 223(a)(1), (d)).

¹⁷² See Lisa Schultz Bressman, Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399, 1403–06 (2000); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 478–88 (1989) (tracing the evolution of the nondelegation doctrine).

¹⁷³ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 421–30 (1935).

¹⁷⁴ See Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass'ns*, 87 CORNELL L. REV. 452, 455 (2002) (“Since then, courts and commentators have viewed the doctrine as dead or at least dormant.”); see also *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 607–08 (1980) (plurality opinion) (invalidating a standard set by the Occupational Safety and Health Administration).

¹⁷⁵ 525 U.S. 366 (1999).

¹⁷⁶ *Id.* at 388.

that term.¹⁷⁷ The Commission simply defined as “necessary” all those elements that new entrants had sought in its rulemaking process.¹⁷⁸ The Supreme Court held that Congress had failed to make the hard policy choices involved in choosing the appropriate network elements to unbundle.¹⁷⁹ Congress 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.¹⁸⁰

Two years later, in *Whitman v. American Trucking Ass'ns, Inc.*, the Supreme Court limited the scope of the doctrine.¹⁸¹ It reversed the District of Columbia Circuit for concluding that the Clean Air Act involved an impermissible delegation to the Environmental Protection Agency (EPA).¹⁸² 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”¹⁸³ offered “substantial guidance” to the administrative agency.¹⁸⁴ The Court concluded that even such a broad command represented sufficient exercise by Congress of its legislative responsibilities.¹⁸⁵

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,” but it does not provide any guidance at all for regulating them. Until now, this has not been a problem. The Title I information-services classification was important solely because it meant that certain rules *did not* apply.¹⁸⁶ There was no need to consider what rules for information services were important because there were no rules. All that changed when the FCC decided to require that information-service providers such as Comcast’s broadband-access operation adhere to the mandates of the Policy Statement.

¹⁷⁷ *Id.* at 388–89; see 47 U.S.C. § 251(d)(2) (2006) (“[T]he Commission shall consider, at a minimum, whether . . . access to such network elements as are proprietary in nature is necessary . . .”).

¹⁷⁸ Bressman, *supra* note 172, at 1432–33.

¹⁷⁹ See *Iowa Utils. Bd.*, 525 U.S. at 397.

¹⁸⁰ See *id.* at 388–89; Bressman, *supra* note 172, at 1436–37.

¹⁸¹ See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 486 (2001).

¹⁸² *Id.*

¹⁸³ 42 U.S.C. § 7409(b)(1) (2006).

¹⁸⁴ *Am. Trucking*, 531 U.S. at 475.

¹⁸⁵ See *id.* at 472–76. 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 *id.* at 472.

¹⁸⁶ The information-services category continued the FCC’s enhanced-services classification, which served both to establish an unregulated 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, 46–47 (1999).

To the FCC, the “national Internet policy” of section 230 provided the limiting principle. According to the story told by the FCC in the *Comcast* decision, Congress made the decision to favor an open, unfettered Internet, properly limiting the FCC’s discretion.¹⁸⁷ As described above, however, this interpretation rests on a faulty reading of the statute and its legislative history.¹⁸⁸ Congress expressed a policy preference for further development of the Internet and for an Internet unfettered by regulation. Congress thus 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 developing the necessary standards itself.¹⁸⁹ 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.¹⁹⁰ An adjudication of an individual case cannot itself provide the limiting standard for future agency action.¹⁹¹

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.¹⁹² That language could not be sufficient to save the *Comcast Order* from a nondelegation 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,¹⁹³ the Internet case is even more extreme, because Congress offered no constraints at all, other than the definition of information services. A different source for FCC authority must be identified.

¹⁸⁷ See *Comcast Order*, *supra* note 2, at 13,042.

¹⁸⁸ See *supra* Part II.A.

¹⁸⁹ See *Am. Trucking*, 531 U.S. at 472–73.

¹⁹⁰ See *Comcast Order*, *supra* note 2, at 13,045 (stating that the Commission was acting in an adjudication, not a rulemaking); Internet Policy Statement, *supra* note 95, at 14,988 & n.15 (stating that the Policy Statement is not a set of enforceable rules).

¹⁹¹ By definition, an adjudication is binding only on the parties before the agency; it is not a prospective rule applicable to an entire industry. See Bressman, *supra* note 172, at 1420 (arguing that agencies must promulgate limiting standards through notice-and-comment rulemaking procedures for those standards to be “generally applicable, visible, and binding”).

¹⁹² See 47 U.S.C. § 303(r) (2006).

¹⁹³ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999).

C. Other Problems with the Commission's Approach

1. *Whatever Happened to Unregulation?*

Although the FCC claims to be consistently implementing the statutory scheme, the *Comcast Order* represents a significant departure from the agency's longstanding reticence to impose binding obligations on Internet-based providers.

Section 230 was adopted twelve years before the *Comcast Order*.¹⁹⁴ During that time, the Commission repeatedly rejected calls to adopt rules governing Internet-based services. For example, it took no action on a 1995 petition to classify VoIP services under the rules governing telecommunications carriers.¹⁹⁵ It issued an extensive report to Congress in 1998 declining to impose interstate access charges on VoIP providers at that time—even on those providers whose services arguably fell within the statutory standard for such charges.¹⁹⁶ It declined to regulate the Internet-backbone market, even when the competitiveness of that market was questioned.¹⁹⁷ It resisted calls in 1999 to impose “open access” conditions on cable-broadband providers.¹⁹⁸ It allowed competitive local-exchange carriers to collect reciprocal compensation for carrying traffic to dial-up Internet-service providers, lest those ISPs fall within the scope of traditional FCC regulation.¹⁹⁹ It even published a working paper that identified an FCC policy of “unregulation” of the Internet.²⁰⁰

The cable open-access debate is particularly instructive, as it involved the same claims about anticompetitive threats to the open Internet as the *Comcast P2P* proceeding.²⁰¹ The Commission considered whether to mandate competitive access to the cable-modem platform in several proceedings, in each case declining to adopt a classification

¹⁹⁴ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56, 137 (codified at 47 U.S.C. § 203); *Comcast Order*, *supra* note 2.

¹⁹⁵ See *In re* The Provision of Interstate & Int'l Interexchange Telecomms. Serv. via the “Internet” by Non-Tariffed, Uncertified Entities, Rulemaking No. 8775 (Mar. 4, 1995) (petition for declaratory ruling, special relief, & institution of rulemaking), available at http://www.fcc.gov/Bureaus/Common_Carrier/Other/actapet.html; Werbach, *supra* note 17, at 44 n.217 (“The Commission has broad latitude in how to respond to petitions for rulemaking, and in [this] case it simply did not proceed with any further action.”).

¹⁹⁶ See Stevens Report, *supra* note 24, at 11,503–04.

¹⁹⁷ See Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, 11 COMM-LAW CONSPICUOUS 45, 52–70 (2003); Werbach, *supra* note 54, at 1255.

¹⁹⁸ See Lemley & Lessig, *supra* note 9, at 946–57; Werbach, *supra* note 54, at 1268.

¹⁹⁹ See *In re* Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, 14 F.C.C.R. 3689, 3689–90 (Feb. 25, 1999) (declaratory ruling & notice of proposed rulemaking) [hereinafter Local Competition Ruling].

²⁰⁰ Oxman, *supra* note 31, *passim*.

²⁰¹ See François Bar et al., *Access and Innovation Policy for the Third-Generation Internet*, 24 TELECOMM. POL'Y 489, 490 (2000); Lemley & Lessig, *supra* note 9, at 928.

that would impose such a mandate.²⁰² When the FCC ultimately decided that cable-broadband services were information services and not telecommunications services,²⁰³ the Commission stated that its goal was to adopt a framework that “encourages the ubiquitous availability of broadband to all Americans,”²⁰⁴ consistent with section 706(a) of the 1996 Act, which promotes universal accessibility of advanced communications services.²⁰⁵ The Commission used section 230(f)(2) as further support for not classifying a portion of wireline-broadband access as a telecommunications service subject to Title II obligations.²⁰⁶ In the order, the FCC made no reference at all to the supposedly central policy mandate of section 230(b).

This framing of the statutory-scheme standard stands in sharp contrast to the Commission’s description of the congressional “national Internet policy” six years later. In fact, prior to the Policy Statement in 2005, the FCC used the phrase “national Internet policy” only twice: to support federal preemption of state VoIP regulation²⁰⁷ and to describe its “unregulation” approach in connection with the court challenge to the cable-modem classification.²⁰⁸

These inconsistencies do not completely discredit 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 greater emphasis to the procompetitive language in section 230(b).²⁰⁹ 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. Furthermore, nothing in the earlier “unregulation” decisions suggests that the FCC would never impose regulations on broadband providers. In fact, once the Commission classified both cable-modem and telephone-based DSL offerings as information services, the agency and the courts repeatedly stated that new rules under Title I might be needed to achieve policy objectives that could no longer be realized through other Titles.²¹⁰

²⁰² See Wireline Broadband Order, *supra* note 32, at 14,856, para. 2; *id.* at 14,856–59 nn.6–10.

²⁰³ See *id.* at 14,857–58, para. 4.

²⁰⁴ *Id.* at 14,855, para. 1.

²⁰⁵ See *id.* at 14,856–57 n.8.

²⁰⁶ See *id.* at 14,864 n.41.

²⁰⁷ See Vonage Order, *supra* note 122, at 22,425.

²⁰⁸ Press Release, Fed. Comm’n Comm’n, FCC Court Brief Underscores Consumer Benefits from National Internet Policy of Unregulation; Urges Narrow Judicial Resolution (Aug. 16, 1999), available at http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1999/nrmc9060.txt.

²⁰⁹ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984) (“An initial agency interpretation is not instantly carved in stone.”).

²¹⁰ See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005) (“Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose addi-

The problem is that the *Comcast Order* rests on ambiguous statutory authority. The Commission's refusal to acknowledge that ambiguity calls into question the validity of the underlying statutory delegation. Section 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. Justice Antonin Scalia concluded that the 1996 Act is “in many important respects a model of ambiguity or indeed even self-contradiction.”²¹¹ As the Supreme Court noted, the Act's statutory ambiguity makes it incumbent on the FCC to make the hard choices necessary to constrain its own discretion.²¹²

2. *The Substance of the National Internet Policy*

Congress intended section 230 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.²¹³ Nevertheless, it does not follow that Congress endorsed any regulation the FCC saw fit to impose. Section 230 was designed to foreclose FCC regulation of the Internet under the traditional price regulation of telecommunications.²¹⁴ To be faithful to the statute, the FCC would have to define the scope of regulation consistently with those restrictions.

The Commission's definition of its statutory mandate, however, also begs for justification. In its Policy Statement, the Commission claimed that the “essence” of the national Internet policy is to “encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet.”²¹⁵ This gloss involves two subtle shifts from the express language of section 230(b). First, the Commission interpreted the section 230(b)(1) mandate “to promote the continued development of the Internet”²¹⁶ as one “to encourage broadband deployment.”²¹⁷ 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.”²¹⁸

tional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications . . .”).

²¹¹ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

²¹² *See id.* at 387–92, 397.

²¹³ *See Comcast Order*, *supra* note 2, at 13,042–43, para. 25.

²¹⁴ *See supra* text accompanying notes 158–61.

²¹⁵ Internet Policy Statement, *supra* note 95, at 14,988 (emphasis omitted).

²¹⁶ *Id.* at 14,987, para. 2 (quoting 47 U.S.C. § 230(b)(1) (2006)).

²¹⁷ *Id.* at 14,988 (emphasis omitted).

²¹⁸ 47 U.S.C. § 1302(a).

The Commission cited this provision in both the Policy Statement and the *Comcast Order*.²¹⁹

Although broadband deployment is certainly a means to “promote the continued development of the Internet,”²²⁰ the connection is not so clear in the *Comcast* case. Comcast argued that P2P file sharing was overwhelming the capacity of its broadband network.²²¹ To Comcast, therefore, the FCC’s restrictions on its network-management practices impeded 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.

Determining the nexus between an open or neutral Internet and the deployment mandate of section 706(a) is one of the “hard choices” that either Congress or the agency must make if the FCC’s actions are to represent a valid delegation.²²² The FCC could convincingly argue that measures to preserve an open and interconnected Internet would best promote broadband deployment and the statutory scheme more generally. The problem is that neither the Policy Statement nor the *Comcast Order* contains such analysis.²²³ Because the FCC has not connected the dots, it has not properly limited its own freedom of action.²²⁴

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 Administrative Procedure Act (APA) provides for procedural protections whenever an agency engages in either rulemaking or adjudication, but principles are not binding unless they are embodied in legislative rules.²²⁵ The Commission’s assertion that it “will incorporate the above principles into its ongoing policymaking activities,”²²⁶—qualified by a footnote

²¹⁹ See *Comcast Order*, *supra* note 2, at 13,036, para. 16; Internet Policy Statement, *supra* note 95, at 14,987, para. 3.

²²⁰ *Comcast Order*, *supra* note 2, at 13,082–83.

²²¹ See *id.* at 13,034–38.

²²² See Bressman, *supra* note 174, at 461.

²²³ The FCC stated in the *Comcast Order* that “prohibiting network operators from blocking or degrading consumer access to desirable content and applications on-line will result in increased consumer demand for high-speed Internet access and, therefore, increased deployment to meet that demand.” See *Comcast Order*, *supra* note 2, at 13,039, para. 18. This claim, with no supporting analysis or data, appears in the laundry list of statutory bases for jurisdiction other than section 230. A more searching inquiry is needed to form a foundation for FCC jurisdiction and proper administrative delegation.

²²⁴ See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 387–92 (1999); Bressman, *supra* note 174, at 452–53.

²²⁵ See 5 U.S.C. § 553 (2006).

²²⁶ Internet Policy Statement, *supra* note 95, at 14,988, para. 5.

stating that it was “not adopting rules in this policy statement”²²⁷—is confusing. If the Policy Statement’s principles are not rules, how can the FCC circulate, according to an FCC source, “‘an item that finds Comcast’s broadband network management practices to be in violation of the FCC’s policy principles’”?²²⁸

By sanctioning Comcast for violating the Policy Statement, the FCC has built a castle on air. Because the Policy Statement, by its own terms, does not adopt rules, the clear implication is that such rules must come from “ongoing policymaking activities.”²²⁹ However, the FCC’s “ongoing policymaking activities” in the *Comcast* case are justified on the basis of the Policy Statement! The Commission cannot turn nonrules into rules simply by separately issuing an order.²³⁰

Under *SEC v. Chenery Corp.*, administrative agencies have discretion to resolve disputes through either case-by-case adjudication or comprehensive rulemaking.²³¹ The FCC will defend its actions by claiming that it is merely adjudicating a complaint filed over a matter within its jurisdiction.²³² This contention has some merit. Although the FCC traditionally makes policy almost exclusively through rulemaking, other agencies, such as the National Labor Relations Board, prefer adjudication.²³³

Nevertheless, an administrative adjudication must have some legal basis. If an agency could unilaterally declare a policy and then hold any company accountable to it, these actions would be tantamount to exercising rulemaking authority.²³⁴ An adjudication to en-

²²⁷ *Id.* at 14,988 n.15.

²²⁸ Chloe Albanesius, *FCC: Comcast Broke Rules, But Will Not Face Fines*, PCMAG.COM, July 11, 2008, <http://www.pcmag.com/article2/0,2817,2325455,00.asp> (quoting “an FCC source”). FCC Chairman Kevin J. Martin made the even stronger statement that companies such as Comcast bear the burden of proof when they violate FCC policies: “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.” Saul Hansell, *F.C.C. Chief Would Bar Comcast from Imposing Web Restrictions*, N.Y. TIMES, July 12, 2008, at C1.

²²⁹ Internet Policy Statement, *supra* note 95, at 14,988.

²³⁰ See Philip J. Weiser, *The Future of Internet Regulation* 32 (Univ. of Colo. Law Sch., Working Paper No. 09-02, 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.”).

²³¹ *SEC v. Chenery Corp.*, 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.”).

²³² See *Comcast Order*, *supra* note 2, at 13,044.

²³³ See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 819 (1990) (Scalia, J., dissenting). Moreover, there may be an argument that case-by-case adjudication is a better mechanism for novel situations where an agency has no track record of understanding the relevant issues. See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1406 (2004); Weiser, *supra* note 230, at 51.

²³⁴ See *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (“The agency cannot apply or rely upon [a policy statement] as law because a general

force statutory obligations requires some indication that the statute does, in fact, describe legal obligations. But the Policy Statement was adopted with no prior notice or opportunity to challenge it, as a stand-alone document that expressly disclaimed any legal force.²³⁵

In the *Comcast* case, the FCC considered the complaint simultaneously with a petition for declaratory ruling and a notice of inquiry on the same set of topics, only choosing to announce at the end of the order that it was treating the matter as an adjudication.²³⁶ That purported adjudication involved no on-the-record hearings or testimony.²³⁷ The FCC held two public forums on broadband-network management, one of which included a presentation by a Comcast representative.²³⁸ The Commission itself 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.²³⁹ Given these procedural shortcomings, the *Comcast* decision faces a stiff challenge in court.

Even if the *Comcast Order* survives a judicial challenge, the FCC's approach is problematic. 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.²⁴⁰ The Commission will have to develop a jurisprudence to give meaning to that term through its resolution of complaints.²⁴¹ In the *Comcast* case, the FCC stated that networking engineers did not consider the techniques

statement of policy only announces what the agency seeks to establish as policy."); 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, 1317 (1992).

²³⁵ See Internet Policy Statement, *supra* note 95, at 14,988 n.15; Weiser, *supra* note 230, at 32–33 & n.110.

²³⁶ 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 Wireline Broadband Order, *supra* note 32.

²³⁷ See Weiser, *supra* note 230, at 32 (explaining that the "proceeding lacked most—if not all—of the characteristics associated with traditional fact-finding" and that the agency "did not receive any evidence under oath, held no cross-examination, and merely evaluated filings where parties advanced self-serving claims").

²³⁸ See Press Release, Fed. Commc'ns Comm'n, FCC Announces Second Public *En Banc* Hearing on Broadband Network Management Practices at Stanford University, Palo Alto, California (Mar. 19, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280895A1.pdf; Press Release, Fed. Commc'ns Comm'n, FCC Announces Public *En Banc* Hearing in Cambridge, Massachusetts on Broadband Network Management Practices (Feb. 12, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280194A1.pdf.

²³⁹ See Comcast Order, *supra* note 2, at 13,047.

²⁴⁰ Internet Policy Statement, *supra* note 95, at 14,988 n.15.

²⁴¹ See Weiser, *supra* note 230, at 31 ("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.'").

Comcast employed reasonable.²⁴² The primary basis for the Commission's conclusion was the testimony of a few experts.²⁴³ Contrary to the FCC's assertion, the challenged practices do not violate the standards of the Internet Engineering Task Force, although engineers generally disfavor such practices.²⁴⁴ A more serious effort to engage these issues would require a process involving a representative technical and industry group.²⁴⁵

There is little in the *Comcast Order* to provide guidance for future cases. For example, Comcast used a form of Deep Packet Inspection (DPI), a technique that allows network operators to read the contents of individual data packets as they pass across the network.²⁴⁶ DPI technologies are controversial because of the level of control they potentially give the network operator.²⁴⁷ Network operators can use these mechanisms to target advertising based on user behavior; such targeting is rapidly becoming a controversial practice.²⁴⁸ The ability of network operators to see the entire contents of the messages they carry has generated privacy concerns. Even so, DPI can serve as a legitimate mechanism for managing network traffic.²⁴⁹ It is not, in all cases, an "unreasonable" technique. The FCC decision, however, suggested that it might be.²⁵⁰ Because the FCC chose an ad-hoc, case-by-case, adjudicative approach to the network-neutrality problem, it remains unclear whether the Commission will more broadly impose fines and other sanctions on uses of DPI in the future.

There is room for vigorous debate about whether certain network-management practices represent unacceptable discrimination or merely necessary and neutral traffic engineering. As an expert regulatory agency, the FCC is qualified to engage in this analysis. It can only do so, however, by developing a full record and considering the issues squarely. The narrow and haphazard record in the *Comcast* case is

²⁴² See *Comcast Order*, *supra* note 2, at 13,054, para. 45.

²⁴³ See *id.* at 13,054 n.212.

²⁴⁴ See *id.*; see also Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance*, 2009 U. ILL. L. REV. 1417, 1439 n.115 (discussing the IETF's comments on the RST packet mechanism that Comcast used). Comcast used a variety of different technical mechanisms, some of which were more problematic than others.

²⁴⁵ See Weiser, *supra* note 230, at 34.

²⁴⁶ See *id.* at 31; Werbach, *supra* note 36, at 92–94.

²⁴⁷ See Werbach, *supra* note 26, at 119.

²⁴⁸ See Ohm, *supra* note 244, at 1433–34.

²⁴⁹ See Werbach, *supra* note 36, at 92; see also SAILESH KUMAR ET AL., ADVANCED ALGORITHMS FOR FAST AND SCALABLE DEEP PACKET INSPECTION 81, 82 (Dec. 2006) ("Deep packet inspection is becoming increasingly important as a means to classify and control traffic based on the content, applications, and subscribers."); Cisco Sys., Inc., *Deploying Premium Services Using Cisco Service Control Technology*, available at <http://www.democraticmedia.org/files/pdf/CiscoPremiumServices.pdf> (last visited Jan. 20, 2010) (promoting DPI as a way to increase "subscriber and application awareness" and meet customer demand for premium services).

²⁵⁰ See *Comcast Order*, *supra* note 2, at 13,055.

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) must start with a solid jurisdictional foundation.

III

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. As explained below, the FCC should declare regulation of broadband Internet access necessary as ancillary to its obligations under sections 251 and 256 of the Communications Act.²⁵¹ 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 cannot mean Title 0. If the agency is to implement the information-services classification consistently, it 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 limited purpose of preventing intermediary liability.²⁵² Regulators must honestly confront the reality that Congress did not create a national Internet policy in 1996.²⁵³ 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, then Internet policy is the new telecommunications policy. The cen-

²⁵¹ The FCC did mention section 256 in the *Comcast Order*, but only as one subsidiary justification in its shotgun list of provisions other than section 230 supporting its jurisdictional claim. See *id.* at 13,039, para. 19. That single reference does not do justice to the importance of section 256 in defining interconnection as a central directive for FCC Internet policy, nor does it address the relationship of section 256 to section 251.

²⁵² See *supra* text accompanying notes 148–58.

²⁵³ See *supra* Part II.A. The fact that the term “Internet” appears only twice out of almost 750,000 words in the Telecommunications Act suggests that Internet-based services were at best an afterthought in the exceptionally detailed regime that Congress spelled out. See H. Russell Frisby, Jr. & David A. Irwin, *The First Great Telecom Debate of the 21st Century*, 15 *COMMLAW CONSPPECTUS* 373, 377 (2007). The term appears only once in the text of the massive FCC interconnection order implementing the local-competition portions of the Act. See *Local Competition Ruling*, *supra* note 199; *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 & Interconnection Between Local Exch. Carriers & Commercial Mobile Radio Serv. Providers*, 11 F.C.C.R. 15,499, 15,878, para. 756 (Aug. 1, 1996) (first report & order).

tral 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 by the Supreme Court in the 1968 case *United States v. Southwestern Cable Co.*²⁵⁴ In *Southwestern Cable*, the FCC sought to regulate cable-television service, which was in its earliest stages of commercial development.²⁵⁵ 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.²⁵⁶ 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.²⁵⁷

The FCC needed a hook to assert jurisdiction over cable. To reach that goal, it used a two-step process. First, the Commission found that cable was within its primary statutory grant of authority under section 152(a) of the Act, which allows the FCC to regulate “all interstate and foreign communication by wire or radio.”²⁵⁸ 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,”²⁵⁹ as “public convenience, interest, or necessity requires.”²⁶⁰ The FCC also referenced section 154(i), which provides that “[t]he 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.”²⁶¹

²⁵⁴ 392 U.S. 157 (1968). Ancillary jurisdiction is not limited to the FCC. The traditional version of the concept applies to federal agencies’ power to adjudicate those state-law claims that are inextricably related to federal claims. See *Commodity Futures 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, 914–16 (2005).

²⁵⁵ See *Sw. Cable*, 392 U.S. at 167.

²⁵⁶ See *id.* at 164.

²⁵⁷ See *id.* at 175–80. The Commission’s assessment was accurate. Today, cable, along with direct-broadcast satellite service, represents over eighty-five percent of the video market. See *In re 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, 2617 (Feb. 10, 2006).

²⁵⁸ 47 U.S.C. § 152(a) (2006).

²⁵⁹ *Id.* § 303(r).

²⁶⁰ *Id.* § 303.

²⁶¹ *Id.* § 154(i).

As the Supreme Court affirmed in *Southwestern Cable*, these provisions give the FCC authority to take steps “reasonably ancillary to the effective performance of the Commission’s various responsibilities.”²⁶² 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.²⁶³

Ancillary authority has limits. In two successor cases in the 1970s, *Midwest Video I*²⁶⁴ and *Midwest Video II*,²⁶⁵ 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.²⁶⁶ *Midwest Video II*, however, rejected FCC requirements that cable providers offer access to unaffiliated content providers and noncommercial users.²⁶⁷ The Court in *Midwest Video II* found these requirements tantamount to common-carriage obligations.²⁶⁸ Section 153(10) of the Act expressly stated that “a person engaged in . . . broadcasting shall not . . . be deemed a common carrier.”²⁶⁹ Although the FCC rules in question might have furthered statutory goals of the Communications Act, they required cable operators to do something that 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.²⁷⁰

As defined in *Southwestern Cable* and refined in *Midwest Video*, ancillary authority requires the expansion of the FCC’s jurisdiction to be *necessary* to meet statutory obligations.²⁷¹ In the case of cable television, the FCC took the position that the statutory scheme for regulating wireless broadcasters would be threatened if analogous wired

²⁶² *Sw. Cable*, 392 U.S. at 178. 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.” Weiser, *supra* note 7, at 51.

²⁶³ *See Sw. Cable*, 392 U.S. at 177. Congress later added Title VI, explicitly regulating cable and supplanting the FCC’s earlier rules. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521–611).

²⁶⁴ *United States v. Midwest Video Corp. (Midwest Video I)*, 406 U.S. 649 (1972).

²⁶⁵ *FCC v. Midwest Video Corp. (Midwest Video II)*, 440 U.S. 689 (1979).

²⁶⁶ *See Midwest Video I*, 406 U.S. at 667–70. The case produced a splintered opinion. Concurring, Chief Justice Warren Burger stated that the order “strains the outer limits” of FCC jurisdiction. *Id.* at 676 (Burger, C.J., concurring in result).

²⁶⁷ *See Midwest Video II*, 440 U.S. at 695–96.

²⁶⁸ *See id.*

²⁶⁹ 47 U.S.C. § 153(10) (2006).

²⁷⁰ *See Midwest Video II*, 440 U.S. at 708–09.

²⁷¹ The distinction between *Southwestern Cable* and *Midwest Video I* was that the former allowed the FCC to protect the existence of the regulated industry (broadcasting), and the latter allowed the FCC to promulgate rules to effectuate the established statutory objectives of broadcast regulation. *See* Crawford, *supra* note 6, at 731–33.

systems were wholly unregulated.²⁷² 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.²⁷³ Cable could be regulated because it was a service within the FCC's general grant of jurisdiction that was likely to have a significant impact on services subject to specific FCC regulatory obligations. But when the FCC attempted to decouple the regulation of cable from the regulation of broadcasting, the Court overturned it.²⁷⁴

In its 1971 *Computer I* decision, the FCC declined to regulate data-processing services but left open the possibility of doing so under ancillary jurisdiction.²⁷⁵ 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 if competitive dynamics in those markets were different.²⁷⁶ However, *Computer I* did promulgate rules restricting regulated common carriers from entering the unregulated data-processing market.²⁷⁷ The Second Circuit upheld these provisions in *GTE Service Corp. v. FCC* even though the Communications Act gave the FCC no authority over such services.²⁷⁸

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.²⁷⁹ As Phil Weiser notes, "the FCC's conception of this authority

²⁷² See *United States v. Sw. Cable Co.*, 392 U.S. 157, 173–78 (1968). 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. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, PROGRESS ON POINT (Progress & Freedom Found., Wash., D.C.), May 2005. Though this may not be a level playing field, it has not made the FCC's content rules untenable.

²⁷³ In *Midwest Video II*, 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*, 440 U.S. at 708–09.

²⁷⁴ See *id.*

²⁷⁵ See *In re Regulatory & Pol'y Problems Presented by the Interdependence of Computer & Commc'n Servs. & Facilities*, 28 F.C.C.2d 267, 268 (1971) (final decision & order) [hereinafter *Regulatory & Pol'y Problems Final Order*] ("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 . . .").

²⁷⁶ See *id.*

²⁷⁷ See *id.* 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. See *Regulatory & Pol'y Problems Presented by the Interdependence of Computer & Commc'n Servs. & Facilities*, 28 F.C.C.2d 291, 298–99 & n.2 (1970).

²⁷⁸ See *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730–32 (2d Cir. 1973).

²⁷⁹ See *Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1310 (D.C. Cir. 1988) (universal service); *In re Applications for Consent to the Transfer of Control of Licenses & Section 214 Authorizations by Time Warner Inc. & Am. Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, 16 F.C.C.R. 6547, 6610, para. 148 (2001) (mem. opinion & or-

is hardly a model of clarity or consistency.”²⁸⁰ The forty-year-old cable-television decisions remain the benchmarks for understanding the contours of ancillary jurisdiction.²⁸¹

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.²⁸² 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 widely distributed.²⁸³ The FCC was eager to promote the switch to digital television. It concluded that a content-protection system was important to ensure sufficient digital programming to entice consumers to purchase the new digital sets.²⁸⁴ The jurisdictional problem was that the broadcast flag applied to *hardware*. The flag regulated television sets, not the television broadcasters covered under Title III of the Act.²⁸⁵

The FCC tried and ultimately failed to defend the broadcast flag as an exercise of ancillary jurisdiction.²⁸⁶ The Commission’s argument was that FCC’s statutory authority included not only communications but also all incidental “instrumentalities, facilities, apparatus, and services” used for the “receipt, forwarding, and delivery of communications.”²⁸⁷ The District of Columbia Circuit Court of Appeals disagreed.²⁸⁸ In *American Library Ass’n v. FCC*, the court concluded

der) [hereinafter AOL–Time Warner Merger Order] (instant messaging); *In re Implementation of Video Description of Video Programming*, 15 F.C.C.R. 15,230, 15,256, para. 67 (2000) (report & order), *rev’d*, Motion Picture Ass’n of Am., Inc. v. FCC, 309 F.3d 796 (D.C. Cir. 2002) (video descriptions).

²⁸⁰ Weiser, *supra* note 7, at 49.

²⁸¹ *See id.* at 52.

²⁸² *See In re Digital Broadcast Content Protection*, 18 F.C.C.R. 23,550, 23,552, para.4 (Nov. 4, 2003) (report & order & further notice of proposed rulemaking) [hereinafter Broadcast Flag Order].

²⁸³ *See* Werbach, *supra* note 17, at 60–63; John Borland, *FCC Nears Vote on TV ‘Broadcast Flag’*, CNET NEWS, Oct. 28, 2003, http://news.com.com/FCC+nears+vote+on+TV+broadcast+flag/2100-1028_3-5097927.html.

²⁸⁴ *See* Broadcast Flag Order, *supra* note 282, at 23,552; Werbach, *supra* note 17, at 63.

²⁸⁵ The FCC’s order applied to all “Demodulator Products,” which were essentially all devices able to display a digital-television broadcast signal on a screen. *See* Broadcast Flag Order, *supra* note 282, at 23,565; *see also* 47 C.F.R. § 73.9000(f) (2008) (defining “covered demodulator product” as “a product that is required . . . to comply with the demodulator compliance requirements, and to be manufactured in accordance with the demodulator robustness requirements”); *id.* § 73.9002(b) (prohibiting sale or distribution in interstate commerce of “covered demodulator products” except in accordance with demodulator compliance and robustness requirements).

²⁸⁶ *See* Broadcast Flag Order, *supra* note 282, at 23,562–63.

²⁸⁷ 47 U.S.C. § 153(33) (2006); *Am. Library Ass’n v. FCC*, 406 F.3d 689, 703 (D.C. Cir. 2005) (quoting § 153(33)).

²⁸⁸ *See Am. Library Ass’n*, 406 F.3d at 692.

that, because the broadcast flag operated *after* a digital-broadcast transmission arrived at a television set, the statutory provision did not cover the flag.²⁸⁹

The *American Library Ass'n* court struck down the broadcast flag, but it did not narrow the scope of the FCC's ancillary jurisdiction. As the court noted, "[t]he 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."²⁹⁰ It is tempting to characterize the broadcast flag as the FCC overreaching toward the Internet.²⁹¹ However, the case is more properly seen as a straightforward application of the *Midwest Video II* doctrine that ancillary jurisdiction cannot produce a result inconsistent with express statutory language.²⁹²

B. Internet Communications as Ancillary to Interconnection

1. *Internet Communications Services*

The *Wireline Broadband Order* concerned providers of integrated telecommunications and information services.²⁹³ Broadband-access services such as DSL and cable modem clearly involve both a pure transportation pipe and a suite of data-processing functionality.²⁹⁴ The trouble is that providers do not offer the two components separately.²⁹⁵ The FCC decided to treat the bundles as information services.²⁹⁶ This conclusion effectively placed "pure" information services, which are, according to the statutory definition, capabilities offered "via telecommunications,"²⁹⁷ into the same category as "integrated" information services, which include those very telecommunications capabilities.

For example, the search engine Google transforms information and delivers results via telecommunications networks, making it an in-

²⁸⁹ See *id.* at 703–04.

²⁹⁰ *Id.* at 692.

²⁹¹ See Crawford, *supra* note 6, at 712–14.

²⁹² See *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 798–99 (D.C. Cir. 2002). The video-description case similarly involved a proposed FCC rule that contravened express limits set out in the statute. See *FCC v. Midwest Video Corp. (Midwest Video II)*, 440 U.S. 689, 708–09 (1979).

²⁹³ See *Wireline Broadband Order*, *supra* note 32, at 14,860.

²⁹⁴ See *id.* at 14,860–61.

²⁹⁵ See *id.*

²⁹⁶ Interestingly, this was the opposite of the FCC's original decision in *Computer I*. There, the Commission 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 generally Cannon, *supra* note 32.

²⁹⁷ 47 U.S.C. § 153(20) (2006).

formation service.²⁹⁸ When a user accesses Google through a dial-up Internet-service provider, that ISP purchases access from a regulated telecommunications provider.²⁹⁹ In other words, the physical network operator is classified differently than the service offered over the network. When that same user connects to Google over a broadband connection, however, the situation changes. The FCC now classifies broadband-access providers as information services, the very same category that applies to Google.

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. The Commission adjudicated a dispute involving a single provider, Comcast. Under the Commission's case-by-case 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 that the FCC regulates.³⁰⁰ For example, there is no policy reason to develop rules under the Telecommunications Act for Google's search engine or Amazon.com's online bookstore.³⁰¹ 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 is an example: even though it involved some mechanical protocol conversion, it was effectively a telecommunications service.³⁰²

Having a class of information services that straddles the boundary in this way would eliminate uncertainty about where a service falls. 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

²⁹⁸ See *id.*

²⁹⁹ See Cannon, *supra* note 38, at 56.

³⁰⁰ See Cannon, *supra* note 32, at 188 (giving examples of enhanced services).

³⁰¹ That is not to say that no regulation would be appropriate. Antitrust rules may apply, for example.

³⁰² See Petition for Declaratory Ruling, *supra* note 48, at 7465.

service, even if they compete with it.³⁰³ Applying the same obligations to those services could put a damper on competition and innovation.³⁰⁴ Internet communications services would consider only those services that were indistinguishable from regulated services or clearly designed to evade regulatory obligations.³⁰⁵

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, this approach would be fully consistent with the real congressional intent behind section 230 of the 1996 Act.³⁰⁶ 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. Instead, it is telecommunications transport integrated with data-processing functionality.³⁰⁷ The major companies that offer it are regulated telephone, cable, and wireless providers.³⁰⁸ 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 is favorable because it means a net reduction in regulatory obligations, since they would otherwise be Title II common carriers. But treating them as information-service providers 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, but it did

³⁰³ See Crawford, *supra* note 6, at 700 n.17.

³⁰⁴ See *id.* at 724.

³⁰⁵ See *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 733 (2d Cir. 1973) (rejecting ancillary jurisdiction when it was clear that a class of providers was not structured to avoid regulation).

³⁰⁶ See *supra* Part II.A; see also Crawford, *supra* note 6, at 704–05.

³⁰⁷ Wireline Broadband Order, *supra* note 32, at 14,860.

³⁰⁸ See *supra* note 49.

not consider regulated services that might be affected.³⁰⁹ 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.³¹⁰ 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 the company's legitimate technical requirements.³¹¹ 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.³¹²

This is not the analysis the Supreme Court prescribed in *Southwestern Cable* and *Midwest Video*. Under the cable cases, the characteristics of the new service are relevant only to determine whether 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.³¹³

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 is it even a command to achieve the policy objectives the FCC identified in the *Comcast Order*.³¹⁴ The logic of ancillary authority is that there must be some primary authority at

³⁰⁹ See *Comcast Order*, *supra* note 2, at 13,045–46. The FCC did note in passing 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 *id.* at 13,039.

³¹⁰ See *id.* at 13,030.

³¹¹ See *id.* at 13,054.

³¹² See *id.* at 13,034.

³¹³ The Commission did note in the *Comcast Order* that Comcast's practices could "have the effect of shifting traffic to other carrier's telecommunications networks." *Id.* at 13,039, para. 19. Its primary focus, however, was on the potential impacts of broadband network management practices on the Internet ecosystem. And even as a subsidiary justification, the FCC's traffic-shifting argument is something of a stretch. Other telecommunications networks and their customers were not complaining about Comcast's practices. Any Internet network-management practice can have the effect of changing traffic patterns on other networks because the Internet is fundamentally interconnected.

³¹⁴ See *supra* Part II.A.

risk.³¹⁵ Moreover, as developed in *Midwest Video II*, the ancillary authority must track the contours of those primary mandates.³¹⁶

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. This reading makes no sense. Such a reading would give general policy pronouncements in a regulatory statute effectively the same status as specific mandates.³¹⁷ 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 "'communication[s] by wire or radio'" that cross state lines.³¹⁸

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).³¹⁹ FCC exercise of ancillary authority was deemed necessary to preserve the statutory public-interest mandates on broadcasters.³²⁰ The analogous issue today is whether new, unregulated broadband-Internet services would have the same effect.³²¹ The answer is unquestionably yes.

The rise of broadband-Internet services and content threaten FCC statutory obligations in two ways: (1) unregulated services can

³¹⁵ See *supra* notes 258–78 and accompanying text.

³¹⁶ See *FCC v. Midwest Video Corp.* (*Midwest Video II*), 440 U.S. 689, 708–09 (1979).

³¹⁷ Language from the general provisions of Title I of the Act can be used in support of ancillary jurisdiction. Law professor John Blevins made this argument in a comment to the FCC. See *Ex Parte Letter of John Blevins Regarding the Commission's Ancillary Jurisdiction*, Before Fed. Comm'n's Comm'n (Jul. 17, 2008), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6520034634>. However, the cases Blevins cites tie back to *Southwestern Cable*, where jurisdiction rested primarily on the impacts on regulated broadcast services. The Title I provisions are not meaningless but neither are they equivalent to the statutory commands of Titles II, III, and VI.

³¹⁸ *United States v. Sw. Cable Co.*, 392 U.S. 157, 167–69 (1968) (quoting 47 U.S.C. § 152(a) (2006)).

³¹⁹ See *id.* at 175–77.

³²⁰ See *id.* at 180–81.

³²¹ 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. See 47 U.S.C. § 301. The Act 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 Regulations 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." See *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943).

mimic and compete with regulated telecommunications services, and (2) 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 content-less regulatory gray area.³²² For example, if Verizon or Cablevision refused to allow independent-application and content providers to reach customers through their pipes or discriminated against unaffiliated providers on their platform, the substantive provisions of Title II of the Act would ultimately be meaningless.

The FCC should not try to stop the “Digital Broadband Migration,” to borrow a phrase from former FCC Chairman Michael Powell.³²³ On the contrary, the Commission should cheer the substitution of closed network silos with a converged, layered, interconnected universal-data network.³²⁴ The perception that regulatory concern with the Internet will somehow contaminate the FCC is a residue of the CDA debate and the early work of “cyber-exceptionalists” such as John Perry Barlow, David Johnson, and David Post.³²⁵ 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.³²⁶

³²² Cf. *GTE Serv. Corp. v. FCC*, 474 F.2d. 724, 731 (2d Cir. 1973) (“[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.”).

³²³ Michael K. Powell, Comm’r, Fed. Commc’ns Comm’n, *The Great Digital Broadband Migration* (Dec. 8, 2000), available at <http://www.fcc.gov/Speeches/Powell/2000/spmkp003.html>.

³²⁴ See Werbach, *Layered Model*, *supra* note 69, at 54–64.

³²⁵ See generally David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (arguing that Cyberspace demands a different regulatory approach because it transcends the geographic borders and physical markers upon which traditional law relies); John Perry Barlow, *A Declaration of the Independence of Cyberspace*, Feb. 8, 1996, available at http://w2.eff.org/Censorship/Internet_censorship_bills/barlow_0296.declaration (declaring the Internet independent from the regulatory authority of world governments).

³²⁶ See Weiser, *supra* note 230, at 2–6.

2. *GTE Service Corp. v. FCC*

The court decision most directly applicable to the ancillary-jurisdiction analysis for Internet communications services is *GTE Service Corp. v. FCC*, a 1973 decision in which the Second Circuit upheld certain rules that the FCC had promulgated in its *Computer II* decision.³²⁷ 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 II* 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.³²⁸ The Court of Appeals had no difficulty upholding this action: "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."³²⁹

In 1971, there was no "information service" category in the statute. Had there been, the FCC's *Computer II* 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 noncategory.

Even the portion of *GTE* that found that the FCC exceeded its authority supports the exercise of ancillary jurisdiction over Internet communications services today. The court invalidated the *Computer II* rules that sought to regulate the behavior of the structurally separate data-processing affiliates that the FCC required common carriers to establish.³³⁰ 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.³³¹ The FCC's justification for the challenged rules was based on antitrust theory, not the requirements of the Communications Act. As the court

³²⁷ See *GTE*, 474 F.2d at 729–35.

³²⁸ See Regulatory & Pol'y Problems Final Order, *supra* note 275, at 268–69.

³²⁹ *GTE*, 474 F.2d at 730.

³³⁰ See *id.* at 733.

³³¹ See *id.* ("[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.").

noted, the data-processing affiliates were not means to escape regulation but corporate vehicles that the FCC itself required.³³² 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.³³³ Nevertheless, 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 action by the Commission," it would reevaluate the regulatory status of the market.³³⁴

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.³³⁵ Imposing rules on data-processing affiliates would have expanded the base of regulated entities. Such a move could 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

³³² See *id.*

³³³ See *id.*

³³⁴ See Regulatory & Pol'y Problems Final Order, *supra* note 275, at 268.

³³⁵ See *GTE*, 474 F.2d at 733.

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!³³⁶

The majority in *Brand X* found that the FCC had sufficiently justified its appeal to ancillary authority.³³⁷ Still, Justice Scalia’s criticism does have some bite. Consistent with *Midwest Video II*, the Commission must constrain its actions so that the outcome is not flatly contrary to the statute.³³⁸ The ultimate decisions remain with Congress and should not be usurped by a bureaucratic agency.³³⁹

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.³⁴⁰ It distinguishes telecommunications service from information service³⁴¹ but offers no particular requirements for those information services. The assumption has been that information services were designed as an inherently unregulated zone. Members of the information-service industry often describe information services as “Title I” services, as if any regulation must come under that section of the Act.³⁴²

However, Congress issued no such pronouncement in the statutory text. The term “information service” is defined in section 153 (part of Title I), but so are “telecommunications service,” “common carrier,” “broadcasting,” and all the other major statutory categories.³⁴³ Title II includes rules primarily applicable to telecommunications carriers, but it is not exclusive.³⁴⁴ That Congress chose to establish a new category for information services supports the notion

³³⁶ Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1013–14 (2005) (Scalia, J., dissenting) (footnote omitted).

³³⁷ See *id.* at 1000–03.

³³⁸ See FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689, 704–09 (1979).

³³⁹ See *Brand X*, 545 U.S. at 1005 (Scalia, J., dissenting); *Midwest Video II*, 440 U.S. at 704–09. The specific scenario Justice Scalia painted, however, would conflict with the Court’s holding in *Midwest Video II*. See 440 U.S. at 704–09. Just as the FCC could not “change the facts” to regulate cable companies as common carriers in that case, it could not do so in *Brand X*. 545 U.S. at 1014 (Scalia, J., dissenting). Common-carrier regulation is still limited to common carriers under the statutory scheme. See *id.* at 1002.

³⁴⁰ See 47 U.S.C. § 251(a)(1) (2006).

³⁴¹ See *id.* § 153(20), (46).

³⁴² See NUCHECHTERLEIN & WEISER, *supra* note 6, at 213 (“[I]ndustry participants often use ‘Title I’ (as in a ‘Title I service’) as a shorthand for ‘deregulated’ and ‘Title II’ as a shorthand for ‘regulated.’”).

³⁴³ See 47 U.S.C. § 153.

³⁴⁴ See *id.* § 201.

that some regulatory obligations would be consistent with the congressional mandate.³⁴⁵

The question then is what should govern the FCC rules adopted under ancillary authority.³⁴⁶ The FCC in the *Comcast Order* pointed to a hodgepodge of provisions of the Communications Act that offer no clear limits on the contours of a Title I regime.³⁴⁷ Weiser argues for an antitrust-like regime, on the ground that it is better suited to the challenges of broadband access than the prophylactic regime of Title II.³⁴⁸ The FCC need not go so far afield. A better option is right there within the Act.

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.³⁴⁹ 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.³⁵⁰ These rules modified and expanded Title II of the original Act. Although the title of the relevant section of the Act is still “Common Carriers,” only the first of three parts describes common-carriage requirements.³⁵¹ Section 201, for example, requires common carriers (and only common carriers) to furnish service “upon reasonable request” and charge “just and reasonable” rates.³⁵² The rest of Title II, though, has broader applicability and can therefore serve as a basis for rules governing Internet-based communications.

³⁴⁵ If information services were intended to be wholly outside the statutory scheme, their inclusion in the definitions section would be superfluous.

³⁴⁶ See Weiser, *supra* note 7, 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.”).

³⁴⁷ See *Comcast Order*, *supra* note 2, at 13,036–44.

³⁴⁸ Weiser, *supra* note 7, at 65–66.

³⁴⁹ See NUCHESTERLEIN & WEISER, *supra* note 6, at 69–113.

³⁵⁰ See 47 U.S.C. § 251 (2006).

³⁵¹ See *id.* § 201. The definition of a common carrier is circular: it is “any person engaged as a common carrier for hire, in interstate or foreign communication.” *Id.* § 153(10).

³⁵² *Id.* § 201(a)–(b).

The general regulatory pronouncements governing telecommunications networks are in Part II of Subchapter II of the Communications Act as codified, "Development of Competitive Markets."³⁵³ The substantive provisions that apply generally, not just to incumbents, are section 251 (requiring interconnection),³⁵⁴ and section 256 (requiring coordination for interconnectivity).³⁵⁵ The sections have a common theme of open interconnection. 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.³⁵⁶

Moreover, although these requirements specifically apply to telecommunications carriers, they are not limited in application to telecommunications services. For example, Verizon is still a telecommunications carrier even though it sometimes provides information services.³⁵⁷ So is Comcast, which is now one of the nation's largest telephone companies.³⁵⁸ Section 251 mandates interconnection of "facilities and equipment,"³⁵⁹ which in a digital environment can be used to provide many different kinds of services. Section 256 declares a goal of promoting unfettered transmission for "users and information providers,"³⁶⁰ who 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.³⁶¹ But nothing suggests that Congress intended to limit openness of network

³⁵³ *Id.* §§ 251–61.

³⁵⁴ *Id.* § 251.

³⁵⁵ *Id.* § 256. Section 259 requires sharing of infrastructure with "qualifying carrier[s]" but has limited applicability. *Id.* § 259(a).

³⁵⁶ See *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002) ("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 . . ."). In *Motion Picture Ass'n of America*, the D.C. Circuit rejected the FCC's claim of ancillary jurisdiction to issue rules for television video descriptions. Even that skeptical court recognized that there is a place for ancillary authority in the area considered here. See *id.*

³⁵⁷ This is the significance of the statutory provision that, "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." 47 U.S.C. § 153(44).

³⁵⁸ See Bob Fernandez, *Comcast First-Quarter Revenue Up 5 Percent*, PHILA. INQUIRER, May 1, 2009, LexisNexis Academic.

³⁵⁹ 47 U.S.C. § 251(a)(1).

³⁶⁰ *Id.* § 256(a)(2).

³⁶¹ See generally Werbach, *supra* note 54 (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 279, at 6603–04. There, however, the FCC had specific statutory authority to review and impose conditions on mergers involving change of control over spectrum licenses. See *id.* at 6610–11. The Commission only had to show that instant messaging fell within its general section 152 authority and that the conditions were

ecosystems built on telecommunications infrastructure. On the contrary, the Act manifests an express desire to promote those goals.³⁶²

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.³⁶³ The grants are to be administered by the Department of Agriculture and the National Telecommunications and Information Administration (NTIA) of the Department of Commerce, but the funding is contingent on 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).”³⁶⁴ 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,³⁶⁵ provisions geared to those specific transitional situations garnered a disproportionate share of attention and statutory text.³⁶⁶ Now that those processes are mostly complete, the Act’s core common-carrier obligations and broader requirements such as sections 251 and 256 remain.

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.³⁶⁷ This approach would not, for example, support FCC imposition of rules regulating online content or social policies such as 911 emergency services

related to the merger. *See id.* Rules covering instant messaging in other contexts would be more difficult to justify.

³⁶² *See supra* text accompanying notes 215–24. 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. *See* 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.

³⁶³ *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001, 123 Stat. 115, 515.

³⁶⁴ *Id.* § 6001(j).

³⁶⁵ NUECHTERLEIN & WEISER, *supra* note 6, at 69–74.

³⁶⁶ *See* HUBER ET AL., *supra* note 18, at 226–32, 256–58.

³⁶⁷ *See supra* text accompanying note 336.

and access for law enforcement.³⁶⁸ Nor would it allow the FCC to impose obligations such as the broadcast flag or other digital-rights management technologies.³⁶⁹ None of these regulations would have a sufficient nexus with the goal of promoting open interconnection to fall under the statutory authority.³⁷⁰

2. Section 251: Interconnection

Section 251(a)(1) requires telecommunications carriers “to interconnect directly or indirectly” with other carriers.³⁷¹ 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.³⁷² Without effective interconnection, network effects crowd out smaller players.³⁷³ 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.³⁷⁴ 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 among telephone companies.

That section 251(a)(1) covers telecommunications carriers only 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 just links among classic telecommunications carriers.³⁷⁵ 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

³⁶⁸ See, e.g., Crawford, *Ambulance*, *supra* note 7 (describing the FCC’s extension of E911 and CALEA requirements, policies traditionally applied to telephone companies, to broadband-internet providers).

³⁶⁹ See Crawford, *supra* note 6, at 709–27; Werbach, *supra* note 17, at 58–68.

³⁷⁰ The FCC might, however, be able to address digital-rights management as a standardization exercise. See generally Daniel Benoliel, *Cyberspace Technological Standardization: An Institutional Theory Retrospective*, 18 BERKELEY TECH. L.J. 1259 (2003) (assessing standardization policies and considering the proper body for standardizing the internet); Daniel Benoliel, *Technological Standards, Inc.: Rethinking Cyberspace Regulatory Epistemology*, 92 CAL. L. REV. 1069 (2004) (arguing for a rule-oriented approach to setting technological standards for digital-rights management); Molly Shaffer Van Houweling, *Communications’ Copyright Policy*, 4 J. TELECOMM. & HIGH TECH. L. 97 (2005) (arguing that the FCC, despite its failure with the Broadcast Flag Order, may have a role in setting technological protection measures).

³⁷¹ 47 U.S.C. § 251(a)(1) (2006).

³⁷² See Werbach, *supra* note 54, at 1241–43.

³⁷³ See *id.*; Werbach, *supra* note 9, at 403.

³⁷⁴ See Werbach, *supra* note 54, at 1250–57.

³⁷⁵ 47 U.S.C. § 251(a)(1).

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. Only after the emergence of the broadband Internet, and the FCC's decision to treat broadband access as an indivisible information service, were telecommunications carriers such as AT&T and Verizon viewed as interconnecting as information-service providers.³⁷⁶ Just as the FCC in the 1960s saw the growth of unregulated cable-television service potentially making FCC rules promoting local broadcast content irrelevant,³⁷⁷ the FCC today could argue that unregulated broadband-access networks would make its rules promoting interconnection irrelevant.

Section 251(a)(2) directly ties interconnection obligations to standards under section 256.³⁷⁸ 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.³⁷⁹ Comcast's proprietary, hidden, discriminatory traffic-management techniques could be considered "capabilities" in violation of this provision. Under the ancillary-jurisdiction precedent, the Commission need only conclude that adopting such a rule for Internet communications services is necessary to effectuate the statutory scheme for telecommunications carriers.³⁸⁰

3. *Section 256: Standards*

Section 256 concerns the FCC's involvement in network management and standards development. The section 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 service."³⁸¹ Specifically, section 256 directs the Commission to establish procedures "for the effective and efficient interconnection of public telecommunications networks used to provide telecommunications

³⁷⁶ Previously, such operators were classified as telecommunications-service providers.

³⁷⁷ See *supra* Part III.A.

³⁷⁸ See 47 U.S.C. § 251(a)(2).

³⁷⁹ *Id.*

³⁸⁰ See *supra* Part III.A.

³⁸¹ 47 U.S.C. § 256(a).

service”³⁸² and authorizes the Commission to continue its practice of participating in telecommunications-standards processes.³⁸³

As with section 251, this provision is limited on its face to telecommunications networks. Section 256 goes even further, however, by limiting its interoperability mandate to “public telecommunications networks used to provide telecommunications service”³⁸⁴ and expressly stating that the provision does not change the scope of preexisting FCC authority.³⁸⁵ Section 256 cannot reasonably be read to give the FCC the same authority to set standards and coordinate network planning for information services as it does for telecommunications services. The FCC could not, for example, define the data over cable service interface specification (DOCSIS) standards for cable modems.³⁸⁶

On the other hand, section 256 states that one of its purposes is “to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks.”³⁸⁷ This statement recognizes that information services travel via telecommunications networks. Interconnection standards for those networks can shape the information-services markets that they support.³⁸⁸ Section 256(c) states that Congress did not intend to reduce (or expand) the FCC’s preexisting authority.³⁸⁹ 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 the Commission could continue to oversee broadband reliability and interoperability, even though broadband access was now classified as an information service.³⁹⁰ 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.”³⁹¹

³⁸² *Id.* § 256(b)(1).

³⁸³ *Id.* § 256(b)(2).

³⁸⁴ *Id.* § 256(d). In fact, section 256 uses the term “telecommunications” nineteen times. *Id.* § 256.

³⁸⁵ *Id.* § 256(c).

³⁸⁶ See CableLabs, DOCSIS Specifications, <http://www.cablemodem.com/specifications/> (last visited Jan. 20, 2010).

³⁸⁷ 47 U.S.C. § 256(a)(2).

³⁸⁸ See Kevin Werbach, *Higher Standards: Regulation in the Network Age*, 23 HARV. J.L. & TECH. 179, 180 (2009).

³⁸⁹ 47 U.S.C. § 256(c).

³⁹⁰ See *Wireline Broadband Order*, *supra* note 32, at 14,919, para. 120.

³⁹¹ *Comcast Order*, *supra* note 2, at 13,039, para. 19.

In a world where traditional public telecommunications networks and newer Internet-data-transmission networks are pervasively interconnected,³⁹² 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.³⁹³ These provisions arguably represent the legislative directive 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 an inaccurate reading of section 230 or an abstract generalization of the "national Internet policy" that Congress intended in the 1996 Act,³⁹⁴ 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.*³⁹⁵ 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.³⁹⁶ In *United States v. Mead Corp.*, the Supreme Court clarified that this judicial deference is appropriate only if Congress first delegates legislative authority to the agency.³⁹⁷ As discussed above, Congress has granted the FCC such authority through the interconnection mandates of the Telecommunications Act of 1996.³⁹⁸

This analysis also demonstrates why *FDA v. Brown & Williamson Tobacco Corp.*³⁹⁹ supports the exercise of FCC jurisdiction.⁴⁰⁰ In *Brown & Williamson*, the Supreme Court rejected the Food and Drug Administration's claim that it could regulate cigarettes, because the Court

³⁹² See Werbach, *supra* note 54, at 1261–66.

³⁹³ See *supra* Part II.B.

³⁹⁴ See *supra* Part II.A.

³⁹⁵ 467 U.S. 837, 842–45 (1984).

³⁹⁶ See Weiser, *supra* note 7, at 49–52.

³⁹⁷ *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, *supra* note 7, at 50.

³⁹⁸ See *supra* Parts III.C.1–3.

³⁹⁹ 529 U.S. 120 (2000).

⁴⁰⁰ *But see* Crawford, *supra* note 6 (invoking *Brown & Williamson* to argue against FCC ancillary jurisdiction over the Internet).

found that “Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.”⁴⁰¹ 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.⁴⁰²

In the 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.⁴⁰³ The section of the Cox–Wyden bill dropped in the Conference Committee would have had such an effect.⁴⁰⁴ Had Congress wished to limit FCC Internet rulemaking, it would have left that provision in the statute. Any analogy to *Brown & Williamson* therefore rests on the overly speculative interpretation of section 230 attacked in Part III.⁴⁰⁵

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, it should be limited to situations directly analogous to *Southwestern Cable*.⁴⁰⁶ Thomas Merrill and Kathryn Watts assert that section 4(i) grants the FCC authority only on matters of internal procedure.⁴⁰⁷ Jim Speta acknowledges some validity for ancillary jurisdiction but argues that its application cannot be extended to the Internet.⁴⁰⁸ 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.⁴⁰⁹

These critics overlook the impact of the 1996 Telecommunications Act. It is true that the original Communications Act prior to the

⁴⁰¹ *Brown & Williamson*, 529 U.S. at 160–61.

⁴⁰² *Id.* at 160.

⁴⁰³ See *supra* text accompanying note 164.

⁴⁰⁴ See *supra* text accompanying note 164.

⁴⁰⁵ See, e.g., Crawford, *supra* note 6, at 734–35.

⁴⁰⁶ See *id.* at 730–35; Rob Frieden, *Neither Fish Nor Fowl: New Strategies for Selective Regulation of Information Services*, 6 J. ON TELECOMM. & HIGH TECH. L. 373 (2008); Speta, *supra* note 7, at 24–26.

⁴⁰⁷ Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 517–19 (2002).

⁴⁰⁸ See Speta, *supra* note 7, 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. *Id.* at 38–39. His concern is that such mandates must be specified in a new congressional delegation, rather than imposed by the FCC under its existing authority. *Id.* at 16–17.

⁴⁰⁹ See Crawford, *supra* note 6, at 715–16.

1996 overhaul granted the FCC legislative-rulemaking authority over only three classes of companies: interstate common carriers, spectrum licensees, and cable-television providers.⁴¹⁰ However, that changed when Congress revamped the statute. The 1996 legislation added several new categories, including telecommunications and information services.⁴¹¹ It was only in 1996 that the statute expressly mentioned information services; the predecessor category of enhanced services was purely an FCC interpretive creation.⁴¹² And the 1996 Act layered rules on telecommunications providers, such as the section 251 interconnection mandate, on top of the more intensive but less broadly applicable rules for common carriers.⁴¹³ “Telecommunications carrier” is expressly broader than “common carrier” under the 1996 Act.⁴¹⁴

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,⁴¹⁵ but that interpretation need not remain fixed indefinitely. When the Supreme Court in *Southwestern Cable* endorsed an interpretation of FCC authority contrary to the Merrill and Watts thesis,⁴¹⁶ 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).⁴¹⁷ In the 1996 Act, it did the same, while rewriting significant portions of the original statute.⁴¹⁸ Furthermore, Congress chose in 1996 to create a new category, information services, without specifying any substantive mandates for that category—if it had intended information services as a regulatory null set, there was no need for a separate bucket.⁴¹⁹ Congress, despite not expressly con-

⁴¹⁰ See Speta, *supra* note 7, at 24.

⁴¹¹ Telecommunications Act of 1996, Pub. L. No. 104-104, § 3(a)(41), (48), 110 Stat. 56, 58 (codified at 47 U.S.C. § 203 (2006)).

⁴¹² See *supra* text accompanying note 36.

⁴¹³ § 251, 110 Stat. at 61.

⁴¹⁴ 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 . . .”).

⁴¹⁵ See Merrill & Watts, *supra* note 407, at 515–19.

⁴¹⁶ See *United States v. Sw. Cable Co.*, 392 U.S. 157, 172–73 (1968).

⁴¹⁷ Pub. L. No. 102-385, 106 Stat. 1460 (1992); Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified in scattered sections of 47 U.S.C.).

⁴¹⁸ See 110 Stat. 56.

⁴¹⁹ 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 David Hatch, *Markey Offers Network Neutrality Alternative to Barton Bill*, 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 Opt for Talks, Not Legislation, on Net Neutrality*, CONGRESSDAILY, Feb. 26, 2009. If

templating 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 surplusage.

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 nonexistent.⁴²⁰

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."⁴²¹ 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.⁴²² Although this argument may have some purchase in the VoIP-regulation cases with which Crawford is concerned, it is inapposite to the broadband-access scenario.⁴²³ 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.

In essence, the critiques of FCC authority rest on the agency's flawed assumption that such authority must flow from section 230. Congress must affirmatively transfer some legislative authority to an agency before that agency can act.⁴²⁴ The view adopted by the FCC in the *Comcast Order* and other decisions is that Congress did so when it

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 that 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 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000); Crawford, *supra* note 6, at 698.

⁴²⁰ See Broadcast Flag Order, *supra* note 282, at 23,566–67.

⁴²¹ Speta, *supra* note 7, at 26.

⁴²² See *id.*

⁴²³ See Crawford, *supra* note 6, at 715–16.

⁴²⁴ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2100 (2004).

told the FCC, in section 230(b)(1), “to promote the continued development of the Internet.”⁴²⁵ Opponents of that view emphasize that what Congress giveth in section 230(b)(1), Congress taketh away in section 230(b)(2), which demands an Internet “unfettered by Federal or State regulation.”⁴²⁶ There is ultimately no way to square these two statements, which makes them ideal for selective quotation.⁴²⁷

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.⁴²⁸

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.⁴²⁹ 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.⁴³⁰ Network operators

⁴²⁵ 47 U.S.C. § 230(b)(1) (2006).

⁴²⁶ *Id.* § 230(b)(2).

⁴²⁷ An interpretation that Congress intended for the FCC to “promote” the Internet entirely by keeping it “unfettered by . . . regulation,” *id.* § 230(b)(1), (2), would be inconsistent with the history of section 230 and its relationship with the Communications Decency Act, *see supra* Part II.A. 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.

⁴²⁸ *See* Werbach, *supra* note 54, at 1249–50.

⁴²⁹ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005).

⁴³⁰ *See supra* note 48 and accompanying text.

such as Verizon and AT&T are moving toward all-IP networks for business and technical reasons.⁴³¹ 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, because they required detailed filings.⁴³² 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 it has enjoyed little political support in the United States.⁴³³

3. *Institutional Competence*

Ultimately, the question of the best regime comes down to institutional competence.⁴³⁴ 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.⁴³⁵ Those who believe that the courts applying general-purpose doctrines can effectively address the economic challenges of interconnected networks will emphasize antitrust mechanisms.⁴³⁶ And those who see continued viability of the expert-agency model will prefer giving the FCC more room to maneuver.⁴³⁷

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

⁴³¹ See Werbach, *supra* note 54, at 1292 (describing the growth of all-IP "next-generation networks").

⁴³² See Werbach, *supra* note 17, at 24–25.

⁴³³ See *supra* note 77 and accompanying text.

⁴³⁴ See Weiser, *supra* note 7, at 49.

⁴³⁵ See Crawford, *Ambulance*, *supra* note 7, at 933–39; Lessig, *supra* note 5.

⁴³⁶ See PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM 201–02 (1997) ("The people's constitution is antitrust law, developed in the courts under the short, broad mandate of the Sherman Act."); Thomas W. Hazlett, *FCC Should Leave Net Neutrality to Anti-Trust Courts*, FIN. TIMES (Sept. 30, 2008) (on file with author), available at <http://www.ft.com/cms/s/0/bac78ca48ee8-11dd-946c-0000779fd18c.html>.

⁴³⁷ There is also room for hybrid models. Weiser, for example, proposes that the FCC could superintend mechanisms that use post-hoc, antitrust-like standards or that involve self-regulatory organizations. See Weiser, *supra* note 230, at 33–39; Philip J. Weiser, *The Next Frontier for Network Neutrality*, 60 ADMIN. L. REV. 273, 318 (2008); Weiser, *supra* note 7, at 74–80.

first substantial overhaul of the telecommunications provisions of the Act adopted.⁴³⁸

When Congress does get involved, the powerful competing interests tend to create a lobbying food fight, the results of which are unpredictable and often problematic.⁴³⁹ As discussed above, there have been rumblings for several years about a “fix” for the problems with the 1996 Act, and numerous bills introduced,⁴⁴⁰ 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.⁴⁴¹ A quarter-century later, the Supreme Court has sharply limited the prospects for antitrust litigation as a means to ensure the openness of broadband-Internet platforms.⁴⁴² In two recent cases, the Court rejected antitrust claims against incumbent local-exchange carriers. In 2004, the Court held in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* that the FCC’s comprehensive regulatory scheme precluded assertion of an antitrust claim on a refusal-to-deal theory.⁴⁴³ *Pacific Bell v. Linkline*, issued in February 2009, extended that holding for a price-squeeze claim by a broadband-access competitor.⁴⁴⁴ 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.”⁴⁴⁵ Rightly or wrongly, the Court views the FCC as the proper forum for competitive issues arising out of the broadband-access market.⁴⁴⁶

The FCC must take seriously its responsibility for oversight of the broadband market. And those who are concerned about the future of

⁴³⁸ See *supra* text accompanying note 411.

⁴³⁹ Cf. William Safire, Op-Ed., *Stop the Giveaway*, N.Y. TIMES, Jan. 4, 1996, at A21 (complaining about the impact of lobbying over the 1996 Telecommunications Act).

⁴⁴⁰ See *supra* note 419.

⁴⁴¹ See *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 222–25 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

⁴⁴² See Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, 50 ANTITRUST BULL. 549, 559–61 (2005).

⁴⁴³ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 412–13 (2004).

⁴⁴⁴ See *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, No. 07-512, slip op. at 9–10 (Feb. 25, 2009).

⁴⁴⁵ *Id.* at 8 n.2.

⁴⁴⁶ 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, Fed. Commc’ns Comm’n, *Broadband Connectivity Competition Policy* (2007), available at <http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf>.

that market must take seriously the legal foundations for FCC involvement. A desired outcome is useless without a path to achieve that outcome.

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.⁴⁴⁷ 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.⁴⁴⁸ Innovation has flourished, from the Blackberry to Facebook, iTunes to Google, Wikipedia to Tivo, with the promise of even more extraordinary things to come.⁴⁴⁹ 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 reexamines 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.

⁴⁴⁷ See Werbach, *supra* note 9, at 348–49.

⁴⁴⁸ See VAN SCHEWICK, *supra* note 10, at 1; Lemley & Lessig, *supra* note 9, at 931; Werbach, *supra* note 9, at 400–02.

⁴⁴⁹ See VAN SCHEWICK, *supra* note 10, at 310–30.